

PUBLIC LAW BOARD NO. 6935

PARTIES)	BROTHERHOOD OF MAINTENANCE OF WAY
)	EMPLOYES 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 [sixty (60) day suspension, thirty (30) days to be served as actual time off and thirty (30) 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. S. Brewster, by letter dated November 3, 2020, for alleged violation of Kansas City Southern Railway Company’s General Code of Operating Rules 1.2.5 – Reporting was severe, harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File KCS706SN20D/2020-161-01 KCS).
2. As a consequence of the violation referred to in Part 1 above, Claimant S. Brewster shall now be returned to work on his assigned position:

‘... 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. Brewster 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.

Claimant's hire date is April 22, 2019. When the incident occurred giving rise to Claimant's receipt of discipline in November 2020, he had approximately eighteen (18) months of service with the Carrier as a Laborer performing manual duties that required use of his hands.

The incident occurred on October 12, 2020 when Claimant, while off-duty, was sorting lumber at the house of his fiancé's mother and injured his finger causing it to swell, open and bleed. He wrapped his wound.

Claimant reported for duty at 5:30 a.m. on October 13; he experienced soreness with his hand but intended to perform his duties, e.g., installing ties. He did not inform his manager - - the Assistant Roadmaster ("AR") - - about his wound. Around 10:04 a.m. the wound re-opened causing discomfort that rendered Claimant unable to perform his duties whereupon he informed the AR of his injury and provided a written statement.

I smashed my middle finger on my left hand at home on Monday October 12, 2020. I do not require any medical attention. Rewrapped and cleaned it at work the next day. Requesting to go home without further medical attention.

Prior to departing work Claimant did not accept the Carrier's offer of first-aid treatment and transport to a medical facility.

On October 19, 2020 the Carrier notified Claimant of a formal investigation; it convened on October 26, 2020. The purpose of the investigation was to ascertain facts and determine responsibility, if any, in connection with Claimant's alleged failure to report to the AR his personal injury incurred off duty on October 12.

On November 3, 2020 the Assistant Vice President Engineering notified Claimant that the evidence established during the formal investigation established Claimant's violation of GCOR Rule 1.2.5 - Reporting ("A personal injury that occurs while off duty that will in any way affect employee performance of duties must be reported to the proper manager as soon as possible.")

In considering the rule violation and Claimant's response thereto, the deciding official noted as follows:

Due to mitigating circumstances GCOR 1.2.5 will be assessed as a minor infraction instead of a major. You did not comply with the rule but you did admit that you were aware of the rule and your obligation to report such an event.

Based on the mitigating circumstances and Claimant's prior discipline history, the deciding official assessed Claimant a sixty (60) day suspension with thirty (30) days served as actual time off and a thirty (30) day record suspension which was not served but recorded in Claimant's personal file as an actual suspension.

By letter dated December 31, 2020 the Organization filed a claim alleging the investigation was not fair and impartial because the Carrier prejudged Claimant as well as failed to meet its burden of proof on the rule violation. Thus the excessive, harsh and improper discipline cannot stand. Claimant did not intentionally violate GCOR Rule 1.2.5 - Reporting. In its submission to the Board the Organization states that the rule empowers Claimant to determine whether his off-duty injury will, in any way, affect his performance otherwise an employee would be required to report every off-duty injury such as stubbed toes or a bloody nose. Claimant reported his injury when it affected his performance of work thereby complying with the rule.

On February 3, 2021 the Carrier's Labor Relations Manager denied the claim stating Claimant was not prejudged and received due process with a fair and impartial hearing. There is substantial evidence of a rule violation; Claimant was required to report his off-duty injury to the AR because it affected his ability to perform his duties. Claimant informed the AR after his injury rendered him unable to perform his duties. Claimant acknowledged his rule violation. The Carrier considered Claimant's infraction as a minor offense and assessed an appropriate measure of discipline based on mitigating circumstances and prior discipline. The Carrier disagrees with the Organization's view that the rule empowers an employee to determine whether to report any off-duty injury.

The 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 February 11, 2021 the parties remained at impasse. This 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 years. An example is Third Division Award 9449:

. . . 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 is drawn from *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) where substantial evidence was termed as "more than a mere scintilla. It means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." A scintilla of evidence is minute and negligibly small; substantial evidence is an incremental step beyond scintilla. Claimant acknowledged his rule violation. Award 41 of PLB 7468 states an employee's acknowledgement of the rule violation is substantial evidence; that satisfies the Carrier's burden in this proceeding.

As for the Organization's interpretation of the rule as empowering Claimant to determine whether to report his off-duty injury, Claimant recognized on October 12 that his injury would "in any way affect his performance of duties" because he wrapped his finger and/or hand to enable him to report for work the next day. Without the protective wrap, Claimant could not "in any way" perform his duties. Claimant violated the rule by not reporting his off-duty injury "as soon as possible" when he reported for work on October 13.

As for the Organization's claim that the Carrier prejudged Claimant and denied him due process by conducting an unfair and partial investigation, the Board reviewed the record in detail and finds no support for the Organization's claim on those points.

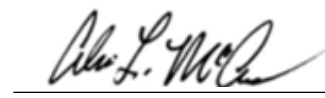
The Carrier acknowledged Claimant's mitigating circumstances and, as a result, assessed his violation of GCOR 1.2.5 - Reporting as a minor infraction with a 60-day suspension rather than finding the rule violation as a major infraction resulting in dismissal. The Carrier's assessment of discipline comports with the Discipline Policy and is not excessive, improper or harsh.

Given the Board's findings in this proceeding, the claim will be denied.

AWARD: Claim denied.

Patrick Halter /s/
Patrick Halter
Chair - Neutral Member


John Schlismann
Employee Member


Al McCombs
Carrier Member

Date: August 7, 2023