

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7357
AWARD NO. 23, (Case No. 23)**

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

vs

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

William R. Miller, Chairman and Neutral Member
Kevin D. Evanski, Employee Member
Anthony Stillittano, Carrier Member

Hearing Date: December 20, 2013

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

**Appeal of discipline on behalf of BMWE member Mr. William Kanton, Jr.
requests that the discipline of thirty (30) demerits and Foreman's seniority
revoked for one (1) year assessed to Mr. Kanton's personal record be removed
and or reversed."
(Carrier File No. 8-00875)**

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 the dispute were given due notice of the hearing thereon and did participate therein.

The facts indicate that on May 16, 2012, Claimant was working as a Foreman on DH Utility 2 Crew. On May 16th, a job briefing was conducted with all employees of the crew that reviewed the authorized track authority that did not include MP 87. The crew traveled out on the main line without proper "Track warrant" authority to approximately MP 87 and was working on a unprotected track.

The entire crew was removed from service and taken to the Best Western Motel in Ticonderoga, New York, for a FRA -49CFR Part 219 and Carrier's Policy 1807 "For Cause Drug and Alcoholic Test". The Claimant's test results came back negative.

On May 21, 2012, Claimant was directed to attend a formal Investigation on May 24, 2013, which was mutually postponed until May 30, 2012, concerning in pertinent part the following charge:

"The purpose of this investigation is for ascertaining the facts surrounding your tour of duty on May 16, 2012 and a potential rules violation at approximate MP 86.7 Canadian Main Line."

On June 12, 2012, Claimant was notified that he had been found guilty as charged and assessed 30 Demerits and his seniority as a Foreman was revoked for 12 months from the date of the incident on May 16, 2012. It further stated that upon completion of the 12 month suspension, assuming there was no further discipline, Claimant's Foreman seniority would be restored after successfully completing Rules testing.

The Board notes that this is a companion case to Award No. 22, Case No. 22 (Claimant Mr. T. Delamater) as both cases arise from the same May 16, 2012, incident.

It is the Organization's position that the Investigation was not "fair and impartial" because the Notice of Investigation did not cite any specific Rules that were allegedly violated which made it impossible for the Organization to prepare an adequate defense. It argued that at the onset of the Investigation the Hearing Officer attempted to repair the inadequacy of the Notice by rephrasing what the intent of the Investigation was thereby showing that the Notice of Investigation was not precise and was fatally flawed. It pointed out that in the past the Carrier had always listed what Rules and employee had allegedly violated in its Notice of Investigations and furnished multiple copies of past Notices showing that information. It further argued that the Hearing Officer improperly ignored objections by the Organization and continued to enter Rules into the transcript that the Claimant was never charged with having violated asking the Claimant questions about those Rules. Based upon those procedural errors the Organization asked that the discipline be set aside without reviewing the merits.

Turning to the merits the Organization asserted that the Employee In Charge (EIC) of the Crew (Carrier Officer F. Konosky) was present when the Claimant obtained Track Protection and provided a Job Briefing to the Crew which Mr. Konosky participated in, however, he was not disciplined for his role in the incident. Simply put it argued that the Claimant was the "fall guy" for the alleged safety error. Lastly, it argued that if the Carrier had proven a violation (which it did not do) the discipline was excessive. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that Claimant received a "fair and impartial" Hearing. It argued that Rule 25 of the Agreement does not require that specific Rules must be stated in the Notice Of Investigation and it is clear from a reading of the transcript that the Claimant and the Organization understood the charges and knew of the CRV incident of May 16, 2012. Additionally, it argued that the Hearing Officer did not do anything that hindered the Claimant's defense.

The Carrier further asserted that the transcript shows that on May 16, 2012, the Claimant and his crew were working outside of their track authorization, which is a Cardinal Rule Violation, (CRV) which was acknowledged by the Claimant on page 43 of the transcript and further proven by the written statement of May 16, 2012, by Signal Maintainer, Derek Chaplin. Lastly, the Carrier argued that having proven the violation of a serious matter that could of had catastrophic consequences the discipline administered was appropriate and corrective in nature. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and is not persuaded by the Organization's procedural arguments and has determined that the formal Investigation was conducted in a fair and impartial manner and Claimant was afforded all of his "due process" Agreement rights as it is clear that the Claimant and the Organization understood the charges and were not "blindsided" by anything that occurred during the Hearing. Despite the fact that the Organization understood the instant charges, the Board would recommend that in the future it might behoove the Carrier to set forth those Rules it believes were violated as it could add greater clarity to Notices of Investigation. The dispute will be resolved on its merits.

The question at issue raised by the Notice of Investigation is whether or not the Claimant and his crew were working outside the limits of the Claimant's track authorization on May 16, 2012. Mr. Derek Chaplin, Signal Maintainer, who was site at the time of the alleged incident was asked to submit a written statement about the matter. In Chaplin's statement of May 16th he wrote in pertinent part the following:

"...Foreman Kanton's track and time was between CPC99y - Sig900N which would not cause a track light north of opc 77. I told the dispatcher I would get back to him. I found Foreman Kanton and asked what his limits were, he said: "between Cpc 99y - Sig 900N". I informed Foreman Kanton that the spot he was working was well south of his limits, he immediately called the dispatcher to get another track and time to cover where he was working. Foreman Kanton told his Manager Frank Konnofsky what happened."
(Underlining Board's emphasis)

Claimant was questioned about the incident as well and he submitted a written statement wherein he wrote in pertinent part:

"...Went down the hill and proceeded to open the switch and start work. After realizing that I was out of my limits I immediately called the Dispatcher to get more track and told the other Foreman to head into the clear...."
(Underlining Board's emphasis)

Claimant's statement confirmed Mr. Chaplin's statement that Claimant and his crew were working without proper track authority which was further substantiated by the testimony of Train Dispatcher Larson (See pages 12 - 14 of the Transcript). Substantial evidence was adduced at the Investigation that the Claimant was guilty as charged.

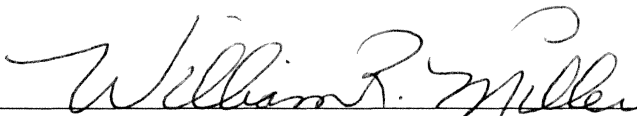
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately seven years of service with two plus years as a Foreman. Claimant's violation was of a serious nature because working without proper track authority could lead to catastrophic results. The Organization argued that if the Carrier had proven the charges (which it did not) the discipline was excessive because the Claimant was treated in a disparate manner because Supervisor Konosky who acted as the Employee in Charge (EIC) at the time of the incident was not disciplined. The Carrier responded to that assertion in its letter of declination of September 24, 2012, as follows:

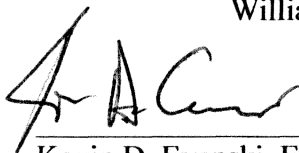
"...Mr. Konosky was removed from service, submitted to a D&A test, given time off, (time served) and given a unfavorable review placed into his personal file."

The aforementioned Carrier's statement was not rebutted. It is well recognized that un-refuted statements stand as fact and because of that it is clear that the Carrier Officer who had a shared responsibility in the incident was disciplined thus the Organization's argument that the Claimant was subjected to disparate treatment is not persuasive. The Board finds and holds the discipline of the Claimant of 30 demerits and the revocation of his Foreman seniority for one year was in accordance with the Carrier's disciplinary policy and it will not be rescinded because it was not arbitrary, excessive or capricious. The claim will remain denied.

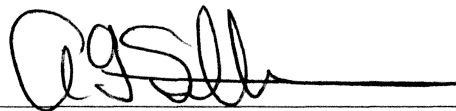
AWARD

Claim denied.


William R. Miller, Chairman & Neutral Member



Kevin D. Evanski, Employee Member



Anthony Stillittano, Carrier Member

Award Date: MARCH 13, 2014