

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. T. Thomas, by letter dated June 2, 2020, for alleged violation of The Kansas City Southern Railway Company’s General Code of Operating Rules 1.6.4 – Notification of Criminal Charges was severe, harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File KCS703SN20D/2020-0131 KCS).
2. As a consequence of the violation referred to in Part 1 above, Claimant T. Thomas shall now:

‘... be returned to work on his position of Machine Operator, and the claimant shall be made whole for all financial loses 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 from 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 on 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. Thomas be fully exonerated, and all notations of the dismissal be removed from all Carrier records.' (Employes' 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.

Claimant's hire date is September 9, 2019. On that date he attended the first day of five (5) consecutive days scheduled for new hire orientation and training which addressed items such as rules and policies. Claimant completed three (3) days before he deployed for a month of military duty with the U.S. Army in Germany. Upon his return from duty in October 2019, Claimant completed the remaining two (2) days of orientation and training, received the rules book and reported for assignment. During the months leading up to Claimant's discipline in March 2020, he performed the duties of a Track Laborer on Gang 379.

On February 17, 2020 Claimant decided to "hang out with some friends" at a daiquiri bar on Plank Road, Baton Rouge (LA). Shortly before midnight a friend shot and killed another person in the parking lot at the bar. A video-surveillance camera captured Claimant fleeing the scene with the sound of the firearm; Claimant hid behind his truck. The friend acknowledged to Claimant that "I had to" shoot the victim.

On February 24, 2020 the East Baton Rouge Parish Sheriff's Office arrested Claimant at 1859 hours, charged him with second degree murder and set bail at \$500,000.00. While in custody for a week, law enforcement asked Claimant to identify the shooter by name; Claimant stated he did not have a name and also denied possession of a firearm at the crime scene.

On February 25, 2020 a Carrier management official forwarded to the Director of Employee Relations ("DER") a link to an article posted by WAFB news station about the shooting and Claimant's arrest on the 24th with second degree murder charge.

This situation implicates GCOR Rule 1.6.4 - Notification of Criminal Charges (System Special Instruction):

Any employee charged with [any crime involving violence] . . . is required to report the situation within 48 hours to the company's notification line (1-844-289-4763). The report of the situation shall include the employee's name, identification number, job title and work location. In regard to the criminal charges, the employee must report the crime(s) that s/he has been charged with committing, the date of the criminal charge(s), the circumstances leading to the charge(s) and the jurisdiction(s) where the criminal charge(s) are pending.

The DER monitors the notification line. When an employee records a message on that line, the DER receives a text. In Claimant's situation the 48-hour window to report his arrest, charge and circumstances opened February 24 at 1859 hours and closed on February 26 at 1859 hours. As of February 27 the DER had not received any message on the line from Claimant. On that date the Carrier's police provided the DER with the Sheriff's Office booking summary; it confirmed the contents of the WAFB article.

When law enforcement arrested Claimant on the 24th it allowed him to place one (1) telephone call; he contacted his mother and instructed her to engage an attorney. On the 27th law enforcement allowed additional calls. Claimant contacted the Roadmaster and informed that official he had been arrested and inquired whether he would be dismissed; the Roadmaster referred Claimant to the "help desk" - Critical Incident Desk. The help desk informed Claimant that "it wasn't up to them" to determine whether he would be dismissed and referred him back to the Roadmaster; that official informed Claimant that he had "no say" in Claimant's situation. With the 48-hour window closed by the 27th and no notification from Claimant, or other person acting on his behalf, the Carrier's Senior Investigating Officer withheld Claimant from service pending formal investigation.

On March 3, 2020 the Sheriff's Office released Claimant from custody. Also the Carrier notified Claimant of a formal investigation as to facts and responsibility, if any, in connection with his alleged failure to comply with GCOR Rule 1.6.4 - Notification of Criminal Charges. The parties agreed to May 21, 2020 for the hearing. The Carrier informed Claimant on June 2, 2020 that the investigative record established his rule violation. The Carrier dismissed Claimant from service.

On July 10, 2020 the Organization filed an appeal alleging the investigation was not fair and impartial as the Carrier predetermined Claimant's guilt when it withheld him from service. Also, the Carrier did not meet its burden of proof to sustain the excessive, harsh and improper discipline. The DER was aware of Claimant's arrest and criminal charge as of February 25 when she received the link to WAFB's article. Claimant did not intentionally violate the rule. Regardless, may be half of the rules were presented during training but not the charged rule. Claimant acknowledged he knew he had to contact the Carrier but the only telephone number he recalled was the Roadmaster's, thus, he contacted that official on February 27 and the Roadmaster referred Claimant to the help desk. As a new hire Claimant cannot be expected to know every rule when an experienced official such as the Roadmaster did not know the notification line number. Upon his release from custody, Claimant returned to military service. In June 2020 the Grand Jury initiated no action against him and, months later, the District Attorney closed the criminal case.

On September 3, 2020 the Carrier denied the appeal. Claimant received the rule book during new hire orientation and training; his receipt of the book establishes his awareness of the rules and the Carrier's expectation and requirement that he adhere to them. As a new hire the rules were "fresh" in his mind. GCOR Rule 1.6.4 - Notification of Criminal Charges is covered during training and highlighted on the "Helpful Contacts List" distributed to new hires; employees are advised to retain the help list for reference and use. Claimant's mother could have reported the rule's required information as the rule does not require Claimant, himself, to report it. Claimant

contacted the Roadmaster and help desk after the 48-hour window closed; he never contacted the notification line at any time.

Claimant's admission of culpability is substantial evidence of his rule violation. Discipline assessed should be sustained since the Carrier acted in accordance with the Discipline Policy where this rule violation is a dismissal infraction. As for the second-degree murder charge, the Grand Jury pretermitted it in June 2020, thus, the District Attorney's Office was not pursuing prosecution against Claimant during on-property processing of this claim.

This claim was properly presented and advanced in the usual manner at all stages of appeal up to and including the Carrier's highest designated officer. Following conference on September 25, 2020 the parties remained at impasse. The dispute is before the Board for final adjudication.

The Board's role and authority adjudicating discipline in this appellate forum is described and recounted in a multitude of awards over the course of seventy-five (75) years. Apropos is Third Division Award 9449 (1960):

. . . the rule is well established that in disciplinary cases it is not the province of the Board to weigh conflicting evidence or substitute its judgement for that of the Carrier (citations omitted), and that even though evidence is denied or disputed the Board will not interfere with disciplinary action based on substantial competent evidence (citations omitted). . . . Our authority is limited to the question whether there is such a lack of any substantial evidence as to justify the conclusion that the Carrier's action was arbitrary, capricious, without just cause, or based on doubt or speculation.

In this proceeding substantial evidence is the Carrier's burden to establish. An oft-cited definition drawn from *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) states substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." Substantial evidence is not onerous to establish compared to other evidentiary standards. Nevertheless, substantial evidence must be relevant, competent and probative and not contradictory, supposition and guestimates.

Claimant, with less than six (6) months service with the Carrier as of March 2020, acknowledged violating GCOR Rule 1.6.4 - Notification of Criminal Charges as neither he nor any other person acting on his behalf reported on the notification line his arrest, criminal charge and circumstances related thereto. The Discipline Policy identifies this rule violation as a dismissal infraction resulting in discharge. Award 75 of PLB 6059 states that an employee's admission of culpability constitutes substantial evidence. Claimant's admission satisfies the Carrier's burden in this proceeding. As for the WAFB article, the record does not establish that Claimant authorized or instructed WAFB to act on his behalf in the context of his employment relationship with the Carrier. Authority to act bespeaks rule compliance. Also not established in the record is prejudgment of Claimant by the Carrier when it withheld him from service. Claimant received due process and a fair and impartial hearing.

Claimant received all orientation and training for a new hire including receipt of the rules book and “Helpful Contact List” for retention, referral and use. Claimant denies any training at any time on GCOR Rule 1.6.4 - Notification of Criminal Charges but acknowledged knowing that he was required to report his arrest and criminal charge and he knew there could be a consequence for his situation as he inquired about it with the Roadmaster.

After the 48-hour window closed, Claimant reported his situation to the Roadmaster and the Roadmaster provided Claimant the help desk telephone number for his dismissal query. The fact that Claimant’s criminal charge was premitted and subsequently closed entirely by the District Attorney does not preclude the Carrier’s imposition of dismissal. [See Norman Brand’s Hornbook *Discipline and Discharge in Arbitration* (Washington, D.C.: The Bureau of National Affairs, Inc., 1998) at 48-49] The Board finds the Carrier’s imposition of dismissal for Claimant aligns with the Discipline Policy where is a violation of GCOR Rule 1.6.4 - Notification of Criminal Charges is identified as an infraction dismissal.

Instructive for the Board’s adjudication of Claimant’s dismissal infraction is on-property Award 104:


The Board has reviewed the record in detail. It reveals that Claimant never did comply with the terms of the General Code of Operating Rules [1.6.4 - Notification of Criminal Charges] that requires an employee charged with a crime, where criminal charges are pending, must report the situation within forty-eight hours. Given the Claimant’s failure to report his arrest in a proper manner, the Board has no basis on which to modify the Carrier’s position here.

Applying Award 104 to the findings in this proceeding, the Board will sustain the Carrier’s dismissal of Claimant and deny the claim.

AWARD: Claim denied.

Patrick Halter /s/
Patrick Halter
Chair - Neutral Member


John Schlismann
Employee Member


Al McCombs
Carrier Member

Date: August 7, 2023