

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 42820  
Docket No. MW-42916  
17-3-NRAB-00003-150119

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
PARTIES TO DISPUTE: (  
(Dakota, Minnesota & Eastern Railroad Corporation

STATEMENT OF CLAIM:

- “(1) The discipline (dismissal) imposed on Mr. J. Morsching by letter dated September 18, 2013 alleged violation of eight (8) General Code of Operating Rules, ten (10) On Track Safety Rules and one (1) Canadian Pacific Core Safety Rule in connection with his alleged . . . collision with an Iowa Interstate (IAIS) train while on duty (assigned to operate a material truck) and while allegedly fouling the IAIS mainline with no authority in Davenport, Iowa on August 5, 2013 \*\*\* was without just cause, excessive, on the basis of unproven charges and in violation of the Agreement (System File J-1334D-503/8-0011).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Morsching shall be reinstated to service with seniority and all other rights unimpaired, his record cleared of the charges leveled against him and he shall be made whole for all monetary losses suffered.”

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.

Claimant Jeremy Morsching had established and held seniority within the Carrier's Maintenance of Way Department. On August 5, 2013, the incident date giving rise to Claimant's dismissal and subsequently to the filing of the instant claim, Claimant was barely into his second year of service with the Carrier having been hired on June 26, 2012. On the incident date of August 5, 2013, Claimant was working as a Material Truck Operator and had been in that position for four months. It is undisputed that Claimant performed in his assignment as a Material Truck Operator for three of the four months before receiving any operator training in his fourth month. Claimant was a crew member of a rail gang under the supervision of Jon Thulen, Manager Track Renewal.

Prior to assuming his duties on August 5, 2013, Claimant along with other crew members of the rail gang attended a job briefing that morning which, according to Claimant was conducted over the telephone that morning by Thulen himself. This was a deviation from the usual job briefing procedure in that they were generally overseen by Thulen but conducted by the Gang Foreman. The specific work performed by the gang crew members occurred in the City of Davenport, Iowa and August 5, 2013 was the second day of their work in the territory. The work assignment given to Claimant was to set his Material Truck, a high rail boom truck on the railroad track at Marquette Street and to meet up with and deliver material items to the gang crew members. Thulen acknowledged there was a second set of tracks at Marquette Street that belonged to the Iowa Interstate Railroad but there was no mention of this at the job briefing and Claimant was not given any guidance or instructions as to which set of tracks he was to set his material truck on. It is undisputed that Claimant had never been instructed on looking for "foreign railroad" markings at a crossing nor for such markings at the Marquette crossing. As a result, Claimant set his material truck on tracks featured with the initials of the Iowa Interstate Railroad, which initials were unknown to Claimant. Thulen explained that multiple railroads operating in Davenport were not unique as other cities such as Kansas City, has a double main and a big double main, tracks that are utilized by the Union Pacific, Burlington Northern as well as other railroad companies.

As instructed, after setting his high rail boom material truck on the tracks located off of Marquette Street, Claimant then proceeded to back up to meet with his

fellow gang crew members within their working limit. However, after backing up on the tracks for a period of time without encountering his fellow gang crew members, he sensed something was amiss and called Thulen on his Company issued cell phone at which time it was determined he had set his material truck not on Carrier's tracks but rather on the tracks of the Iowa Interstate Railroad. In accord with Thulen's instructions, Claimant immediately acted to set his material truck off the Iowa Interstate Railroad tracks. However, at this same time Claimant observed a train heading toward him and concluded he did not have enough time to set his material truck off of the tracks safely before the train arrived and was upon him. As a result, as Claimant abandoned his material truck to seek safety the Iowa Interstate passenger train struck the truck damaging it beyond repair, resulting in a monetary loss to Carrier of \$220,000. Subsequently, the material truck was towed away. Carrier immediately took Claimant out of service and sent him to be tested for drugs and alcohol which results subsequently proved to be negative.

By letter dated August 13, 2013, just eight days after the occurrence of the incident, Carrier informed Claimant he was being summoned to attend a formal investigation to be conducted at Mason City, Iowa the morning of August 22, 2013. This letter apprised that the purpose of the investigation/hearing was to determine the following:

**“All the facts and circumstances and to place responsibility, if any, in connection with your alleged collision with an Iowa Interstate train while on duty (assigned to operate a material truck) and while allegedly fouling the Iowa Interstate mainline with no authority in Davenport, Iowa on August 5, 2013. As a result of the incident on August 5, 2013, the material truck sustained damage beyond repair at a cost of \$220,000 and there was a high risk of serious injury to Iowa Interstate personnel and other persons on the Iowa Interstate train.”**

The investigation/hearing was convened as scheduled on August 22, 2013 and was conducted by Carrier officer Tom Goffinet, Assistant Division Engineer – Mason City Division. It was recorded at the investigation that Claimant qualified on applicable rules and applicable Carrier policies and had last been tested on a rules exam on February 21, 2013. As part of the rules exam, Claimant qualified on the training of On-Track Protection that is, General Code of Operating Rules (GCOR), On-Track Safety and General Safety Rules. Additionally, Claimant had received training on the boom truck on June 26, 2013, just 40 days prior to the occurrence of the subject incident. Claimant however maintained that this training involved ninety

percent (90%) on operating a crane and the remaining 10% on boom truck training. It was also recorded at the investigation/hearing that Claimant had one efficiency test failure on his record for safety glasses.

By letter dated September 18, 2013, Carrier informed Claimant that upon review of the whole of the transcript proceedings of the investigation/hearing, it was Carrier's determination that in connection with the August 5, 2013 incident, he was found responsible for having violated a total of 19 rules violations and referencing each rule violation by its number and title. Carrier then apprised Claimant that in consideration of his responsibility for the cited 19 rules violations and the facts documented in the Formal investigation on August 22, 2013, he was being dismissed from its employment effective immediately. In response, the Organization filed the instant claim by letter dated October 21, 2013.

Carrier maintains that Claimant was afforded a fair and impartial investigation in accordance with the governing January 1, 2013 Collective Bargaining Agreement and that at the investigation it met its burden of proof by producing substantial probative evidence supporting Claimant's guilt of the offenses for which he was charged. Carrier further maintains the discipline of dismissal assessed Claimant was justified based on the seriousness of the offenses committed and was not assessed on the basis of unproven charges, nor arbitrary, capricious, excessive, or in violation of the Collective Bargaining Agreement. In stressing the seriousness of the incident Carrier asserts it had the potential to cause catastrophic injuries to Claimant himself, other employees of both railroads, passengers on the Iowa Interstate train and to the public. The fact that there were no injuries reported does not lessen the gravity of the multiple rules violations committed by Claimant. Moreover, Carrier notes as highly relevant the fact that at the investigation Claimant admitted that occupying a main line constituted a violation of the Safety Rules. As to the latter point, Carrier cites in pertinent part Public Law Board 4643, Award 42 wherein Referee Arthur Van Wart stated, "There was sufficient evidence adduced, including the admission of the Claimant, to support the conclusions of culpability. Once admission of guilt is made the need for further review is not necessitated." Carrier asserts that had Claimant not occupied the Iowa Interstate Railroad's main line without authority, this incident would not have occurred. Carrier argues that no mitigating circumstances exist that would warrant the disturbance of the assessed discipline of dismissal and accordingly requests the Board to deny the instant claim in its entirety.

The Organization refutes Carrier's position that Claimant received a fair and impartial hearing and details the various arguments put forth to support its position.

As the Board concurs in the Organization's position as to the critical points relied upon by the Organization on procedural grounds the Board takes judicial notice of the following: 1) Most significantly, as we noted in a prior case brought before us by these same Parties, arbitral authority has upheld the procedure in the conduct of formal investigations whereby the Carrier officer presiding over the hearing is also the same Carrier officer who has charged the claimant, as well as, the same Carrier officer who reviews the evidentiary record of the investigation proceedings upon which a finding by that officer is one of determining claimant's guilt of the alleged charges and is also the very same Carrier officer who then assesses the discipline determined to be appropriate and commensurate with the offenses found to have been committed by the claimant; 2) Where arbitral authority has drawn the line on the multiplicity of roles performed by the Hearing Officer is when the Hearing Officer also assumes the additional role of a witness and renders indirect testimony either through questioning witnesses such as the Hearing officer did in this instant case or through commentary at the hearing he/she is presiding over. In this case the Hearing Officer did not testify but his conduct at the hearing nevertheless rose to the level of witness testimony in that he had significant pre-hearing knowledge of the incident for which Claimant was charged, and had developed six pages of questions based on that extensive pre-knowledge. Thus, a reasonable inference can be drawn that the Hearing officer had pre-determined Claimant's guilt of the rules violations he was charged with having committed and used that pre-knowledge which was never disclosed to the Organization notwithstanding his favorable ruling on the Organization's objection to admit into evidence the six pages of questions he had developed. However, in the final analysis, the Hearing officer never honored that ruling to supplement witness testimony not in the record proceedings to support the finding of Claimant's culpability for the occurrence of the incident under investigation. On this procedural ground alone, the Board is compelled to sustain the claim notwithstanding our determination that the Organization presented a compelling case, as well, on the merits.

Although the merits of this claim need not be addressed we hold that Claimant cannot under the prevailing circumstances of this case noted above be held accountable for the occurrence of the incident here under review given Carrier's failure to provide Claimant adequate and sufficient training to perform the critical aspects of his assignment as a Material Truck Operator which lack of training was instrumental in the occurrence of the collision of the Iowa Interstate passenger train with Carrier's material truck and its demise. Additionally, Carrier's failure to provide Claimant with clear and precise instructions informing him that tracks of the

Iowa Interstate Railroad were present at the very same crossing location at Marquette Street alongside its tracks also was instrumental in leading to the collision outcome.

Based on the foregoing exposition and analysis of our findings, we rule to sustain the claim in its entirety which encompasses the remedy requested by the Organization.

**AWARD**

Claim sustained.

**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 28th day of November 2017.