

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. Mosley, by letter dated May 25, 2021, for alleged violation of The Kansas City Southern Railway Company’s Maintenance of Way and Signal Department On-Track Safety & Roadway Worker Rules 21.0 – Job Briefings, On-Track Safety & Roadway Worker Rules 21.1 – All Roadway Workers Must Ensure That They Receive A Job Briefing Before They Foul Any Track; The Kansas City Southern Railway Company’s General Code of Operating Rules Rule 1.1 – Safety, GCOR Rule 1.1.2 – Alert and Attentive, GCOR Rule 1.10 – Games, Reading, or Other Media; and The Kansas City Southern Railway Company’s Safety Rules GS-2 – Clothing and Personal Protective Equipment (PPE) was severe, harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File KCS701SN21D/2021-908-01 KCS).
2. As a consequence of the violation referred to in Part 1 above, Claimant T. Mosley shall now:

‘... be returned to work on his position of Laborer, 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. Mosley 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 August 1, 2016. When the incident occurred on April 30, 2021 giving rise to this dispute, Claimant had approximately four (4) years of service and was working as a Track Laborer for Gang 067, Beaumont Subdivision, Many, LA.

On April 30, 2021 the Carrier withheld Claimant from service pending investigation into his wearing facial mask and using an electronic device while on duty. A notice of investigation dated May 7, 2021 informed Claimant that a formal investigative hearing would convene, by agreement of the parties, on May 13 to ascertain facts and determine any responsibility for the incident.

While serving as a Laborer, it is alleged that you failed to properly perform your duties in a safe and proper manner by failing to wear facial covering while in a company vehicle where two or more employees were present. It is also alleged that you were using an electronic device while on duty. This occurred at or near Milepost 633.4 in Many, LA on the Beaumont Subdivision.

On May 25, 2021 the Assistant Vice President Engineering notified Claimant that the evidence developed during the investigation established the following rules violations:

- Maintenance of Way and Signal Department On-Track Safety & Roadway Worker Rules 21.0 - Job Briefings;
- On-Track Safety & Roadway Worker Rules 21.1 - All Roadway Workers Must Ensure That They Receive A Job Briefing Before They Foul Any Track;
- General Code of Operating Rules ("GCOR") 1.1 - Safety;

- GCOR Rule 1.1.2 - Alert and Attentive;
- GCOR Rule 1.10 - Games, Reading, or Other Media;
- and
- Safety Rules GS-2 - Clothing and Personal Protective Equipment (PPE).

Based on the rules violations and Claimant's discipline history, the Assistant Vice President Engineering dismissed Claimant from service effective immediately.

On July 16, 2021 the BMW appealed Claimant's dismissal. It alleged the Carrier prejudged Claimant when it withheld him from service without a fair and impartial hearing. Also, the Carrier did not meet its burden of proof - - beyond a reasonable doubt - - for the rules violations. Claimant was alert and attentive at all times: "But he could tell you everything that happened before they got on the crossing, getting on the crossing, and backing up to the crossing. When they got backed up to the crossing they got out to get the truck off of the rail and a contractor grapple truck slammed in the section truck." He wore his facial covering but pulled it down to eat chips and inadvertently failed to pull it up. He was holding his cell phone in his hand but not using it. Claimant received a verbal job briefing. He heard the Roadmaster present it to the Roadway Worker in Charge ("RWIC") and the RWIC relayed it to Claimant. Dismissal is excessive, harsh and improper discipline; reinstating Claimant with a make whole remedy is appropriate.

On September 8, 2021 the Director Labor Relations denied the appeal stating Claimant was not prejudged and received due process with a fair and impartial hearing. On April 30, 2021 Claimant was in a company vehicle equipped with an interior camera when that vehicle was in a collision with a contractor vehicle. The camera captures Claimant not wearing his mask as required when two (2) other employees are present and using his cell phone for approximately four (4) minutes as shown by his staring downward at the device in his hand and actively using it. During the job briefing Claimant received instruction on GCOR 1.1.2 - Alert and Attentive. Claimant admitted using his phone; this violates GCOR 1.10 - Games, Reading or Other Media and not wearing his facial covering violates Safety Rules GS-2 - Clothing, and Personal Protective Equipment ("PPE"). Applying Award 41 of PLB 7468 the Carrier met its burden of proof as Claimant acknowledged his transgressions. His rules violations are a "PEAK Non-Major" offense and dismissal infraction (two (2) or more violations within a three (3) year lookback period) under the Discipline Policy.

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 October 14, 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 for these arguments.

Pivoting to the substance of this dispute, the parties' submissions and argument were forthright and comprehensive on the rules violations. The Carrier states that should the Board reinstate Claimant, no backpay is warranted given the rules violations. Claimant's reinstatement is not objected to by the Carrier under that scenario. The Organization seeks a make whole remedy including no reduction for outside earnings. Considering the totality of circumstances represented in this dispute, the Board finds that rescinding Claimant's dismissal and returning him to service without backpay is appropriate. The Carrier has thirty (30) days to comply with the findings.

AWARD: Claim sustained in accordance with the findings.

Patrick Halter /s/
Patrick Halter
Chair - Neutral Member


John Schlismann
Employee Member


Al McCombs
Carrier Member

Date: August 7, 2023