

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 [thirty (30) day suspension, five (5) days to be served as actual time off and twenty-five (25) days to be a record suspension, which will not be served but recorded in Claimant’s personnel file as an actual suspension] imposed upon Mr. D. Gordon, by letter dated March 25, 2019, for alleged violation of Maintenance of Way and Signal Department Rules 30.5.3 - Maintaining a Safe Braking Distance, Item C was severe, harsh and imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File KCS701SN19D/2019-0079 KCS).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Gordon shall now:

‘... be returned to work on his position of Machine Operator, and the claimant shall be made whole for all financial losses as a result of the violation, including compensation for the 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. Gordon be fully exonerated, and all notations of the dismissal be removed from all Carrier records.’ (Employees’ Exhibit ‘A-3’).”

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 has approximately five (5) years of service with the KCS' Maintenance of Way Department. During the months leading up to Claimant's discipline, he was the assigned Machine Operator on the spiker machine for Gang 500. Claimant's record is discipline free.

During morning hours on February 12, 2019, Claimant and Gang 500 joined with Gang 501 for a job briefing. After this job briefing, Gang 500 met with its Foreman for another job briefing focused on the Gang's work assignment - - Claimant with Operator Staggs in Spiker 1969W traveling from Benavides, TX to Hebbronville, TX with Operator Fountain in Anchor 2023W following. Foreman Payton reminded gang members to maintain distance between machines [three hundred (300)] feet and vigilance at road crossings. During this job briefing Claimant (spiker machine) and Operator Fountain (anchor machine) did not discuss a pre-determined signal to use when slowing or stopping their machines; however, Claimant states their practice was to signal slowing or stopping with flashing brake lights.

At 9:15 a.m. near Mile Post 85.4 Claimant, with Operator Staggs in Spiker 1969W, received notice over the spiker's radio from an operator in a machine ahead of them that forward machines had stopped on the track. Claimant stopped the spiker. Claimant could not use the spiker's radio to notify Operator Fountain to stop the anchor machine because that machine did not have a radio. When Spiker 1969W stopped, Anchor 2023W was approximately one (1) mile or five thousand two hundred eighty (5,280) feet following it. At the safe distance of 300 feet Operator Fountain observed Spiker 1969W on the track and at one hundred twenty-three (123) feet from the spiker realized it had stopped whereupon he applied the anchor's brakes. Operator Fountain states the brakes failed when the machine unexpectedly shutdown yet continued moving until it collided with the spiker. The machines incurred no structural damage with only dents in the front bumper of the anchor machine and operators suffered no injuries.

On February 15, 2019, the Presiding Officer notified Claimant of a formal investigative hearing set for 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 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 C*** - When slowing or stopping on-track equipment during travel, Operators must use a predetermined signal to slow or stop their on-track equipment as discussed in their job briefing. The operator who slows or stops a machine of a machine will signal other Roadway workers and receive acknowledgement of understanding. Operators should use the following examples for signaling:

1. If using a radio, the lead operator must ensure that the following operator has received and understood the message received.
2. If using hand signals, the lead operator must give a continuous signal until the following operator has acknowledged that the signal was received and understood.
3. The operator of a track car that follows must watch signals and must acknowledge the signal as discussed in the job briefing. If emergency stop must be made, notify the following operator as soon as practicable to avoid collision.

Accordingly, for your violation of the above-mentioned rule you are hereby assessed a thirty (30) day suspension. Five (5) days to be served as actual time-off and a twenty-five (25) day record suspension, which will not be served, but recorded in your personnel file as an actual suspension.

In response to this decision, the BMWF presented a claim and advanced it through all on-property stages including conference on July 30, 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 disputing discipline is the Carrier's responsibility to prove the charged rule violation and establish that the assessed discipline is proportional to the violation and not punitive or an abuse of discretion. According to the Carrier, Claimant violated Rule 30.5.3 - Maintaining a Safe Braking Distance, Item C:

When slowing or stopping on-track equipment during travel, Operators must use a predetermined signal to slow or stop their

on-track equipment as discussed in their job briefing. The operator who slows or stops a machine of a machine will signal other Roadway workers and receive acknowledgement of understanding.

Operators should use the following examples for signaling:

1. If using a radio, the lead operator must ensure that the following operator has received and understood the message received.
 2. If using hand signals, the lead operator must give a continuous signal until the following operator has acknowledged that the signal was received and understood.
 3. The operator of a track car that follows must watch signals and must acknowledge the signal as discussed in the job briefing.
- If emergency stop must be made, notify the following operator as soon as practicable to avoid collision.

Claimant acknowledged no discussion with Operator Fountain “in their job briefing” to set “a predetermined signal to slow or stop their on-track equipment.” Claimant states the practice with the anchor machine operator was to signal slowing or stopping was flashing brake lights. The practice may be known to spiker machine operators Claimant and Operator Staggs but anchor machine Operator Fountain testified he was unaware of it.

Item C provides examples of signals - - radio and hands. Operators pre-determine or choose a signal prior to on-track travel. In this situation, the Carrier states that use of brake lights to signal an operator to slow or stop a machine must be supplemented or used with a radio signal or hands signal. Whether or not the Carrier’s statement reflects Item C as written is disputed by the BMW. Undisputed is that radio was unavailable because the KCS had not installed it in the anchor machine despite multiple requests during the three (3) to four (4) months preceding this incident. Hand signals were not used as Claimant states the practice with the anchor machine operator was to signal with brake lights. This practice between operators of spiker and anchor machines is not founded upon sufficient evidence since the anchor machine operator was unaware of it; however, there is sufficient evidence that Claimant violated Item C because there was no discussion at any time with the anchor machine operator to pre-determine any signal. The dispute over flags used with hand signals and exiting the machine are recognized but not dispositive in determining Claimant’s violation.

Considered alongside Claimant’s violation is the Carrier’s decision not to install a radio in the anchor machine. This failure constitutes withholding a tool from machine operators that supports on-track safety and is a mitigating factor unaccounted for in the assessed discipline. When mitigation is accounted for in assessing discipline, a lesser penalty is warranted. Accordingly, Claimant is assessed a letter of reprimand and make whole compensation for any monetary losses resulting from the decision letter dated March 25, 2019. Any monies awarded will follow precedent established in First Division Award 26295; PLB 6192 - Awards 7 and 34; PLB 6639 - Awards 97 and 110; PLB 6670 - Award 8; and PLB 5760 - Award 41. 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



John Schlismann
Employee Member



Louis Fernandez
Carrier Member

Date: *November 15, 2021*