

**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. G. Howell, by letter dated September 14, 2022, for alleged violation of Kansas City Southern Railway Company's Maintenance of Way & Signal Department Rules - 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 was excessive, arbitrary, disparate; without the Carrier having met its burden of proof; and in violation of the Agreement (System File KCS400RR22/2022-1775-01 KCS).
2. As a consequence of the violation referred to in Part 1 above, Claimant G. Howell 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. Howell shall be made whole for all financial and benefits losses 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. Gary Howell was held out of service and that Mr. Howell be returned to service.'"

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) Public Law Board 6935 is duly constituted by Agreement and has jurisdiction over this dispute; and (3) the parties received notice of the hearing.

As of calendar year 2022 Claimant had established and maintained seniority within the Carrier's Maintenance of Way Department for approximately eighteen (18) years. For years Claimant operated the Carrier-owned mini-excavator, e.g., backhoe, in his role as a B&B Helper on Bridge Gang 683.

On the incident date - - August 23, 2022 - - the Carrier rented a backhoe for Claimant to operate. Claimant offloaded it onto the side of Highway 112 in Cameron (OK) and walked it through the woods to the location on the Fort Smith Branch where he would use the backhoe to replace piles under a bridge. Claimant cleared brush and tree for a right of way onto the sloped embankment leading to the track. Claimant stationed the backhoe on the slope pending a job briefing and track authority. He throttled down the backhoe and exited from it for a bio-break. Upon returning, Claimant throttled up the backhoe whereupon it rolled backwards down the embankment and flipped upside down landing approximately twenty-four (24) feet from the track.

On August 31, 2022 the Carrier notified Claimant of a formal investigation “to ascertain the facts and determine your responsibility, if any, in connection with an incident that occurred on August 23, 2022 at approximately 12:02 p.m.”

While working on Bridge Gang 683, it is alleged that you failed to properly perform your duties in a safe and proper manner by fouling the track before having a job briefing about the track authority. It is also alleged that an excavator was damaged at or near Milepost 18.2 in Poteau, OK on the Fort Smith Branch.

The parties agreed to convene the formal investigative hearing on September 7, 2022. Following completion of the hearing and consideration of the record, the Carrier notified Claimant on September 14, 2022 that he was dismissed from service for violating The Kansas City Southern Railway Company’s Maintenance of Way and Signal Departments – On-Track Safety & Roadway Worker Rules 22.2 - Do Not Foul Track Except When Necessary; Confirm On-Track Safety is Provided Before Fouling any Track, specifically, “[r]oadway workers shall not foul any track except when necessary in the performance of duty” and “must verify proper on-track protection is being provided prior to fouling any track[.]”

On September 21, 2022 the Organization appealed Claimant’s dismissal alleging the Carrier denied Claimant a fair and impartial hearing and identified no rules allegedly violated in the notice of investigation. Also, the Carrier did not meet its burden of proof with substantial evidence because the Supervisor assumes Claimant fouled track since he was not present when the incident occurred. Claimant never operated this rented backhoe prior to the incident date. Once at the work location, Claimant powered down the backhoe and exited from it for a bio-break. Upon returning, he re-started it whereupon the backhoe flipped backwards down the embankment resulting in minor damage. Claimant believed the ground ballast was safe to traverse but it gave way. Since Claimant did not violate any rule because he did not foul track, his dismissal is excessive, arbitrary and punitive. Should the Board decide discipline is warranted, Claimant’s 18-year clean disciplinary record mitigates dismissal to a lesser penalty.

On November 18, 2022 the Carrier denied the appeal stating Claimant received a fair and impartial hearing with proper notice of investigation about the incident. The Carrier introduced rules at the hearing which were subject to examination. Claimant received ample time to prepare and present a defense. After the initial start-of-the-day job briefing, the Supervisor testified that Claimant fouled track prior to another job briefing and track authority from the Foreman. Claimant stationed the backhoe on the embankment slope as the Supervisor observed disturbed rock and dirt near the

rail and track bed; this shows Claimant fouled track by placing the backhoe in close proximity to the track such that it could be damaged by on-track equipment. Claimant is solely responsible for the incident which is a “PEAK Major” offense under the Discipline Policy justifying dismissal.

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 December 1, 2022 the parties remained at impasse. The record closed when this claim was docketed with the Board. 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.”


The Board reviewed the record for process and substance. Due process concerns are asserted by the Organization but are not established beyond assertion. The Board finds Claimant received a fair and impartial hearing with due process as required by the controlling agreement. Pivoting to the substance of the dispute, the Board finds there is substantial evidence that Claimant fouled track prior to receiving track authority and a job briefing from the Foreman. This violates the charged rule as well as damaged the backhoe. Claimant testified the slope was a steep grade; he assumed the ground was safe and sturdy but it gave way; the Supervisor testified to disturbed rock and dirt near the rail and track bed. Claimant fouled track by positioning the backhoe within such proximity to the track that the equipment could be struck by on-track equipment.


Notwithstanding Claimant’s rule violation, the Board finds, as stated in Part 1 of the Statement of Claim, that dismissal is excessive and arbitrary. The Carrier did not sustain its burden establishing the penalty assessed as commensurate to the infraction given the mitigating circumstance that Claimant accumulated a clean disciplinary record during his 18 years of service. His past performance is construed favorably for rehabilitation potential with corrective discipline. Therefore, the Board rescinds Claimant’s dismissal and reinstates Claimant in accordance with Part 2 in the Statement of Claim. Claimant will be compensated for wage loss, if any, suffered by him in excess of a sixty (60) day suspension.

In short, the claim is sustained in accordance with these findings and conclusions. The Carrier shall comply with this final and binding decision within thirty (30) calendar days.

AWARD: Claim sustained in accordance with findings and conclusions.

Patrick Halter /s/  
Patrick Halter  
Chair - Neutral Member

  
John Schlismann  
Employee Member

  
Al McCombs  
Carrier Member

Date: December 18, 2024