

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6466

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

GRAND TRUNK WESTERN RAILROAD, INCORPORATED

)
) Case No. 6
)
) Award No. 2
)

Martin H. Malin, Chairman & Neutral Member
P. K. Geller, Employee Member
M. J. Kovacs, Carrier Member

Hearing Date: April 16, 2003

STATEMENT OF CLAIM:

1. The discipline [three (3) day overhead suspension] assessed to Trackmen M. Shirk and M. Pearson for alleged violation of On-Track Safety Rules in connection with an incident that occurred on March 27, 2002, was without just and sufficient cause and based on unproven charges (Carrier's File 8365-784)
2. Trackmen M. Shirk and M. Pearson shall now be exonerated and have the discipline removed from their records.

FINDINGS:

Public Law Board No. 6466, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On April 3, 2002, Carrier notified Claimants to appear for an investigation on April 9, 2002, concerning their alleged violations of Track Safety Rules 100 and 902, in connection with an incident on March 27, 2002, the same incident as was before this Board in Case No. 5, Award No. 1. The hearing was held as scheduled. On April 26, 2002, Carrier notified Claimants that they had been found guilty of the charges and each assessed a three day record suspension.

The record reflects that on March 27, 2002, Claimants and their Foreman were clearing snow from a switch when Claimant Shirk noticed a pull-apart on the main line. The employees prepared to use a controlled burn to repair the defect. The Foreman was responsible for getting

track authority. The Foreman contacted the Dispatcher and advised the Dispatcher that his location was MP 110.97 and that he and his crew would be working west of McKinley. In fact, they were working east of McKinley. As a result, the Dispatcher placed a block west of McKinley between McKinley and South Bend instead of blocking the track where Claimants and the Foreman were working. Because the track where Claimants and the Foreman were working was not blocked, Train 761 came through. The three employees were able to run out of the way of the train and no one was hurt.

The record also reflects that the Foreman failed to write down the track and the time that the track was taken out of service, but advised both Claimants that he had contacted the Dispatcher and had taken the track out of service.

Rule 100 provides:

Each roadway worker is responsible for determining that on-track safety is provided before fouling any track or assuming a position from which he or she could potentially foul a track.

A roadway worker or road way machine is fouling a track within four feet of the field side of the near running rail.

Rule 902 provides:

Management and individual roadway workers jointly share the responsibility for ensuring that proper on-track safety procedures are followed when workers are fouling the track.

The Organization contends that Claimants complied with Rules 100 and 902 by ascertaining from their Foreman that the track had been taken out of service. Carrier contends that Claimants were obligated to ask their Foreman to show them the written documentation that the track was out of service. In Carrier's view, had Claimants insisted on seeing the documentation, the incident would not have occurred.

On their face, the rules do not expressly require Trackmen to ask their Foreman for documentation that track has been taken out of service. The rules also do not expressly state that Trackmen may rely on oral assurances from their Foreman that the track has been taken out of service.

Given the generality of Rules 100 and 902, it was incumbent on Carrier to prove by substantial evidence that Claimants could not comply with the rules by relying on their Foreman's oral assurances that the track was out of service but were obligated to request to see the documentation. We can find no such evidence in the record.

The investigation of Claimants and their Foreman occurred in the same hearing. On direct examination, the Track Supervisor gave no testimony concerning the culpability of Claimants. His entire testimony concerned the Foreman's culpability. On cross-examination, the Track Supervisor testified as follows:

Q. As far as Mr. Pearson and Mr. Shirk are concerned here, in the charges they're brought up on, if there's no paper – if there's no form to view, then they would have to go on the word of the foreman; is that correct?

A. That's correct.

Q. Unless they were privy to the radio conversation with the dispatcher; is that correct?

A. That's correct.

Q. Is that generally – there's not requirement that they would – if they saw no paper, no form filled out and didn't hear the conversation, are they required to contact the dispatcher themselves?

A. No.

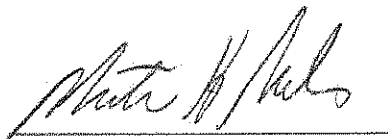
Carrier points to testimony from both Claimants acknowledging that they jointly shared responsibility for ensuring that on-track safety procedures are followed when fouling the track. However, that testimony is as general as Rules 100 and 902. It does not establish that their responsibility included asking to see the documentation when their Foreman told them that the track had been taken out of service. Carrier also points to Claimant Shirk's testimony that he usually double checks the foreman on such matters. However, shortly thereafter, Claimant Shirk also testified that when there is no form to review he relies on the Foreman's word and does not contact the Dispatcher to double check the Foreman. In this regard, Claimant Shirk's testimony mirrors the testimony of the Track Supervisor.

Thus, our review of the record fails to disclose any evidence that Claimants were obligated to question their Foreman's oral assurances that the track was out of service and request to see the documentation. Accordingly, we hold that Carrier failed to prove the charges by substantial evidence.

AWARD

Claim sustained.


The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto



Martin H. Malin, Chairman



M. J. Kovacs
Carrier Member



P. K. Geller
Employee Member

Dated at Chicago, Illinois, September 30, 2003