

PUBLIC LAW BOARD NO. 6920

Brotherhood of Maintenance of Way)	
Employees Division - IBT Rail)	
Conference)	
)	
and)	Case No. 25
)	Award No. 25
)	
The Kansas City Southern Railway Company)	
(Former Gateway Western Railway))	

Statement of Claim

"Claim of the System Committee of the Brotherhood that:

1. The imposition of a twenty-five (25) day overhead suspension and five (5) day actual suspension upon Mr. D. Dennis for the alleged violation of General Code of Operating Rule (GCOR) 6.3 - Main Track Authorization and GCOR 6.11 - Mandatory Directive was based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File C 15 10 07/K0415-6535 GAT).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Dennis shall "*** be exonerated of all charges and be reimbursed for all wage loss sustained as a result of the Carrier's action. Said Claimant should have his record cleared of all charges and not affected by this decision."

Background

On October 1, 2015 the Carrier issued to Claimant D. Dennis a notice of formal investigation which states, in part, the following:

A formal investigation will be held to ascertain the facts and determine your responsibility, if any, in connection with an incident that occurred on September 30, 2015 at approximately 9:45 a.m. While serving on Gang 625, it is alleged that you failed to properly perform your duties in a safe and proper manner by occupying the main track without proper authority from Milepost 206 to Milepost 209.5 on the Springfield Subdivision.

On October 6, 2015 the formal investigative hearing convened wherein Claimant, assisted by his representative, presented testimony and two (2) exhibits and examined the Carrier's witness and eight (8) exhibits.

On October 7, 2015 the Assistant Vice President Engineering issued a discipline assessment letter to Claimant stating as follows:

After careful and thorough review of the transcript of this investigation, it has been determined that you have violated The Kansas City Southern Railway Company's General Code of Operating Rules 6.3 - Main Track Authorization and GCOR 6.11 - Mandatory Directive.

Accordingly, for your violation of the above-mentioned rules you are hereby assessed a thirty (30) day suspension. Five (5) days to be served as actual time off commencing from October 1, 2015, and continuing through and including October 5, 2015, and a twenty-five (25) day record suspension, which will not be served, but recorded in your personnel file as an actual suspension. **You are eligible to return to service immediately.**

Rule 6.3 - Main Track Authorization is, essentially, a prohibition on occupying a main track unless authorized by appropriate authorities such as rules, special instructions or general orders. Rule 6.11 - Mandatory Directive states that such directives are, for example, track warrants, track and time and track permits and are "written, printed or displayed authorities or speed restrictions issued by a train dispatcher or control operator."

On November 4, 2015 the Organization filed a claim contesting the Carrier's assessment of discipline to Claimant. The Organization asserts that the Carrier (1) did not afford Claimant a fair and impartial hearing and failed to hold or conduct the hearing at Claimant's home terminal, (2) failed to identify or state a specific charge in the notice of formal investigation and (3) issued harsh and punitive discipline to Claimant.

On December 10, 2015 the Carrier denied the Organization's claim by stating it was procedurally defective because the claim cites an inapplicable collective bargaining agreement. Aside from this defect, the Carrier noted that Claimant acknowledged at the investigative hearing his violations of Rule 6.3 - Main Track Authorization and Rule 6.11 - Mandatory Directive.

On February 4, 2016 the Organization filed an appeal wherein it asserts the alleged procedural defect was a typographical error which was corrected in the appeal. The BMWWE observes that Claimant relied on the Employee in Charge ("EIC") during the job briefing for the mileposts framing track authorization limits.

On March 29, 2016 the Carrier denied the Organization's appeal and reiterated its reasons set forth in the initial declination.

On December 13, 2016 the Organization and the Carrier convened in conference to discuss this matter but did not attain a resolution whereupon the Organization forwarded this claim to the Board.

Findings

Public Law Board No. 6920, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

This claim was timely and properly presented and handled by the Organization at all stages of the appeal up to and including the Carrier's highest appellate officer. Having met in conference without attaining a resolution of this matter, the Organization has placed the claim before the Board for final adjudication.

According to the Organization, the Carrier did not afford Claimant a fair and impartial hearing. The Organization points to no remarks or conduct in the record showing prejudice by the presiding official towards Claimant nor does the BMW highlight any matter of alleged impropriety during on-property claim processing to support its assertion. The Board's review of the record, including Third Division Awards 11295 and 21040 submitted by the Organization, shows the Carrier afforded Claimant a fair and impartial hearing and, in doing so, complied with Rule 32 - Disciplinary Procedure.

In this regard, Rule 32 states that an investigation "shall be held when possible at the home terminal of the employee involved[.]" Claimant does not have a home terminal as he is a member of a mobile gang. The Carrier held the formal investigative hearing at a location accessible by Claimant; there is no indication that Claimant was disadvantaged in the presentation of a defense to the charged rules violations by the location.

Rule 32 also states that "[a]n employee charged with an offense shall be furnished with a letter stating the precise charge or charges against him[.]" The Carrier issued a notice of formal investigation specifying date, time and location of Claimant's wrongdoing along with a descriptive statement ("it is alleged that you failed to properly perform your duties in a safe and proper manner by occupying the main track without proper authority from Milepost 206 to Milepost 209.5 on the Springfield Subdivision"). This is sufficient detail constituting a "precise charge" as required by Rule 32.

In this matter of discipline, the responsibility rests with the Carrier to establish by substantial evidence the charge levied against Claimant and to show that the discipline assessed is not arbitrary or an abuse of discretion and corrective in nature.

The record shows that Claimant is a Heavy Machine Operator with fifteen (15) years of service with the Carrier. On September 30, 2015 Claimant operated a ballast regulator on Gang 625; a co-worker was the EIC. Prior to receiving the track warrant from the controller, the EIC conducted a job briefing with Claimant and, later when the EIC was on the radio with the controller obtaining a track warrant, Claimant was repairing the ballast machine. After receiving the track limits from the controller, the EIC incorrectly recorded the limits and verbally conveyed the incorrect limits to Claimant. The EIC did not conduct another job briefing with Claimant after receiving the warrant and Claimant did not request a briefing.

According to the Carrier, Claimant and the EIC are equally responsible for verifying track limits. Claimant should have listened to the EIC's radio communications with the controller and should have requested a second job briefing after the warrant was issued as the first job briefing was conducted prior to the warrant's issuance. The Roadmaster testified that safety is the responsibility of every employee. The Carrier notes that Claimant did not except to any testimony by the Roadmaster.

Claimant acknowledged in his testimony that he performed duties from Milepost 206 to Milepost 209.5 which was beyond track authorization limits. This is substantial evidence that Claimant performed duties in an unsafe manner on an area of the main track where he did not have authorization, and this violates Rule 6.3 - Main Track Authorization and Rule 6.11 - Mandatory Directive. Under its disciplinary policy,

the Carrier assessed Claimant a thirty (30) day suspension of which five (5) days are an actual suspension and twenty-five (25) are an overhead suspension. The Carrier notes that it considered Claimant's fifteen (15) years of service and his clean disciplinary record; the discipline assessed is appropriate and not arbitrary or an abuse of discretion. There is no basis under applicable precedent, such as Third Division Award 26920, for the Board to adjust the discipline.

According to the Organization, Claimant is not in the same position as the EIC although the Carrier treated the EIC and Claimant as equally responsible for verifying track limits. The EIC exercises dominion and control in obtaining track authorization limits and is responsible for providing accurate information to Claimant. There was no basis or reason for Claimant to dispute or question the track limits conveyed to him by the EIC.

The BMW, citing Award 8 of Public Law Board No. 7599, points out that any factual disputes must be resolved in favor of the Claimant since the burden of proof resides with the Carrier in this matter. Although the Board recognizes the Claimant did not except to any of the Roadmaster's testimony, the record shows and the Board finds that the Carrier did not except to Claimant's testimony, in response to the hearing officer's question, that the EIC is the employee responsible for ensuring proper track limits. The Roadmaster's unrebutted testimony that everyone is responsible for ensuring and practicing safety is credited; also credited is Claimant's unrebutted testimony that the EIC is the employee responsible in this situation. Applying Award 8 to this factual dispute -- Carrier stating Claimant is equally responsible versus Organization stating EIC is responsible -- resolves it in Claimant's favor. Additionally, the rules cited by the Carrier do not address a requirement for Claimant to (i) participate in EIC - controller communications or (ii) request a job briefing after the warrant was issued.

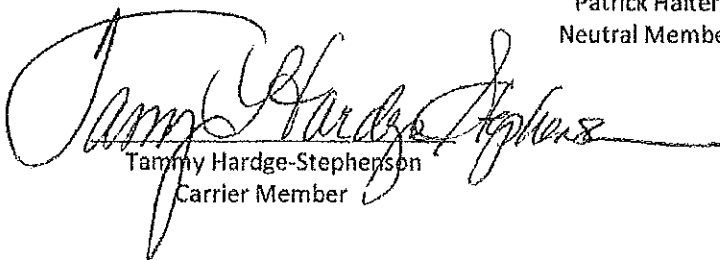
In the circumstances of this claim, the Board finds that the Carrier's assessment of a thirty (30) day suspension to Claimant is excessive and punitive for these technical rules violations. The Board finds that the appropriate measure of corrective discipline for Claimant is rescinding the thirty (30) day suspension -- five (5) day actual suspension and twenty-five (25) day overhead suspension -- and assessing Claimant a letter of reprimand. Claimant shall be compensated reimbursed for wage loss suffered during the five (5) day actual suspension.

Award

Claim sustained in part as set forth above.



Patrick Halter
Neutral Member



Tammy Hardge-Stephenson
Carrier Member



Andrew M. Mulford
Organization Member

PLB No. 6920
Award No. 25

Dated on this 27th day of
February, 2018