

**PUBLIC LAW BOARD NO. 6935**

PARTIES	)	BROTHERHOOD OF MAINTENANCE OF WAY
	)	EMPLOYEES DIVISION - IBT RAIL CONFERENCE
	)	
TO	)	
	)	
DISPUTE	)	THE KANSAS CITY SOUTHERN RAILWAY COMPANY

**STATEMENT OF CLAIM:** “Claim of the System Committee of the Brotherhood that:

1. The discipline (dismissal) imposed upon Mr. D. Fountain, by letter dated March 25, 2019, for alleged violation of ‘ ... **The Kansas City Southern Railway Company’s General Code of Operating Rules 1.12** - Alert and Attentive and **GCOR Rule 1.6** - Conduct, **item 1** -Careless of the safety of themselves or others, **item 2** - Negligent and **item 4** - Dishonest and **The Kansas City Southern Railway Company’s Maintenance of Way and Signal Department Rules 30.2.3** - Movement of On-Track Equipment, **item A** - On-track equipment must have proper authority to occupy controlled track. On-track equipment will operate according to track occupancy authority without regard to signal indication except for equipment moving as directed by a train service pilot (Rule 30.2.6). On-track equipment must comply with interlocking rules (30.2.7 through 30.2.10) On-track equipment approaching trains or other on-track equipment on the same or adjacent tracks must be prepared to stop within 1/2 of the range of vision and **item C** - All On-Track equipment must be prepared to stop when approaching any obstruction, including but not limited to the following: \* People or animals \* Any road crossing \* Standing or moving trains or On-Track equipment on the same or adjacent tracks \* Frogs or switches \* Derails, tunnels or station platforms \* Curves or points where the view is obscured and **Maintenance of Way and Signal Department Rules 30.5.3** - Maintaining a Safe Braking Distance, On-track equipment operators are responsible for maintaining a safe braking distance between trains and other on-track equipment, **item B** - Maintaining a Safe Braking Distance Behind other On-track Equipment 1. On-track equipment must remain at least 300 feet behind other on-track equipment while traveling to or from a work location.’ (Emphasis in original) was severe, harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File KCS260KM19D/2019-0077 KCS).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Fountain shall now:  
  
‘... be allowed to return to work, with all vacation and seniority rights unimpaired, that the charge and discipline, issued per letter of March 25, 2019 from Vice President and Chief Engineer, Vernon A. Jones, resultant from investigation held March 12, 2019, be

removed from his personal record, that he be made whole for all time lost due to discipline issued in connection with these charges, and that he be reimbursed for any additional expenses, including those requested in the March 12, 2019 hearing, incurred that would have normally been covered by Carrier benefits.

\* \* \*

... including compensation for straight time for each regular workday lost and holiday pay for each holiday lost. This is to be paid at the rate of position assigned to the claimant at the time of removal of service. This amount is not to be reduced by earnings for alternate employment, obtained by the claimant while wrongfully removed from service. This should also include any general lump sum payment or retroactive general wage increase provided in any applicable agreement that becomes effective while claimant was out of service. Any overtime needs to be included for the lost overtime opportunities for any position the claimant could have held during the time he was removed from service, or on overtime paid to any junior employee for work the claimant could have bid and performed had he not been removed from service. Any health, dental and vision care insurance premiums, deductibles and copays that he would not have paid had he not been unjustly removed from service.

It is hereby stated that Mr. Fountain be fully exonerated, and all notations of the dismissal be removed from all Carrier records.' (Employees' Exhibit 'A-2')."

#### FINDINGS:

Upon consideration of the entire record and all of the evidence, the Board finds 1) the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended; 2) PLB 6935 is duly constituted by Agreement and has jurisdiction over this dispute; and 3) the parties received notice of the hearing. Board findings are drawn from the record established by the parties in this proceeding and are set forth in the narrative that follows.

Claimant is a Machine Operator with approximately six (6) years of service in the Carrier's Maintenance of Way Department. During his tenure with the KCS, Claimant has been assigned Anchor Machine 2023W - Gang 500. Claimant's record is discipline free.

On the morning of February 12, 2019, Claimant and members of Gang 500 participated in a job briefing with Gang 501. After this joint briefing, Gang 500 met with its Foreman for a job briefing on that day's work assignment -- Operator Gordon and Operator Staggs in Spiker 1969W traveling from Benavides, TX to Hebbronville, TX followed by Claimant in Anchor 2023W. Foreman Payton reminded Gang 500 to maintain safe distance [three hundred (300)] feet between machines and vigilance at road crossings. During this briefing Claimant and Operators Gordon and Staggs did not discuss a pre-determined signal to use when slowing or stopping their machines. Operators Gordon and Staggs state the operators' practice to signal slowing or stopping has been flashing brake lights.

Around 9:15 a.m. at Mile Post 85.4 Spiker Machine Operators Gordon and Staggs received notice over the spiker's radio from an operator in a forward machine that forward on-track machines had stopped. They stopped the spiker; however, they could not use the spiker's radio to notify Claimant to stop the anchor machine because that machine did not have a radio. When the spiker machine stopped the anchor machine was following at a distance of approximately one (1) mile. At approximately one hundred twenty-three (123) feet from the stopped spiker, Claimant applied the anchor's brakes. He states the brakes failed as his machine shutdown yet continued its forward movement until colliding with the spiker machine. The operators suffered no injuries and the machines incurred no structural damage other than dents in the front bumper of Anchor 2023W.

On February 15, 2019, the Presiding Officer notified Claimant of a formal investigative hearing on February 19, 2019:

A formal investigation will be held to determine your responsibility, if any, in connection with an incident that occurred on February 12, 2019, at approximately 9:15 a.m. While working on Gang 500, it is alleged that you failed to properly perform your duties in a safe and proper manner resulting in a collision with Spiker Machine 1969W and Anchor Machine 2023W. This incident occurred at or near Milepost 85.4 in Benavides, TX.

By agreement the hearing convened March 12, 2019. Thereafter the Vice President and Chief Engineer issued a decision letter dated March 25, 2019:

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 1.12*** - Alert and Attentive and ***GCOR Rule 1.6*** - Conduct, ***item 1*** - Careless of the safety of themselves or others, ***item 2*** - Negligent and ***item 4*** - Dishonest and ***The Kansas City Southern Railway Company's Maintenance of Way and Signal Department Rules 30.2.3*** - Movement of On-Track Equipment, ***item A*** - On-track equipment must have proper authority to occupy controlled track. On-track equipment will operate according to track occupancy authority without regard to signal indication except for equipment moving as directed by a train service pilot (Rule 30.2.6). On-track equipment must comply with interlocking rules (30.2.7 through 30.2.10) On-track equipment approaching trains or other on-track equipment on the same or adjacent tracks must be prepared to stop within 1/2 of the range of vision and ***item C*** - All On-Track equipment must be prepared to stop when approaching any obstruction, including but not limited to the following: \* People or animals \* Any road crossing \* Standing or moving trains or On-Track equipment on the same or adjacent tracks \* Frogs or switches \* Derails, tunnels or station platforms \* Curves or points where the view is obscured and ***Maintenance of Way and Signal Department Rules 30.5.3*** -

Maintaining a Safe Braking Distance. On-track equipment operators are responsible for maintaining a safe braking distance between trains and other on-track equipment, *item B - Maintaining a Safe Braking Distance Behind other On-track Equipment* 1. On-track equipment must remain at least 300 feet behind other on-track equipment while traveling to or from a work location.

Accordingly, for your violation of the above-mentioned rules you are hereby dismissed from the services of The Kansas City Southern Railway Company effective immediately, **March 25, 2019**.

In response to the decision, the BMW presented a claim and advanced it through all on-property stages including conference on July 10, 2019; however, the claim remains unresolved. The Board finds the claim is procedurally correct and proper for a decision as Claimant received a fair and impartial hearing.

Well-established in a claim where discipline has been assessed is the Carrier's responsibility or burden to prove the charged violation(s) and establish that the assessed discipline is proportional to the infraction rather than punitive and an abuse of discretion. The BMW states that when the burden of proof resides with the Carrier, factual disputes are resolved in favor of Claimant according to precedent in Award 25 - PLB 6920.

Aside from the BMW's assertion that Claimant did not receive a fair and impartial hearing which the Board finds otherwise, the Organization states that KCS failed to carry its burden of proof on the charged offenses and there are superseding considerations (engine shutdown and no radio) plus the assessed discipline of dismissal is punitive.

Throughout his six (6) years of service with the Carrier, Claimant has been the assigned Machine Operator on Anchor 2023W. The machine, he states, has a history of mechanical malfunctions exemplified by the unexpected engine shutdown when he applied the brakes to avert colliding with Spiker 1969W. The engine malfunction and brake failure caused the collision.

At the collision site Work Equipment Supervisor ("WES") Potter conducted a visual examination of both machines, including brakes and brake shoes; he observed no mechanical defects or related concerns that would have caused the engine to "die" when Claimant applied the brakes. WES Potter re-enacted the situation described by Claimant, that is, at a distance of 123 feet from the spiker machine WES Potter turned off the engine when he applied the brakes; Anchor 2023W stopped short of Spiker 1969W. WES Potter stated that whether or not the engine shutdown, the brakes remain operable as they function independently of the engine. He noted that the anchor's electric wire spark occurring later in the day of the incident was related to the hydraulic cooling fan and unrelated to brakes or engine.

During the 6 years Claimant has operated Anchor 2023W, WES Potter states that Claimant never brought forward any engine malfunction or mechanical defects for correction and the equipment repair logbook shows no repairs for Anchor 2023W. Foreman Payton testified that Claimant never informed him of any mechanical difficulties with the anchor machine. Claimant testified he never

identified any mechanical or operating problems about his assigned anchor machine to Assistant Roadmaster Glinski. The BMW's position that the anchor machine's history of malfunction exemplified by its unexpected shutdown when Claimant applied the brakes constitutes a superseding consideration is not confirmed by testimony or the equipment repair logbook.

The BMW questions the Carrier's re-enactments because the anchor stopped short of the spiker but at varying distances. The Organization's concerns are noted and assessed in the following context. Claimant states he maintained a safe 300-foot distance following the spiker machine and there were no obstructions or curves interfering with his on-track view. With an unimpeded view and safe distance spacing, Claimant did not brake until he was 123 feet from the stopped spiker. Subtracting those numbers (300 feet safe distance minus 123 braking) shows Claimant traveled one hundred sixty-seven (167) feet with the spiker machine stopped before he attempted to stop. In other words, Claimant did not stop within half the range of vision [300-foot safe distance minus half the safe distance or one hundred fifty (150)] from on-track equipment. This violates Rule 30.2.3 - Movement of On-Track Equipment, Item A - prepared to stop at one-half (1/2) range of vision, Item C - prepared to stop with on-track equipment occupying same track; Rule 30.5.3 - Maintaining a Safe Braking Distance, Item B - maintain safe braking distance; and GCOR Rule 1.12 - Alert and Attentive. The cumulative effect of multiple violations coupled with the evidence disproving engine malfunction when brakes applied support finding a violation of GCOR 1.6 - Conduct.

With these violations, the Board considers the assessed discipline of dismissal. In this regard, the Organization maintains that a superseding consideration is no radio. Claimant states the radio was stolen and his requests for another radio months prior to the incident were not fulfilled. The reason for no radio in the anchor machine is not relevant but the decision or failure to install a radio eliminated that signal as a useful tool for Claimant before his work assignments began. Spiker machine operators received notice to stop (Roadmaster Glinski: machine in front of spiker "radioed back"). At the time the spiker stopped, Claimant was 1 mile distanced from them. But for no radio the spiker operators could have "radioed back" to Claimant. Radio signal at 1 mile is significantly safer for on-track protection than visual observation at 123 feet. The decision not to install a radio is tantamount to withholding a work tool from an operator and abuse of discretion. The Board credits the Foreman's candid acknowledgment recognizing that a radio in the anchor machine could have averted this incident. Joined with this mitigating factor is Claimant's discipline free record. These factors were not developed during the investigation, therefore, a careful and thorough review of them was not available to the deciding official. Thus these factors were unaccounted for in the assessed discipline of dismissal. After accounting for these factors, the Board finds that a penalty other than dismissal is warranted. The Board rescinds the dismissal and reinstates Claimant, without backpay, and subject to completion of any KCS-provided training deemed necessary by the Carrier. The Carrier has thirty (30) days to comply with this order.

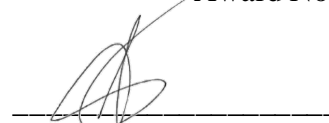
AWARD: Claim sustained in accordance with the findings.

Patrick Halter /s/  
Patrick Halter  
Chair - Neutral Member



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John Schlismann  
Employee Member



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Louis Fernandez  
Carrier Member

Date: *November 15, 2021*