

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7357
AWARD NO. 2 (Case No. 2)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

**CP RAIL SYSTEM/DELAWARE AND HUDSON
RAILWAY COMPANY, INC.**

**William R. Miller, Chairman & Neutral Member
Timothy W. Kreke, Employee Member
Anthony Stillittano, Carrier Member**

Hearing Date: March 26, 2010

STATEMENT OF CLAIM:

- "1. The discipline [removed and withheld from service beginning April 16, 2008, and an assessment of forty (40) Demerits & Loss of Time already served on May 8, 2008] imposed upon Mr. R. Leonard for alleged violation of GCOR Rule 1.1.1 (Safest Course), effective April 3, 2005 and alleged violation of Safety Rules & Recommended Practice for Engineering Service Employees, Rule E-21, effective Jan. 1, 2005, at the end of his shift on DHRAIL 1 on the morning of April 16, 2008 in the vicinity of Bevier St. Yard, was arbitrary, capricious, unwarranted and in violation of the Agreement (Carrier's File 8-00611).
2. As a consequence of the violation referred to in Part 1 above, the aforesaid discipline shall now be removed from Mr. R. Leonard's record and he shall be compensated for all time lost time beginning April 16, 2008 and continuing until his reinstatement."

FINDINGS:

Public Law Board No. 7357, 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 dispute were given due notice of the hearing thereon and did participate therein.

On April 18, 2008, the Carrier notified Claimant to appear for a formal Investigation on April 28, 2008, concerning in pertinent part the following charge:

"...The purpose of this Investigation will be to determine your responsibility, if any, for your alleged violation of GCOR Rule 1.1.1 (Safest Course) Eff. April 3, 2005, and alleged violation of Safety Rules & Recommended Practice for Engineering Service Employees, Rule E-21, Eff. Jan. 1, 2005. For your actions at the end of shift on DHRAIL 1, on the morning of April 16, 2008, in the vicinity of the Bevier St. Yard...."

The subject Rules in dispute are as follows:

"SAFETY RULES

GCOR 1.1 Safety

Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment.

1.1.1 Maintaining a Safe Course

In case of doubt or uncertainty, take the safe course.

E-21 On or About Railcars

1. Do not cross over moving rail cars or standing rail cars that are not protected against movement...."

On May 8, 2008, Claimant was notified that he had been found guilty as charged and the Carrier imposed 40 Demerits and returned him to service.

It is the position of the Organization that several procedural errors occurred in the handling of the case which denied the Claimant his fundamental right to a fair and impartial Investigation and "due process". It argued that the violations were as follows: (1.) The Carrier failed to hold a timely Investigation; (2.) The Hearing Officer pre-judged the Claimant; (3.) The Hearing Officer did not render the decision; and (4.) The Charging Officer rendered the decision. It argued that any of the aforementioned procedural violations require the Board to sustain the claim without even addressing the merits.

On the merits the Organization argued that even though Claimant admitted climbing over two trains, he should be excused because he believed that he was protected against train movement by the train crews. Additionally, it argued that the 40 demerits and time served while

out of service from April 16 through May 8, 2008 was excessive. It closed by asking that the discipline be set aside and the claim be sustained as presented.

It is the Carrier's position that the evidence indicates that Claimant was afforded all the contractual rights to which he was entitled. It argued that Claimant was properly notified of the charges, he attended the Hearing, was properly represented and his defense was not hindered, therefore, it reasoned that the Claimant was afforded a fair and impartial Investigation. Additionally, it argued that the Organization waived its argument regarding the time limits for holding the Investigation because it did not make any objections to its timeliness during the Hearing on April 28, 2008 and only raised the issue during its appeal. According to it "estoppel" applies in this instance and the Organization is barred from referring to the time limits.

It further argued that the facts conclusively show that the Claimant climbed on to a train and crossed over two unprotected tracks and that violation of the Safety Rules could have resulted in him being seriously injured or killed had either of the trains moved. It concluded by requesting that the discipline not be disturbed.

The Board thoroughly reviewed the transcript and the record of evidence and will next address the Organization's procedural arguments. The issue of multiple roles being held by one Officer in the disciplinary process within this industry has been the subject of countless Awards wherein authority can be found on both sides of each issue regarding the alleged procedural errors raised by the Organization. For the same reasons expressed in Award No. 1 of this Board allegations (3.) and (4.) referenced above are denied because there is nothing in the Agreement which requires that the Hearing Officer must issue the discipline, nor is there anything which prohibits the charging officer from rendering the discipline. Nonetheless, the recommendation made by the Board in Award No. 1 regarding disciplinary decision making is reaffirmed. The Organization also contended that the Hearing was not held within the prescribed ten day time limit which the Carrier acknowledged was correct, but argued that the Organization had waived that issue because it was not raised during the Hearing. The question of waiver in like and/or similar cases has been addressed before many Boards and again we have split arbitral authority on both sides of the issue. In Third Division Award No. 22695 it was ruled as follows:

"...It is well settled by case law of this Board that if objections are to be taken to the charge, the timeliness of the investigation, or the manner in which the investigation is conducted, such objections must be raised prior to or during the investigation or they are considered to have been waived."

Third Division Award Nos. 19916, 22456 and many others stand for the same proposition. Second Division Award No. 11240 cited by the Organization noted that the Representatives of the Organization at the beginning of the Investigation protested the timeliness of the Hearing. In

this instance the Board finds that the time limit issue will not resolve the case nor is there sufficient evidence to substantiate that Claimant was improperly pre-judged.

The Board having determined that the Claimant was not denied "due process" will resolve the case on its merits. Testimony of Foreman Konosky and the Claimant confirm that at the end of the shift on April 16, 2008, Konosky was taking a group of employees, including the Claimant, back to their personal vehicles that were parked on the west side of Bevier Street Yard. After the employees exited Konosky's vehicle and headed for their own vehicles Foreman Konosky noticed the Claimant in the process of climbing on a train and crossing over two unprotected tracks at which time he blew his vehicle horn and flashed his lights in a effort to stop the Claimant. That effort was to no avail. The Claimant's testimony was in agreement with that of Foreman Konosky and on pages 15 through 20 of the Transcript wherein he testified that he crossed over the unprotected tracks. The record is clear that the Carrier met its burden of proof that Claimant was guilty as charged.

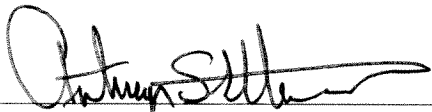
The only issue remaining is whether the discipline was proper. The Board finds and holds that the discipline was appropriate because it was not arbitrary, excessive or capricious for a proven violation of Safety Rules which had the potential for catastrophic results.

AWARD

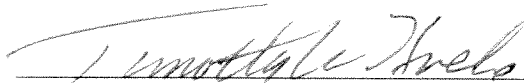
Claim denied.



William R. Miller, Chairman



Anthony Stillitano, Carrier Member



Timothy W. Kreke, Employee Member

Award Date: July 14, 2010