

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. N. Howell, by letter dated November 19, 2019, for alleged violation of The Kansas City Southern Railway Company’s General Code of Operating Rules 1.6.4 - Notifications of Criminal Charges, The Kansas City Southern Railway Company’s Driver Policy and The Kansas City Southern Railway Company’s Drug and Alcohol Free Workplace Policy was severe, harsh and an abuse of Carrier discretion (System File KCS700SN20D/2019-0653 KCS).
2. As a consequence of the violation referred to in Part 1 above, Claimant N. Howell 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. Howell’s (sic) 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.

On April 4, 2005, Claimant entered on duty in the Carrier's Maintenance of Way Department as a Machine Operator. In the fall of 2019 Claimant served as the assigned Tamper Operator on Gang 506. Claimant's position requires that he maintain a commercial driver's license ("CDL") and that is the Carrier's responsibility to assess and confirm pursuant to 49 C.F.R. Chapter III at § 391.25 Annual inquiry and review of driving record.

On June 22, 2019, at approximately 1:40 a.m. local law enforcement ("police") in Alexandria, Louisiana, stopped Claimant for an improper lane change. The officer assessed that Claimant may be driving under the influence ("DUI"). Claimant was subjected to a field sobriety test ("walk the line") and, thereafter, the officer drove Claimant to the station for a breathalyzer test. After completing that test the officer drove Claimant to his vehicle and Claimant drove home.

On September 19, 2019, Roadmaster Barr received notice from the Carrier's CDL Compliance advising him that completion of the "Certification of Violations" for Claimant was due to ensure his CDL did not expire. Five days later (September 24) CDL Compliance received a report from its contract vendor ("SambaSafety") showing Claimant's receipt of a citation and conviction for "submit at or over .08" on June 22, 2019. The Carrier followed up the next day (September 25) with the Louisiana Department of Public Safety and Corrections Office of Motor Vehicles ("OMV") wherein OMV reported:

Your [Claimant's] driver's license is pending a suspension because our records show that you requested an Administrative Hearing for submitting to a chemical test on 06/22/2019 [submit at or over .08].

Employee Relations contacted Claimant to discuss this matter. Claimant confirmed that he did not report the DUI to the KCS. With that confirmation, Employee Relations advised the Roadmaster to remove Claimant from service which occurred on October 9, 2019.

On October 15, 2019, the presiding official notified Claimant of a formal investigative hearing - -

. . . to ascertain the facts and determine your responsibility, if any, in connection with your alleged failure to comply with the Carrier's rule requiring that you notify the [KCS] Railway Company and provide specific required information within 48 hours of being charged with certain specified offenses. Specifically, it is alleged that you failed to comply with the rule by not reporting *charges relating to your arrest* on or around June 22, 2019. Carrier's first knowledge was on October 8, 2019.

The next day (October 16), the presiding official issued a "Correction" to the notice of investigative hearing and removed the italicized phrase *charges relating to your arrest* and inserted the phrase "a charge of operating a motor vehicle while under the influence of or impaired by, alcohol or a controlled substance[.]" The revised notice states:

. . . to ascertain the facts and determine your responsibility, if any, in connection with your alleged failure to comply with the Carrier's rule requiring that you notify the [KCS] Railway Company and provide specific required information within 48 hours of being charged with certain specified offenses. Specifically, it is alleged that you failed to comply with the rule by not reporting *a charge of operating a motor vehicle while under the influence of or impaired by, alcohol or a controlled substance* on or around June 22, 2019. Carrier's first knowledge was on October 8, 2019.

By agreement the hearing convened November 6, 2019. Thereafter the Vice President and Chief Engineer assessed Claimant the discipline of dismissal on November 19, 2019, for violating the KCS' General Code of Operating Rules 1.6.4 - Notifications of Criminal Charges, Driver's Policy and Drug and Alcohol Free Workplace Policy.

Rule 1.6.4 - Notifications of Criminal Charges states in relevant part:

Any employee charged with a crime involving any of the following is required to report the situation within 48 hours to the Company's notification line (1-844-289-4763).

* * *

- Operating a motor vehicle under the influence of, or impaired by, alcohol or a controlled substance[.]

The Driver's Policy states:

M. Other Required Notification

3.Charges and/or Convictions Involving Drugs and/or Alcohol

... any employee *charged* with an offense involving drugs or alcohol, including but not limited to, driving under the influence of drugs or alcohol, must call the KCS notification line (1-844-289-4763) within 48 hours.

The Drug and Alcohol Workplace Free Policy echoes the notification process in Rule 1.6.4 and the Driver's Policy.

In response to the decision letter, the BMW presented a claim and advanced it through all on-property stages including conference on April 16, 2020; however, the claim remains unresolved. In the Organization's view, certain procedural flaws attributable to the KCS are sufficient to sustain this claim. For example, the Carrier pre-determined Claimant's guilt when it removed him from service prior to conducting an investigation. Claimant's removal was related to Federal requirements where safety-sensitive positions, such as Claimant's, are to be drug and alcohol free.

The Organization states that Claimant was not afforded a fair and impartial hearing as required by Article 13 - Discipline and Grievances. The BMW states that the notice of hearing dated October 15, 2019, confines the Carrier's investigation to the details and essential facts of an incident the Carrier first gained knowledge on October 8, 2019. The BMW states the subject of the investigation at hearing, however, was an incident the Carrier gained first knowledge of September 24, 2019 -- the date of the SambaSafety report -- followed by the OMV report dated September 25, 2019, as acknowledged in testimony by Mr. Brazeal, Director of Operational Compliance ("DOC"). The Organization relies on Third Division Award 41467 for affirmation that the case caption in the notice of investigation cannot be expanded or changed at the hearing.

The case caption in this claim is based on first gained knowledge October 8, 2019, as stated in the notice of investigation dated October 15, 2019. When DOC Brazeal attempted to testify about September 24, 2019, the BMW objected and the presiding official sustained the BMW's objection. The Board finds the case caption was not expanded or changed at the hearing. There is a defining difference between Third Division Award 41467 and the claim before this Board. In the Third Division proceeding the hearing official allowed testimony that expanded the case caption whereas the presiding official in this claim disallowed any testimony affecting the case caption which ensured that Claimant received a fair and impartial hearing. Article 13 - Discipline and Grievances was not breached.

The Carrier determined an investigation was warranted October 8, 2019, when it had confirmation of Claimant's DUI, citation, chemical test (at or over .08) and confirmation none of it had been reported at any time. Claimant's failure to report within 48 hours violates Rule 1.6.4, the Driver's Policy and Drug and Alcohol Workplace Free Policy. Under the Carrier's rule, this situation constitutes a criminal charge. The Carrier is not required to follow criminal procedure formalities or, as the Organization asserts, prove a violation beyond a reasonable doubt. The charged offenses are proven by substantial evidence and dismissal is not severe, harsh or an abuse of discretion. This claim will be denied.

AWARD: Claim denied.

Patrick Halter /s/
Patrick Halter
Chair - Neutral Member


John Schlismann
Employee Member


Louis Fernandez
Carrier Member

Date: November 15, 2021