

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 44062  
Docket No. MW-45267  
20-3-NRAB-00003-190052

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

(Brotherhood of Maintenance of Way Employes Division  
(IBT Rail Conference

PARTIES TO DISPUTE: (  
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. T. Missick, by letter dated October 26, 2017, for alleged violation of CSX Transportation Operating Rules 104.3(e) and 712.17 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File F35852417/2017-228742 WSS).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Missick shall be immediately returned to service, no unfavorable mark placed in his record and he be made whole for all time lost, loss of pay (including straight time, overtime and otherwise) and any other benefits accruing to active BMWWE members from the date he was removed from service up and until the time he is restored to service.”

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.**

**At the time of his dismissal, the Claimant held the position of Machine Operator and had been in the Carrier's service since March 26, 2007. On September 26, 2017, the Claimant was given notice of an investigation in connection with the following charge:**

**"The purpose of this formal investigation is to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 0900 hours, on September 18, 2017, in the vicinity of milepost W 17.3, when you endangered property and the lives of other employees by driving recklessly and at excessive speeds in an area where employees were working to repair track, and all circumstances related thereto."**

**After a formal investigation on October 7, 2017, the Claimant was found in violation of the Carrier's rules and was dismissed from the Carrier' service.**

**CSX Transportation Operating Rule 104.3(e) states:**

**"The following behaviors are prohibited while on duty, on CSX property, or when occupying facilities provided by CSX:**

**\*\*\*\***

**e. Behavior that endangers life or property."**

**CSX Transportation Operating Rule 712.17 states:**

**"When operating on-track equipment, operate at a speed that permits stopping within one-half the range of vision. Do not exceed the speed authorized for trains on the same track or listed in the table below, whichever is less."**

The Organization filed a claim on October 30, 2017. The Carrier declined the claim on January 1, 2018. The parties were unable to resolve the dispute on-property and the claim is now properly before this Board for final adjudication.

On September 18, 2017, Roadmaster Ben King received a call about an incident on a bridge near Mile Post W 17.3, in which the Claimant was hi-railing a Carrier truck through a worksite and failed to slow down which forced several employees to move from the tracks to avoid being struck. The Roadmaster spoke to the Claimant who admitted he was going too fast but apologized for his actions and did not believe it to be a significant event. When the Roadmaster continued his investigation, he learned that a passenger in the Claimant's vehicle had warned him to slow down. He also learned that when the Claimant stopped his vehicle, it almost went completely off the track and almost to the end of the unattached track panels. The Claimant testified that he slowed down when his passenger said he was traveling too fast.

During the investigation, the Claimant denied that his truck left the track and went onto the unattached track panel, or that any employees had to move out of the way because of his actions. He admitted the foreman told him he almost hit the employees, but the Claimant believed the foreman to have been joking.

The Carrier contends that it presented substantial evidence that the Claimant was operating a vehicle at excessive speeds through a work site, to a point where he nearly took it off the track. The Carrier contends that it has shown that the Claimant was unable to stop his vehicle as required by its Rules.

The Carrier contends that the penalty of dismissal was justified because the Claimant's actions were careless and had the potential to cause fatal injuries.

The Organization contends that the Carrier failed to meet its burden of proof. The Organization contends that the hearsay statements that were offered by the Carrier should be given little or no weight, as they were not subject to cross examination. The Organization contends that when he was told to slow down, the Claimant complied. The Organization contends that there is no credible evidence that he was speeding when he approached the work group.

The Organization contends that the Claimant had the authority to be on the tracks and that the work group was fouling the track. The Organization contends that

the Claimant was honest about what happened; his testimony aligned with his written statement. The Organization contends that the Claimant was a ten-year employee with no previous discipline, so dismissal was excessive for any misconduct that was proved.

This Board has reviewed the evidence and testimony and finds that there is substantial evidence in the record to support a finding that the Claimant was operating his vehicle at an excessive speed. However, the Carrier has not shown with substantial evidence that the Claimant engaged in behavior that endangered life or property. The Claimant testified that he slowed down well before reaching the work group. The only evidence offered to the contrary was in the form of hearsay statements, which are prohibited by Ruled 39 of the parties' Agreement.

Given the Claimant's work history, this Board finds that the discipline of discharge is excessive for the proved charges and is not consistent with the principles of progressive discipline. Based upon the unique circumstances of this case and without precedent for any future similar claims, the Claimant is returned to duty without back payment, but with all other rights and privileges as permitted by the Agreement. The Claimant should clearly understand, however, that the purpose of this Award is to give him a "last chance" to become and remain a responsible employee. The claim is sustained in part and denied in part with the discipline reduced to time served.

### 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 18th day of June 2020.