

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7357
AWARD NO. 7, (Case No. 8)**

**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 of twenty (20) demerits resulting in the dismissal of Trackman/Truck Driver Brett S. Brown for violation of GCOR Rule 1.1.2, On Track Safety Manual Rules 29.1(A) and (D) and ES Safety Rules and Recommended Practices for Engineering Employees for failure to wear personal protective equipment (his hard hat) on February 17, 2009 is arbitrary, unjust, unwarranted, disparate and in violation of the Agreement (Carrier's File 8-00664).
2. As a consequence of violation referred to in Part 1 above, Claimant Brown shall be returned to service immediately and be made whole for losses incurred to him from March 18, 2009 until he is returned to 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 February 23, 2009, the Carrier notified Claimant to appear for a formal Investigation on February 26th which was postponed and subsequently held on March 5, 2009, 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 General Responsibilities Rule 1, Item 1.1 and 1.1.2**
- * On Track Safety, Rules and Procedures Manual Rules 29.1 items (a) and (d),**
- * ES Safety Rules and Recommended Practices for Engineering Service Employees Rules page 7, item 1.b, c, and page 20, item 6**

This is in reference to your alleged safety failure in the workplace whereby, you were observed working without required hard hat safety protection at Mileage 13.0 on the Colonie Subdivision on February 17, 2009 at approximately 11.30 hours, while covering your position as a Trackman/Driver on MWKENWOO...."

In general terms the aforementioned Rules in dispute deal with safety while working on a job site or Carrier property.

On March 18, 2009, Claimant was notified that he had been found guilty as charged and the Carrier imposed 20 demerits and dismissed him because of the accumulation of over 60 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 and on that basis alone the Board should sustain the claim without even addressing the merits.

On the merits the Organization argued that on February 17, 2009, the Kenwood maintenance crew was assigned to repair or replace a defective switch stand at Mileage 13.0 on the Colonie Subdivision. The crew was unable to repair the switch stand and the replacement was also found to be defective. While waiting for another employee to bring another switch stand to the location Foreman Berner informed the gang that that they could take time for a brief meal period. During that time, The Train Dispatcher attempted to radio Foreman Berner about an approaching train through his work limits. Claimant exited his vehicle to inform the Foreman that the Dispatcher was trying to reach him and getting out of the vehicle he forgot to put on his hard hat. Supervisor Kulzar drove up and saw the Claimant near the work area without the required personal protective equipment (PPE), i.e., his hard hat. Another member of the gang, N. Bloomingdale, also heard the Dispatcher's call and got out of his vehicle to tell Foreman Berner. He was also outside his vehicle without his hard hat at the same time as the Claimant. The Organization further argued that Supervisor Kulzar then instructed both employees to put their hard hats on and then coached/counseled them on the importance to wear all PPE when working on or about the track. According to it, that should have ended the matter as most minor

infractions are handled with a coaching/counseling session. Lastly, it argued that the Claimant was subjected to disparate treatment as the Carrier administered 20 demerits against his record and only 10 against Bloomingdales. 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 contrary to the Organization's assertions no procedural violations occurred.

It further argued that the record was clear that Claimant failed to wear protective equipment (hard hat) on February 17, 2009, in violation of Carrier Safety Rules which he admitted during the Investigation (See page 58 of the Transcript). It concluded that the discipline was appropriate for a short time employee who had already accumulated more than 40 demerits, therefore, it asked 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 not found in this instance to resolve the dispute in behalf of the Claimant.

The parties and the Claimant are not in dispute that on February 17th at approximately 11:30 a.m., Claimant and fellow employee Bloomingdale was observed working without the required hard hat protection by Supervisor Kulzer. On page 27 of the Transcript Kulzer testified that he gave both employees a verbal coaching and as far as he was concerned, that was the end of it.

Kulzer's superiors decided that an Investigation was necessary. Investigations were called on the Claimant and Bloomingdale and both were found guilty. Claimant was assessed 20 demerits which gave him a total of 70 demerits after which he was dismissed. Bloomingdale was assessed 10 demerits. Review of the record substantiates that Claimant was guilty as charged and the Carrier met its burden of proof.

During the appeal process the Organization argued on the property that the Claimant was subjected to disparate treatment. It specifically stated:

"The Organization contends that this investigation is and was a "witch hunt" used to dismiss Brett Brown from his duties on the Delaware and Hudson Railway. The Organization draws this conclusion from the fact that Mr. Nick Bloomingdale, who was also found to be in violation was only assessed ten (10) demerits for the same offense as Mr. Brown who was assessed twenty (20) demerits and ultimately dismissed from his duties on the D&H."

The Carrier responded to the Organization's allegation as follows:

"In response to the above, discipline is assessed after a full review of the transcript and a full review of the employees discipline record, Mr. Brown had a far from perfect record which was standing at fifty (50) prior this February 17, 2009 safety failure, this was the reason for the twenty, (20) demerits assessed to Brown."

The Carrier's answer to the Organization's assertion was unresponsive and there is nothing in the record during the handling of the case on the property that refutes the Organization's position that the Claimant was treated in a disparate manner. The Carrier never argued that Bloomingdale was assessed a lesser amount because his personal record was better than the Claimants. The Organization challenged the Carrier and at that point in the handling of the claim the burden of proof shifted to the Carrier to refute the Organization's position. It is a well settled issue within this industry that if one party sets forth a factual or positional argument and it is not refuted by the other, that contention not challenged must be accepted by the Board as fact (See Third Division Awards 11828, 12251, 12363, 15018 and First Division Awards 16517, 20288 and 20552 which stand for that proposition, to name just a few). Absent any information to the contrary the Board as the appellate trier of fact is locked to the record that was produced on the property and in this instance the Organization's unchallenged position must be accepted as fact.

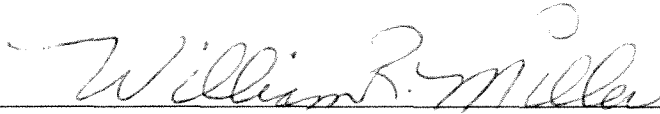
Therefore, the Board finds and holds that the discipline was excessive and it is reduced from 20 to 10 demerits reducing the Claimant's total demerits from 70 to 60. The Carrier's **DISCIPLINE POLICY, Paragraph 4** states:

"A net total of 60 demerits marks against an employee's record usually results in dismissal."

In view of the fact that 60 demerits does not require mandatory dismissal the discipline will be reduced to a lengthy suspension and the Claimant is to be reinstated to service with seniority rights intact, benefits unimpaired, but with no back pay. Claimant is forewarned that in the future he needs to be cognizant of all Carrier Rules and abide by them.

AWARD

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman



Anthony Stillitano, Carrier Member



Timothy W. Kreke, Employee Member

Award Date: July 14, 2010