

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37358
Docket No. MW-37491
05-3-02-3-572

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc.)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline imposed upon Mr. R. C. Knudsen [withheld from service and subsequent thirty (30) day actual suspension] for alleged violation of NORAC Operating Rules 166, 803(a) and Life Critical Rule, Track Authority violations, in connection with charges of alleged occupation of track without proper authority on Tuesday, August 28, 2001 at CP 169 at approximately 1:30 P.M. on the Selkirk Sub, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [Carrier's File 12 (01-0563) CSX].
- (2) As a consequence of the violation referred to in Part (1) above, the discipline shall be removed from Mr. R. C. Knudsen's record and he shall be made whole for all lost pay and benefits.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On August 28, 2001, Claimant R. C. Knudsen was assigned to a Boom Truck Operator position on the Selkirk Subdivision. He was in charge of piloting a hi-rail log truck, designated as "track car 1477," and was working behind a rail gang at Mile Post 37. Although the Claimant was not the vehicle's operator, he was responsible for communicating with various train control personnel and the vehicle's operator, as well as obtaining the vehicle's protection while occupying certain portions of the right-of-way.

At 1:18 P.M., the Claimant received authority from the Dispatcher to operate the vehicle in a westbound direction on Track No. 2 between points CPRJ and CP 169. The Claimant attempted to explain to the driver the working limits of the vehicle, however, when he next had contact with the vehicle, it was occupying a section of track beyond the working authority.

The Dispatcher notified Roadmaster P. Williams that the log truck was operating beyond its track authority and advised Williams to investigate the matter. Upon contacting the Claimant, he admitted that he did not have contact with the vehicle after it had traveled beyond the track authority granted by the Dispatcher. Pursuant to this statement, the Claimant was immediately removed from service.

By letter dated August 31, 2001, the Carrier directed the Claimant to report for an Investigation "... to determine the facts in connection with your occupation of track without proper authority on Tuesday, August 28, 2001 at CP 169, at approximately 1:30 PM on the Selkirk Sub. You are charged with violation of NORAC Operating Rules 166, 803 (A) and Life Critical Rule, Track Authority violations." After one postponement, the Hearing was held on September 21, 2001.

In a letter dated September 28, 2001, the Claimant was assessed a 30-day suspension with time held out of service pending the Investigation to apply.

The Organization claims that the discipline imposed upon the Claimant was unwarranted, harsh and excessive. It contends that the burden of proof in a discipline matter such as this is on the Carrier and that burden has not been met. While the Organization concedes that the Claimant was involved in said incident, it is the Organization's position that the Claimant was not the operator of the vehicle and was unable to take any action other than to notify the Dispatcher. The Claimant did not engage in any wrongdoing. In addition, even if he was wrong, given the 27 years of unblemished service that he had accrued, the penalty imposed was far too severe. Finally, and very significantly, because the Claimant was immediately removed from service without a proper Investigation, the Organization claims that the penalty was predetermined and as such, was a violation of Rule 25. According to the Organization, the Carrier should now be required to clear the Claimant's record of any mention of the incident, to compensate him for all lost wages, including lost overtime, and to make him whole for vacation, holidays and seniority.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Investigation in accordance with the requirements of the Agreement. The Carrier considers the Claimant guilty as charged. According to the Carrier, the transcript developed during the Investigation contains substantial evidence that the Claimant was responsible for the incident and, therefore, violated the relevant Rules.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of its discretion. See Second Division Award 7325 and Third Division Award 16166.

After a review of the evidence, we conclude that the Claimant was responsible for insuring that the contractor did not exceed the limits of track authority, and note that he did take reasonable steps to insure such compliance. However, in light of the Claimant's unblemished record and his attempt to remedy the situation, the Board believes that the penalty imposed on the Claimant was too severe.

Based on this determination, we believe that a more appropriate penalty is a five-day suspension. Therefore, the Claimant shall be made whole for the additional 25 days served in accordance with Rule 25, Section 4 of the parties' Agreement.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of February 2005.