

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7357
AWARD NO. 6, (Case No. 7)**

**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 and an assessment of thirty (30) demerits by letter dated October 29, 2008] imposed upon Mr. L. Boyle for alleged violation of GCOR Rules 1.1, 1.1.1, 1.6 Item 1, 6.2 & 6.2.1 for the incident that occurred on September 16, 2008 at 07:30 at Mile Post 639 was arbitrary, excessive and in violation of the Agreement (Carrier's File 8-00642).
2. As a consequence of the violation referred to in Part 1 above, the Carrier shall now remove the aforesaid discipline from Mr. L. Boyle's record and compensate him for all lost wages during the period he was withheld from service."

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 September 17, 2008, the Carrier notified Claimant to appear for a formal Investigation on September 25, 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(s) 1.1, 1.1.1, 1.6 Item 1, 6.2 & 6.2.1 effective April 3, 2005 for the incident that occurred on Tuesday, September 16, 2008 at 07:30 at Mile Post 639...."

The aforementioned Rules in dispute deal with safety, train movement and location.

On October 29, 2008, Claimant was notified that he had been found guilty as charged and the Carrier imposed 30 demerits.

It is the position of the Organization that the Claimant did not receive a fair and impartial Investigation because the Hearing Officer did not issue the decision and instead the Charging Officer rendered the decision. Additionally, it argued that the decision was untimely and on the basis of the procedural violations the Board should sustain the claim without even addressing the merits.

On the merits the Organization argued that the Carrier did not meet its burden of proof, but instead only substantiated that there was a confusion between the Claimant and the Train Dispatcher over a track warrant. And, assuming for the sake of argument that if it had proven its charges, which it did not, the discipline was excessively severe. It closed by requesting that the discipline be set aside and the claim sustained as presented.

It is the Carrier's position that the Claimant was afforded a fair and impartial Investigation and the Organization's time limit argument should not be considered as it is "de novo".

It further argued that on September 16, 2008, the Claimant called the Train Dispatcher and was issued a MW Track Warrant No. 8 with permission to work from MP 638 to 647 with a line 9, that required the passing of train NS 3316 south, before the Claimant could foul limits MP 638 to 647.

According to the Carrier the Claimant placed his track car on the siding track at Kingsely, PA, opened the switch and proceeded in a north direction and when rounded a curve he saw the approaching train NS 3316. Claimant called NS 3316 with his radio to stop after which he backed up and got into the clear. He then contacted the train and told them they could proceed forward. The Carrier argued that the charges stemmed from the fact that the Claimant occupied the mainline track without receiving information from the NS 3316 crew or the Train Dispatcher about the location of said train as per the instructions on MW Track Warrant No. 8, line No. 9 and in doing such he placed himself and others in danger. It concluded by asking that the discipline not be disturbed.

The Board thoroughly reviewed the transcript and the record of evidence and will first address the Organization's procedural arguments. For the same reasons expressed in Award Nos. 1 and 2 of this Board the Organization's technical arguments are rejected. The time limit argument will not be considered because it was not set forth on the property, therefore, the case will be resolved on its merits.

The facts indicate that the Claimant called the Train Dispatcher and asked for permission to put up boards between MP 638 to MP 647 so that he could work. Claimant was issued MW Track Warrant No. 8, with a line 9. Line No. 9 was marked with an **X in the box** which stated the following:

"...DO NOT FOUL LIMITS AHEAD OF NS 3316 South..."

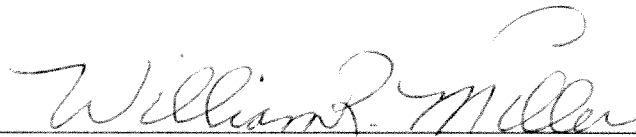
The Claimant testified on page 47 of the Transcript that he never had a track warrant in dark territory before and he was confused about the line 9 directive. According to him when he talked to the Train Dispatcher at 6:00 a.m., he was advised that the train should be gone when he arrived at Kingsley. The key phraseology is the Claimant was advised the train **should** be gone and not it **will** be gone. Claimant proceeded north on the track based upon an assumption rather than finding out the facts and in doing so he was in foul of the limits ahead of NS 3316. Testimony confirms that Claimant was qualified as a Foreman, had passed all required tests scoring 94% as recently as February, 2008. The record further confirmed that at the time of the incident Claimant had previously taken many track warrants.

If the Claimant was uncomfortable or confused as to the meaning of his track warrant in dark territory he should have taken it upon himself to clarify the meaning of the line 9 by either calling the Train Dispatcher or the crew of NS 3316 to verify train location. Claimant's failure resulted in placing himself in serious jeopardy. It is clear that the Carrier met its burden of persuasion that Claimant was guilty as charged.

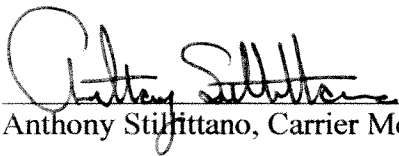
The only issue remaining is whether the discipline was proper. At the time of the incident the Claimant had a little over five years of service with an unblemished record. Nonetheless, because of the potential serious consequences of the violation of the Safety Rules the discipline will not be disturbed as it was not excessive, arbitrary or capricious.

AWARD

Claim denied.



William R. Miller, Chairman



Anthony Stittano, Carrier Member



Timothy W. Kreke, Employee Member

Award Date: July 14, 2010