

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. K. Collins, by letter dated November 29, 2022, for alleged violation of Kansas City Southern Railway Company’s Maintenance of Way & Signal Department Rules - On-Track Safety & Roadway Worker Rules 26.5.1 - Safe Zone and OTS Rule 26.5.2 - Ground Crew Coordination and the Kansas City Southern Railway Company’s General Code of Operating Rules 1.6 - Conduct was excessive, arbitrary, disparate; without the Carrier having met its burden of proof and in violation of the Agreement (System File KCS501KL22/ 2022-1276-01 KCS).
2. As a consequence of the violation referred to in Part 1 above, Claimant K. Collins shall now be allowed to return to work with all vacation and seniority rights unimpaired, that the charge and discipline, issued per letter of November 29, 2022, be removed from his personal record, that he be compensated all wage loss due to discipline in connection with these charges and that he be reimbursed for any additional expenses incurred that would have normally been covered by Carrier benefits, account the Carrier violated the Agreement.”

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.

On June 4, 2012 Claimant entered service with the Carrier and established seniority in the Carrier’s Maintenance of Way Department which he maintained for approximately ten (10) years into calendar year 2022.

For workdays September 20 - 24, 2022 Claimant and Machine Operator Fountain were members of Gang 506 in Oil City, Louisiana. As part of a tie gang consist, Claimant and Fountain performed their assigned duties in an assembly-line arrangement with workers on the ground followed by

machines, all forward facing and advancing in a unitary direction. First in line was the trip machine removing ties. Second in line, behind the trip machine, was Claimant using a hook to remove plates from ties. Third in line, behind Claimant, was Machine Operator Fountain spreading anchors with an Anchor Spreader machine. Claimant's 6:30 a.m. workday shift began with Manager Glinski's job briefing focused on the work for that day and potential safety hazards. On September 24, 2022 Manager Glinski's briefing addressed oil, wet rail, radio communication, spacing, traveling, road crossing and brake tests.

At approximately 11:50 a.m. on the 24th Assistant Foreman Turner notified Manager Glinski that Claimant reported an injury to his right arm while removing plates near Milepost 534.0 on the Shreveport Terminal Subdivision. Manager Glinski arrived at the site and met with Claimant; Claimant stated that he was flipping plates behind the trip machine when his injury occurred. Manager Glinski instructed Supervisor Bailey to transport Claimant to a hospital for treatment; the Manager remained onsite to investigate.

Due to his arm injury Claimant could not write or print to complete Form 68-E - Employee Report of Injury and Illness. Claimant responded verbally to requested information on each line of Form 68-E and Supervisor Bailey transcribed his responses. Line 25 ("How Did Injury Occur?") states "while flipping plates employee bumped elbow into front of the machine." On the 24th Claimant filed Form 68-E and Manager Glinski, after completing his onsite investigation, filed Form 82-E Manager's Report of Employee Injury or Illness where Line 19 ("Describe How The Accident Occurred") states "employee was moving plates when he struck the anchor machine with his elbow."

On October 8 and 10, 2022 the Carrier issued notices of formal investigation to Claimant with the stated purpose "to ascertain the facts and determine your responsibility, if any, in connection with an incident that occurred on September 24, 2022 at approximately 11:50 a.m. While working on Gang 506, it is alleged that you failed to properly perform your duties in a safe and proper manner while working at or near Milepost 534.0 in Oil City, LA."

The parties agreed to convene the investigative hearing on November 8, 2022. Following completion of the hearing and consideration of the record, the Carrier's Assistant Vice President Engineering notified Claimant on November 29, 2022 that he was dismissed from service for violating the following three (3) rules:

- 1) The Kansas City Southern Railway Company's Maintenance of Way & Signal Department Rules – On-Track Safety & Roadway Worker Rules 26.5.1 - Safe Zone

Roadway workers who must work in the vicinity of roadway maintenance machines, and the operators of roadway maintenance machines, will maintain a 15 foot safe area around the machine.

2) OTS Rule 26.5.2 - Ground Crew Coordination

A. When the job being performed requires the roadway worker on the ground to be closer than 15 feet from the roadway maintenance machine, these duties will be performed from the location established during communication with the operator during their job briefing.

3) The Kansas City Southern Railway Company's General Code of Operating Rules 1.6 - Conduct

Employees must not be: 1. Careless of the safety of themselves or others.

On December 19, 2022 the Organization appealed Claimant's dismissal. The Carrier denied the appeal on February 15, 2023. Following conference on March 20, 2023 the parties remained at impasse. This claim - - properly presented and advanced in the usual manner at all stages of appeal up to and including the Carrier's highest designated officer - - is before the Board for adjudication and final decision.

During on-property exchanges, discussion, conference, appeal and submission to the Board, the Organization alleged the Carrier denied Claimant a fair and impartial hearing and it disregarded due process protections in the controlling agreement. For example, Claimant did not receive the notices of investigation dated October 8 and 10, 2022 until the hearing on November 8, 2022. He was surprised by the allegations and denied time to prepare and present a defense. The BMW E objected at the hearing citing Rule 13-1 which states an employee "disciplined or dismissed will be advised, in writing, of the cause for such action." The notices were mailed to Claimant's "old" address which he could not update in the Carrier's system because he was locked out. In addition to not receiving the notices, the caption of the investigation is vague and cites no rules allegedly violated by Claimant. Finally, the hearing officer prejudged Claimant's culpability because he ignored mitigating circumstances, rendered no findings on credibility nor determined any facts and he did not make the decision to dismiss Claimant.

The Carrier did not meet its burden of proof with substantial evidence on the three (3) rules it alleges Claimant violated. For example, the Carrier failed to develop or identify facts showing Claimant violated GCOR 1.6 - Conduct (careless) which is listed in the decision letter as a basis for dismissal. Claimant suffered an injury while performing his duties but that fact, standing alone, is not sufficient evidence to prove he was careless or violated any rule.

Regarding On-Track Safety and Roadway Worker Rules 26.5.1 - Safe Zone and OTS Rule 26.5.2 - Ground Crew Coordination, there was no need, nor does the rule require, for Claimant and Fountain to job brief at their work location on the track after Manager Glinski's start-of-the-workday briefing where the Manager discussed spacing in relation to machine and ground crew worker. The incident date marks the fifth (5th) consecutive day Claimant and Fountain worked

together; they were aware of spacing while performing their duties as members of a tie gang consist with Claimant as ground crew and Fountain as machine operator.

Regardless, the record contains two (2) conflicting written statements - - Claimant's and Fountain's - - about the incident and injury. Claimant states Fountain moved his machine into the 15-foot safe space and bumped Claimant's elbow; Claimant testified he reported that to Supervisor Bailey for inclusion on Line 25 ("How Did Injury Occur?") of Form 68-E but the Supervisor did not transcribe it. In his written statement and testimony Fountain states his machine was immobilized with brakes applied when Claimant struck the front of the Anchor Spreader with his arm causing injury to his elbow. Many and numerous public law boards hold that when a hearing officer is confronted with conflicting statements, such statements are resolved against the party with the burden of proof which is the Carrier. Claimant's version of the incident must be credited. Instead the Carrier arbitrarily credited Fountain's version thereby ignoring long-standing arbitral precedent and practice.

Claimant violated no rules, thus, the assessed discipline (dismissal) is unjustified, arbitrary, punitive and disparately excessive. The incident involves only Claimant and Fountain; there are no differentiating factors between them. The Carrier joined their investigations and charged them with the same three (3) rules violations. The Carrier dismissed Claimant based on violating three (3) rules and assessed Fountain a one (1) day suspension and coaching event for violating two (2) rules; however, the Carrier maintained during on-property discussions there was a shared responsibility imposed by the rules and each worker is equally culpable.

Further noted is Manager Glinski, without Claimant's permission, added names as witnesses on Line 30 ("List Witnesses") of Form 68-E - Employee Report of Injury and Illness, after Claimant filed the form. Line 25 describing the incident is incomplete because Supervisor Bailey omitted, although instructed by Claimant to include, that Fountain's machine bumped into Claimant's elbow. The BMW asserts Form 68-E is a forged document and should be excluded from the record. Claimant was dismissed for reporting an on-the-job injury and that is not cause for any discipline. At the time of the hearing Claimant was not on any disciplinary level and he has no record of prior incidents or injury of this nature. Claimant's dismissal is arbitrary, unjustified, punitive and disparately excessive.

Parts 1 and 2 of this claim should be sustained with Claimant reinstated and compensated for any wage loss. The Organization's submission is replete with citations to and narrative by public law board awards supporting the BMW position. That is, no offset for outside earnings by Claimant upon reinstatement to service. Wording in the controlling agreement is explicit and prevails - - "If the charge against him is not sustained, he shall be reinstated and compensated for the wage loss, if any, suffered by him." Claimant is contractually entitled to receive compensation "for wage loss if any" pursuant to Rule 13 - Discipline and Grievances. The Board should interpret Rule 13 as written given there is no countervailing and/or relevant language wording in the collective bargaining agreement.

The Carrier denied the claim during on-property exchanges, discussion, conference, appeal and submission to the Board. Claimant received a fair and impartial hearing in accordance with industry standards and due process protocols in Rule 13. The BMW lodged due process assertions

but presented no substantive examples to support those assertions. The Carrier issued notices of investigation (October 8 and 10, 2022) to Claimant's address of record. The address was not current; the burden resides with Claimant as a condition of employment to maintain a current and correct address of record with the Carrier. Claimant updated his address on November 7, 2022; the formal investigation convened on November 8, 2022 - - a date agreed to by the Organization. In this regard, the Claimant testified that on or about November 4, 2022 the BMW E informed him of the investigative hearing. Claimant was not surprised by the allegations when he reviewed the notice at the hearing.

As for no citation to rules in the notice rendering it vague, Third Division Award 42359 (Bittel) holds "it is not necessary for the notice of investigation to cite specific rules as long as they were included in the investigation." In accordance with the Bittel award the Carrier presented the pertinent rules during the investigative hearing and they were subjected to examination prior to inclusion in the record. There is no factual basis for the BMW E's assertion that the hearing officer and charging officer were "one in the same" conspiring against Claimant. The notice of hearing identified the hearing officer; he developed the record at the hearing. He was not a witness. He did not conspire with the Carrier as shown by his excluding from evidence three (3) written statements tendered by Manager Glinski. Properly included in the record is Form 68-E - Employee Report of Injury and Illness as Claimant testified its contents are accurate but for Line 30 ("List Witnesses"). In short, the Carrier properly issued the notice to Claimant, he received due process such as a fair and impartial hearing that the hearing officer confined to the caption in the notice. That is, the hearing focused on whether Claimant properly and safely performed his duties on September 24, 2022 at Milepost 534.0 on the Shreveport Terminal Subdivision. As required by Rule 13 the Carrier issued a decision letter to Claimant stating, in writing, cause for his dismissal.

As for rules violations, Claimant asserts Fountain moved the Anchor Spreader machine into the 15-foot safe zone and bumped Claimant's arm (elbow) while Claimant was flipping plates. The Manager testified to crediting Fountain's version of the incident that Claimant struck his machine. Whether Claimant was struck by the machine or his elbow struck it, his testimony and Fountain's testimony confirm rules violations as they acknowledged never briefing or communicating with each other regarding the 15-foot safe zone during their five (5) days working together as members on the tie gang consist nor did they consider whether Fountain's machine was stopped or moving on track. On-Track Safety Rules 26.5.1 - Safe Zone stipulates maintaining a 15-foot safe space perimeter between machine operator and crew member on the ground and OTS Rule 26.5.2 - Ground Crew Coordination references job briefing: "When the job being performed requires the roadway worker on the ground to be closer than 15 feet from the roadway maintenance machine, these duties will be performed from the location established during communication with the operator during their job briefing." Responsibility for this briefing and communication is a shared responsibility between Claimant and Fountain.

In its submission to the Board the Carrier asserts that Claimant was careless and negligent when he failed to engage in a job briefing with Fountain to establish protection and not foul the safe zone. Manager Glinski testified that Claimant "did not follow" GCOR 1.1.2 - Alert and Attentive otherwise the incident would have been avoided. Claimant acknowledged awareness of the rules. He and Fountain confirmed they never conducted a job briefing, communicated or discussed

maintaining the 15-foot safe space by coordinating their actions. Claimant violated Rules 26.5.1 - Safe Zone and OTS Rule 26.5.2 - Coordination with Ground Crew.

Claimant's rules violations constitute a major offense under the Discipline Policy justifying dismissal. His record shows prior discipline with a reprimand in 2019 for failure to properly and safely perform duties and dismissal in 2013 for violating the drug and alcohol policy. Thus, dismissal is not excessive or punitive. The Organization's claim and remedy is excessive as it seeks to unjustly enrich Claimant with no offset to wage loss for outside earnings. The Board should not disturb Claimant's dismissal. Nevertheless, should reinstatement be awarded the Board's order must align with on-property practice which is an offset to wage loss for outside earnings.

The Board's function and authority adjudicating discipline up to and including dismissal 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 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 encompasses relevant documents supported by credible testimony on pertinent circumstances.

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 encompassing due process protocols in Rule 13. Due to Claimant not maintaining a current and correct address of record with the Carrier, he did not receive the notice of investigation until the hearing on November 8, 2022 but he was informed about the notice no later than November 4, 2022 when the Organization contacted him on that date about the hearing. The Organization nor Claimant objected to proceeding with the hearing as scheduled. The hearing officer confined the investigation to the caption in the notice which was sufficiently descriptive of the incident - - date, time, location, duties performed - - such that Claimant was not surprised. Upon completion of the hearing the Claimant and Organization acknowledged to the hearing officer they had been allowed to examine witnesses and present their argument and evidence. The Carrier issued a decision letter to Claimant stating, in writing, the cause for his dismissal. Given these findings the BMW's due process concerns are denied.

Pivoting to the substance of the dispute the Board finds there is substantial evidence that Claimant violated On-Track Safety and Roadway Worker Rules 26.5.1 - Safe Zone and OTS Rule 26.5.2 - Ground Crew Coordination. Claimant and Fountain acknowledged never job briefing in relation to safe zone spacing and work performed on any day nor did they communicate and coordinate between groundcrew and machine operator when it was less than fifteen (15) feet. Claimant's acknowledgement is substantial evidence of the two (2) rules violated as charged.

As for GCOR Rule 1.6 - Conduct (careless), Manager Glinski tendered the rule at the hearing but did not testify or apply it to Claimant's circumstances. A rule, standing alone, does not constitute substantial evidence that it was violated. Instead of testifying about Rule 1.6, the Manager testified Claimant violated as in "did not follow" GCOR Rule 1.1.2 - Alert and Attentive otherwise the incident would have been avoided. The decision letter does not state that Claimant violated Rule 1.1.2 nor does it state Claimant was negligent - - another item listed under Rule 1.6 - - which the Carrier raised for the first time in its submission to the Board. Based on these findings, the Board finds insufficient evidence for a violation of Rule 1.6 – Conduct.

With no violation of Rule 1.6, Claimant is culpable for violating the two (2) rules that Fountain violated. Claimant was dismissed; Fountain received a day suspension and coaching. Manager Glinski credited Fountain's version of the incident, that is, Claimant struck the machine. The Manager listed witnesses to the incident and injury on Line 30 of Form 68-E – Employee Report of Injury or Illness. That occurred after Claimant filed Form 68-E; the Manager could have listed the witnesses on Form 82-E – Manager's Report of Injury or Illness. None of the witnesses identified by the Carrier testified and their written statements were excluded from the record by the hearing officer yet forwarded to the deciding official. Excluded documents are not part of the investigative record because, by definition, they are excluded, omitted from consideration and, essentially, disqualified. Their inclusion in the record for appellate review creates an aura of skirting the hearing officer's decision. The Manager's conclusion that Fountain is credible and Claimant is not credible rests on excluded written statements which are hearsay comments by witnesses not testifying to the truth of the matter for which they are offered. In view of these circumstances, the conflicting written statements by Claimant and Fountain are assessed in this appellate forum in line with arbitral practice and resolved against the party with the burden of proof, the Carrier.

Claimant and Fountain have a shared responsibility for the two (2) rules they violated. The Board finds Claimant's dismissal is excessive, punitive and unjustified in the context of Fountain's day suspension and coaching event. The Board rescinds Claimant's dismissal. In lieu of dismissal Claimant is assessed a day suspension and coaching event. Claimant is reinstated and will be compensated for loss of wage suffered, if any, due to his wrongful dismissal.

With respect to whether any wage loss suffered by Claimant is offset by outside earnings, this Board observes the following narrative:

After exhaustive analysis and careful consideration of these antecedent decisions concerning the deduction of outside earnings in computing 'make-whole' damages . . . we endorse and adopt as dispositive of that issue in this case the thoughtful analysis and

persuasive reasoning found in Interpretation No. 1 of First
Division Award 25971.

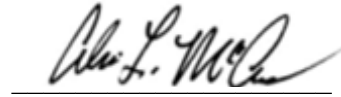
In line with the narrative the Board finds that outside earnings by Claimant during his wrongful dismissal can be considered and applied as an offset to any lost wage.

Having reviewed and assessed the appellate record established by the parties, the Board sustains Parts 1 and 2 of the Statement of Claim in accordance with the findings and conclusions herein. 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