

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45090  
Docket No. MW-47265  
24-3-NRAB-00003-220326**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**  
**(Keolis Commuter Services**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

**(1) The discipline (dismissal) imposed upon Mr. D. Perryman, by undated letter (following a ‘Decision Letter’ dated April 28, 2021), for alleged violation of Keolis Code of Conduct: Rule 1 - Knowledge of the Rules, Rule 8 - Behavioral Expectations for Keolis CS Employees and Prohibited Behaviors, Rule 9- Safety, Rule 11 - Protecting the Company’s Property, Rule 17 - Attending to Duties and for various alleged violations of the Keolis Safety Rules, NORAC RWP Rules in connection with his alleged failure to attend to his duties by not ensuring that the switch was properly lined prior to the hi-rail track car passing over it, telling the dispatcher that he would try to keep their name out of the incident and failing to immediately report the incident to his supervisor on March 29, 2021 on the Franklin Branch, was unsupported, misguided, arbitrary, capricious and excessive (Carrier’s File BMW 21.104 KLS).**

**(2) As a consequence of the violation referred to in Part (1) above, Claimant D. Perryman shall now ‘\*\*\* be placed back into service effective immediately, with all lost straight time, overtime, double-time wages, credits for vacation, credits for retirement, and any other benefits that are applicable to him under our Collective Bargaining Agreement with all charges withdrawn. \*\*\*’**

**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.

**Factual Background:**

The facts of this case are not contested. On March 29, 2021, Claimant was working as a foreman doing track inspection. He was traveling east on the Franklin Branch in a hy-rail vehicle at a speed six miles over the ten-mile speed limit. He traversed an improperly lined switch, causing the vehicle to derail at Sprague Street Interlocking, resulting in damage to the vehicle. Claimant did not report the incident to his supervisor until forty-seven minutes after the derail.

The Carrier found Claimant guilty of violating of Keolis Code of Conduct: Rule 1 - Knowledge of the Rules, Rule 8 - Behavioral Expectations for Keolis CS Employees and Prohibited Behaviors, Rule 9 - Safety, Rule 11 - Protecting the Company's Property, Rule 17 - Attending to Duties and for various alleged violations of the Keolis Safety Rules, NORAC and RWP Rules. As a result of these alleged rule violations, the Carrier dismissed Claimant from service. The claim challenging the propriety of this discipline has been processed through the grievance procedure to consideration by the instant Board.

**Position of Organization:**

It is uncontested that Claimant was hy-railing when he ran through an improperly lined switch, causing a derail. As the Organization sees it, this was not an intentional act of recklessness or negligence, and the Carrier failed to take into account important factors which contributed to the incident. The improperly lined switch was the fault of the dispatcher on duty. As shown in Organization Exhibit 1: "The Dispatcher must

properly line the route for the movement of track cars at interlocking and controlled points.” Therefore, it was of no fault of Claimant that the switch was not properly lined. Claimant did in fact attempt to stop the truck prior to the switch point, but was unable to bring the truck to a complete stop. The Carrier failed to take these critical factors into consideration.

The Carrier failed to establish that Claimant improperly reported the incident to his supervisor. To the contrary, as admitted in the Carrier’s own charge letter, Claimant did in fact report the incident to the dispatcher as well as the supervisor.

This Board has consistently held that the burden of proof in discipline cases rests squarely on the Carrier. This principle was established to ensure that an employee would not be disciplined unless probative evidence was presented during the investigation supporting the charges specified against the charged employee. Third Division Award 21372 held: “In a dismissal case it is well established that the burden of proof rests squarely upon the Carrier to demonstrate convincingly that an employee is guilty of the offense upon which the disciplinary penalty is based. (Third Division Award 20771, and cases cited in that Award).”

This was not an intentional act of recklessness or negligence, and the evidence shows it was properly reported.

**Position of Carrier:**

At the time of the accident, Claimant was operating at a speed that exceeded the speed limit by six miles per hour. His vehicle slid through the unlined switch and derailed, causing damage to the hi-rail vehicle. Roughly 47 minutes after the derailment, Claimant first reported the derailment to his supervisor, Branch Line Road Master R. Nesbitt via text. Claimant then spoke with Nesbitt.

Prior to his call to Nesbitt, Claimant attempted to avoid responsibility for his derailment. He called dispatch and told the dispatcher that he “would try to keep his name out of it and see if he could get through it without going through the bullshit.” He further told the dispatcher that he would “try to explain these hi-rails to your supervisor” and that he would “figure it out.” Claimant took the dispatcher’s cell phone number, most likely for calls off the recorded line. This all occurred before he reported the accident to supervision.

When Claimant later made his statement regarding the accident, that statement had facts that conflicted with his recorded call to dispatch. On his call, Claimant told dispatch he had already called the loader, but in his statement, he claimed he called dispatch first and then the loader. He was required to immediately report the accident to his supervisor and acknowledged this requirement at the Investigation. Claimant tried to avoid culpability by blaming dispatch for the derailment, and quickly and quietly getting the vehicle removed from the site by a loader.

The Carrier concludes that its trust in Claimant has been irrevocably breached and dismissal was the only alternative.

*Analysis:*

KCS Rule of Conduct 815 requires that travel be at the restricted speed of 10 mph when diverting through switches. Rule 8b mandates reporting accidents as soon as practicable.

Claimant was traveling above the speed limit when the derail occurred. Though the dispatcher was responsible for lining the switch, the speed limits are set to allow drivers to see problems and stop prior to impact. It was Claimant's responsibility to travel in accordance with applicable speed limits and stop before running into a misaligned switch. As a result, Claimant cannot escape a charge of rules violation by blaming the dispatcher.

The more serious allegation in this case is the charge that Claimant failed to timely report the incident to his supervisor. We can find no rationale for taking fully 47 minutes to send a text. This, on its face, flatly fails to meet the requirements of reporting accidents. Claimant's conversation with the dispatcher is concerning; he called and advised the dispatcher that a loader is coming because they derailed. He explained that the dispatcher had the switch lined "against us" and he saw it too late. Claimant said he would try to keep the dispatcher's name out of it, and see "if we can get through it without going through the bullshit." He also advised that he was going to have to explain it to his supervisor. In a later exchange, the dispatcher offered his cell phone number and Claimant took it.

These exchanges indicate that Claimant called the loader before he contacted either the dispatcher or his supervisor, and that Claimant had multiple exchanges with the dispatcher before notifying supervision. To his credit however, Claimant was clear in

his intent to contact his supervisor and was not the one to suggest that further exchanges occur by way of cell phone, outside the hearing of management.

We find that Claimant engaged in unsafe job performance by breaching a speed limitation which prevented him from seeing an improperly lined switch. A derail resulted. This is a serious incident. In addition, Claimant was able to call for a loader and have multiple exchanges with the dispatcher, but did not attempt to contact his supervisor for 47 minutes following the incident. This was in breach of the rule requiring early reporting of accidents. The Carrier is within reason in treating these offenses as serious in nature.

**AWARD**

Claim denied.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division**

Dated at Chicago, Illinois, this 31<sup>st</sup> day of October 2023.