

PUBLIC LAW BOARD NO. 6935

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| 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. S. Brewster, by letter dated February 1, 2021, for alleged violation of The Kansas City Southern Railway Company’s Maintenance of Way and Signal Department On-Track Safety & Roadway Worker Rules 22.2 – Do Not Foul Tracks Except When Necessary; Confirm On-Track Safety Is Provided Before Fouling any Track and The Kansas City Southern Railway Company’s General Code of Operating Rules 1.6 – Conduct was severe, harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File KCS700SN21D/2021-727-01 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 (sic) 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 that (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 the Carrier's assessment of discipline in February 2021, Claimant had approximately twenty-one (21) months of service performing the duties of a Track Laborer and establishing seniority in the Maintenance of Way Department.

On January 13, 2021 the Carrier withheld Claimant from service pending formal investigation into an incident on that date about fouling track without track and time. On the 15th the Carrier notified Claimant that, by agreement of the parties, the formal investigation would convene on January 22, 2021 to ascertain facts and determine any responsibility in connection with the incident occurring at approximately 8:30 a.m. near Milepost 547.6 - Shreveport, LA and the Carrier's allegation that Claimant failed to properly perform his duties in a safe and proper manner when he failed to verify proper on-track protection prior to fouling track.

On February 1, 2021 the Assistant Vice President Engineering notified Claimant that the evidence developed during the investigation established two (2) rules violations:

- Maintenance of Way and Signal Department On-Track Safety & Roadway Worker Rules 22.2 - Do Not Foul Tracks Except When Necessary; Confirm On-Track Safety is Provided Before Fouling any Track;

and

- General Code of Operating Rules ("GCOR") 1.6 - Conduct.

Based on these rules violations the Carrier's designated officer dismissed Claimant from service effective immediately.

On March 24, 2021 the BMWF appealed Claimant's dismissal. It alleged the Carrier prejudged Claimant when it withheld him from service without a fair and impartial hearing and the Carrier failed to meet its burden of proof on the rules violations. Thus the excessive, harsh and improper discipline cannot stand.

In its appeal the BMW states Claimant was operating the backhoe when he “entered the location [North Blanchard] as instructed and made a right hand turn paralleling the track somewhere around the edge of the rocks and mud.” The section gang truck backed up behind Claimant’s backhoe and the Roadmaster’s vehicle was behind the truck. The Roadmaster acknowledged Claimant “potentially” fouled track and neither the contract machine operator nor any section gang member informed Claimant that he fouled track. There are numerous tire tracks in the mud near the running rail and rocks that render Claimant’s tracks undecipherable. Also the Carrier’s picture placing the backhoe perpendicular to the tracks is an incorrect re-enactment because Claimant positioned the backhoe at a forty-five (45) to fifty (50) degree angle. Although Claimant agreed with the Roadmaster’s measurement showing Claimant afoul of track as he was within twenty-four (24) inches from the front of the backhoe bucket to the nearest running rail, Claimant agreed “just [to] say okay and move on” thereby avoiding argument because the Roadmaster always talks down to him. Claimant did not intentionally violate any rule.

On May 10, 2021 the Director Labor Relations denied the appeal stating Claimant was not prejudged and received a fair and impartial hearing. There is substantial evidence of rules violations because Claimant acknowledged, verbally, to the Roadmaster that he fouled track and that official recorded it in his written statement:

After, the second job briefing was given I [Roadmaster] asked Seth [Claimant] to walk with me to my truck so we could further investigate him fouling the mainline track without protection. He mentioned he didn’t think he was in the foul, & I told him we would get a tape measure and figure it out. After, Seth and I investigated the site and it was discovered that the front bucket of the back hoe was within 24 inches of the nearest running rail. Once Seth and I came to that conclusion, I then asked him if he agreed with me that he was indeed in the foul of the track and he did agree.

According to the Carrier, Claimant’s written statement also acknowledged his fouling track without protection:

I [Claimant] was asked to drive the backhoe [a quarter mile] down the road to the work location. Once at the location I was turning around in the ditch when the section and Roadmaster pulled up. I was told that when turning around the bucket of the backhoe was fouling the track.

Using the tire impressions left by Claimant’s backhoe, the Roadmaster measured the distance from the front of the backhoe bucket to the nearest running rail. The bucket was within twenty-four (24) inches of the track which violates Safety Rule 21.0 Job Briefings - Definition of Fouling a Track that requires at least four (4) feet. Claimant fouled the main line track without track-and-time protection in violation of On-Track Safety and Roadway Worker Rule 22.2 - Do Not Foul Tracks Except When Necessary; Confirm On-Track Safety is Provided Before Fouling any Track.

Claimant acknowledging that he fouled track is substantial evidence of the rule violation based on precedent established in Award 41 of PLB 7468. Dismissal is appropriate as Claimant is at Step 5 in the Discipline Policy with two (2) major disciplines and a minor discipline in the recent past.

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 May 26, 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 (75) years. Apropos is 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 is relevant, competent, consistent and probative evidence - - not contradiction, unevenness, supposition or assumption.

The Board reviewed the record in detail for process and substance. As for the Organization's arguments that the Carrier prejudged Claimant and denied him due process with an unfair and partial investigation, the Board finds no evidentiary support and notes that BMWÉ pointed to no particulars in the record for its arguments. The Board concludes the Carrier did not prejudge Claimant and afforded him a fair and impartial hearing.

Claimant acknowledged, verbally, to the Roadmaster that he fouled track without protection; the Roadmaster recorded Claimant's acknowledgement in a written statement. Claimant's subsequent attempt to negate his acknowledgement is burdened by uneven explanations. For example, in the BMWÉ appeal the backhoe was placed in the ditch parallel to running rail but at the formal investigation the backhoe was positioned in the ditch at a forty-five (45) to fifty (50) degree angle and an unexplained difference. Claimant agreed with the Roadmaster's measurement and conclusion; the Roadmaster's measurement used the backhoe's tire impressions left in the mud. The Board finds that Claimant's acknowledgement to the Roadmaster meets the Carrier's evidentiary burden. As phrased in *Consolidated Edison*, Claimant's acknowledgement "means [there is] relevant evidence [that] a reasonable mind would accept as adequate to support a

conclusion” that Claimant violated On-Track Safety & Roadway Worker Rule 22.2 - Do Not Foul Tracks Except When Necessary; Confirm On-Track Safety is Provided Before Fouling any Track.

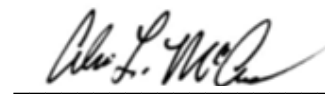
The other violation is GCOR 1.6 - Conduct (“Employees must not be . . . 2. Negligent”) which affects the Carrier’s interests - - property and personnel. The Board finds substantial evidence that Claimant violated GCOR 1.6 - Conduct. In the formal investigation Claimant acknowledged that not fouling track is basic knowledge and practice for employees regardless of experience. Claimant’s failure to perform his duties in a safe and proper manner by fouling track without protection on January 13, 2021 is a repeat violation of two (2) major rule incidents where he failed to perform his duties in a safe and proper manner when operating equipment by (i) running it through a switch (October 2019) and (ii) damaging equipment (May 2020). This incident (January 2021) and its proximity to prior incidents (2019, 2020) is, in the circumstances of this claim, indicia that Claimant fouling track on the 13th is attributable to negligence, that is, failure to exercise the normal or customary care appropriate to the situation because he has repeatedly failed to perform his duties in a safe and proper manner.

Claimant’s prior discipline involved multiple major rules violations and a third major violation in 2020 was reduced to a minor violation. The Carrier followed progressive discipline for each incident resulting in a lengthening suspension (days, pay, no pay) in an effort to attain rules compliance. Given Claimant’s prior discipline and considering his rules violations in this proceeding, dismissal is not excessive but appropriate as the next step in the Discipline Policy. The Board will not disturb the assessed dismissal for this third incident of major rules violations since 2019.

AWARD: Claim denied.

Patrick Halter /s/
Patrick Halter
Chair - Neutral Member


John Schlismann
Employee Member


Al McCombs
Carrier Member

Date: August 7, 2023