

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. J. Hardy, by letter dated December 13, 2021, for alleged violation of The Kansas City Southern Railway Company’s Maintenance of Way and Signal Department On-Track Safety & Roadway Worker Rules 21.3 – Rules for Roadway Worker Groups, OTS Rule 23.1 - General Requirements for the Establishment of Working Limits on Controlled Track, OTS Rule 29.1 - On-Track Safety Rules and Procedures and The Kansas City Southern Railway Company’s General Code of Operating Rules Rule 1.6 – Conduct, GCOR Rule 1.50 - Job Briefing and GCOR Rule 6.11.1 - Issuing or Voiding Mandatory Directives was severe, harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File KCS400RR21/2021-1229-01 KCS).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Hardy shall now ‘*** be re-instated to service that he would not be subject to any additional probation. As a remedy for this violation, the suspension should be sat (sic) aside and Mr. hardy (sic) shall be made whole for all financial and benefits losses (sic) because of the violation. Any benefits including vacation and health insurance benefits shall be restored. Restitution for financial losses because of the violation shall include all straight time pay. Overtime pays and loss of holiday pay for time Mr. Jim Hardy was held out of service and that Mr. Hardy be returned to service.’ (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 January 3, 2005. When the incident occurred in November 2021 giving rise to this dispute Claimant had approximately seventeen (17) years of service and, on the incident date, was assigned to Gang 712 as a Welder Helper on the East/West Main, Beaumont Subdivision.

On November 3, 2021 the Roadway Worker in Charge ("RWIC") conducted an in-person job briefing around 9:15 a.m. for Claimant's work group - - MW KCS 309 - - discussing on-track safety within the work limits of Station 11 (Milepost 766.9) to Station 14 (Milepost 766.1) under Track Authority 4509. After briefing Claimant's work group the RWIC conducted a briefing over the telephone for a Track Supervisor; the RWIC authorized that official to use Track Authority 4509 for inspecting track. Around 9:45 a.m. Claimant heard a request on the welding truck radio from another work group - - MW UP 911 - - for joint track authority ("JTA"). Claimant approved the request and returned to his duties.

At 10:20 a.m. the Track Supervisor contacted the Assistant Roadmaster ("AR") and informed him that foreign roadworkers - - MW UP 911 - - were at Station 14 with a backhoe replacing ties. The AR inquired with Claimant's work group about MW UP 911 working within their limits. Claimant acknowledged approving a request for JTA. The AR explained the rules and process regarding approval of a JTA including job briefing for affected workers prior to approving JTA, completing paperwork on the briefing form and posting the JTA card. At approximately 11:30 a.m. Claimant was withheld from service pending formal investigation into whether he followed proper procedures when he approved JTA for MW - UP 911.

On November 11th the Carrier notified Claimant of a formal investigation which the parties agreed to convene on December 7, 2021 for the purpose of ascertaining facts and determining any responsibility in connection with the incident that occurred on November 3, 2021 at Station 14. The Carrier's Notice of Investigation ("NOI") states that Claimant failed to properly perform his duties in a safe and proper manner when he responded to the request for JTA.

On December 13, 2021 the Senior Division Engineer notified Claimant that the evidence developed during the investigation established six (6) rules violations:

- Maintenance of Way and Signal Department On-Track Safety & Roadway Worker Rules 21.3 - Rules for Roadway Worker Groups;
 - OTS Rule 23.1 - General Requirements for the Establishment of Working Limits on Controlled Track;
 - OTS Rule 29.1 - On-Track Safety Rules and Procedures;
 - General Code of Operating Rules ("GCOR") 1.6 - Conduct;
 - GCOR Rule 1.50 - Job Briefings;
- and
- GCOR Rule 6.11.1 - Issuing or Voiding Mandatory Directives.

Based on the rules violations and Claimant's discipline history, the Senior Division Engineer dismissed Claimant from service effective immediately.

On December 27, 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 and it failed to identify in the NOI rules allegedly violated. Also, the Carrier did not meet its burden of proof on rules violations. Written statements relied on by the Carrier deny Claimant's right to confront his accusers. In accordance with Award 25 of PLB 6920 since the burden of proof resides with the Carrier, disputed facts must be construed to favor Claimant. Lack of proof that Claimant violated six (6) rules renders his dismissal excessive, harsh and improper.

Claimant was not the RWIC. Claimant happened to hear the request and acted in a helpful manner by responding to it. The requestor identified as MW 911, thus, Claimant believed "one of our guys" was the requestor. Claimant acted in good faith and did not intentionally violate rules. Regardless, the Carrier does not consistently enforce or apply its rules. The Track Supervisor walked the rails conducting track inspections within the limits of Track Authority 4509 but that official's name and signature is not on the work group's job briefing form and no official notified or briefed Claimant's work group of his presence within their limits.

On February 14, 2022 the Director Labor Relations denied the appeal stating Claimant was not prejudged, received a fair and impartial hearing and the NOI contained sufficient information for Claimant to present a defense. The written statements are not accusatory nor uncommon in railroad arbitration. Nevertheless the AR is Claimant's accuser and was subject to examination by Claimant at the formal investigation.

There is substantial evidence of rules violations. The MW UP 911 requested track and time within track authority limits for Claimant's work group and other roadway workers. Claimant authorized JTA for MW UP 911 but he failed to inform his work group and others before authorizing it. Since the request changed work conditions after the job briefing, another briefing was required to identify the JTA with MW UP 911, its equipment and locations. Claimant believed the request for JTA was from "one of our guys" but that is not relevant; he was required to establish limits and inform workers affected prior to granting JTA. He failed to update required documents such as displaying the JTA card in a conspicuous location. Claimant acknowledged he has no reason for not seeking help or assistance with the request prior to authorizing it.

Claimant is solely responsible for the incident because he was the only person aware of the request. His carelessness about safety and negligence exposed co-workers and work groups to potential injury and harm. Claimant's discipline history reflects major violations of rules; he has accepted responsibility for of his transgressions. This incident is a "PEAK Major" offense under the Discipline Policy and a dismissal infraction.

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 February 24, 2022 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. 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 position that the Carrier prejudged Claimant, denied him due process with an unfair and partial investigation and issued a flawed NOI, the Board finds no evidentiary support for it. The Board concludes Claimant was not prejudged and was afforded due process with a fair and impartial hearing which included issuance of a NOI stating sufficient information about the incident and allegation to enable Claimant to prepare and present a defense. There are a generous number of awards, such as First Division Awards 26674 and 27755, holding that the Carrier is not required to cite rules or policies in the NOI.

Pivoting to the substance of the dispute, the Board finds that the Claimant's and AR's testimony at the formal investigation constitute substantial evidence of Claimant's rules violations. Claimant knows the rules and that they apply to him. He knew that violation of the rules was subject to discipline up to dismissal. The work conditions changed under Track Authority 4509 for MW KCS 309 and roadway workers when Claimant approved JTA for MW UP 911; however, Claimant did not inform any one of the change prior to or after approving the JTA. He conducted no job briefing about work, equipment and location of MW UP 911, did not complete the required paperwork nor did he post the track authority card in a conspicuous location. Based on these findings, Claimant violated the following rules:

- Maintenance of Way and Signal Department On-Track Safety & Roadway Worker Rules 21.3 - Rules for Roadway Worker Groups, Item D (notice when conditions change);
- OTS Rule 23.1 - General Requirements for the Establishment of Working Limits on Controlled Track, Item C (post JTA in conspicuous location);

- OTS Rule 29.1 - On-Track Safety Rules and Procedures (discipline up to dismissal);
- General Code of Operating Rules (“GCOR”) 1.6 - Conduct, Item 1 (careless of the safety of themselves or others) and Item 2 (negligent);
- GCOR Rule 1.50 - Job Briefings (Special System Instruction);

and

- GCOR Rule 6.11.1 - Issuing or Voiding Mandatory Directives - Special System Instruction (altering track authority).


Notwithstanding Claimant’s rules violations, the Organization states that the Carrier inconsistently enforces or applies its rules as to job briefing, notice of changes and identities or names of all persons working within limits under Track Authority 4509. The Track Supervisor received approval from the RWIC to walk the rails and inspect track within the limits of Track Authority 4509. This approval occurred after Claimant’s work group received its job briefing from the RWIC and signed the job briefing form. Claimant’s work group and other roadway workers received no notice of the Track Supervisor’s presence within their limits. This is an unreported change in conditions occurring after the job briefing for Claimant’s work group concluded and the group had commenced work. The Board finds this unreported change affects the disposition of this dispute and renders Claimant’s dismissal as an abuse of management discretion. The Board rescinds Claimant’s dismissal; Claimant is reinstated without backpay to service with the Carrier. 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