

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7357
AWARD NO. 18, (Case No. 18)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE**

vs

**CP RAIL SYSTEM/DELAWARE AND HUDSON
RAILWAY COMPANY, INC.**

William R. Miller, Chairman and Neutral Member
Kevin D. Evanski, Employee Member
Anthony Stillittano, Carrier Member

Hearing Date: December 20, 2013

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- 1. The discipline (dismissal) assessed Mr. N. Bryant by letter dated September 4, 2012 in connection with an incident that occurred on July 24, 2012 was without just and sufficient cause and in violation of the Agreement (Carrier's File 8-00884).**
- 2. As a consequence of the violation referred to in Part 1 above, we request that Mr. Bryant must be reinstated with seniority unimpaired and compensated for all losses, including all wages, benefits, seniority rights and any other losses as suffered due to the Carrier's improper dismissal."**

FINDINGS:

Public Law Board No. 7357, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On July 24, 2012, Claimant was assigned as a System Equipment Operator, Specialist B to operate the OTM Reclaimer machine and it was alleged during the operation of that equipment the Claimant's machine collided with the stopped equipment occupied by employee B. Hammac and neither employee reported the collision or the damages sustained to both pieces of equipment. The alleged incident took place at approximately 5:00 a.m. on the Canadian Main Line, at the Fort Ann Switch and because of those allegations charges were made against the Claimant.

On August 7, 2012, Claimant was directed to attend a formal Investigation on August 15, 2012, concerning in pertinent part the following charge:

"The purpose of this Investigation will be to determine your responsibility, if any, for the alleged incident that took place on July 24, 2012 at approximately 05:00 hours on the Canadian Main Line, Fort Ann Switch - Resulting in a machine collision while performing your duties as a System Equipment Operator on DHRAIL1, which became known to the Carrier on August 1, 2012."

On September 4, 2012, Claimant was notified that he had been found guilty as charged and was assessed 20 Demerits for violation of GCOR Rule 1.1.3 and 30 Demerits for violation of On Track Safety Rules - OTS 23.3.1 and OTS 23.4 and because he already had 20 Demerits on his discipline record Claimant was dismissed as he had a total of 70 Demerits.

The Board notes that this is companion case to Award No. 19, Case No. 19, (Claimant Mr. Blair Hammac) as both cases dealt with the same July 24, 2012, incident. The Board further notes that this is the first of two cases involving the same Claimant before this tribunal the other being Award No. 20, Case No. 20 where the incident under charge was one day later (July 25, 2012). However, the discipline exercised by the Carrier in Case 20 was issued prior to the discipline administered in the instant dispute and was already on the Claimant's personal record when the totality of Claimant's disciplinary record was reviewed.

It is the Organization's position that the Investigation was not "fair and impartial" because the Hearing was not held in a timely manner. The Organization argued that the Carrier had first knowledge of the incident on July 30, 2012, and pursuant to Rule 25.1 the Carrier had an obligation to hold the Hearing within 15 days from the date of the occurrence and because the incident happened on July 24th the latest the Investigation could have been held was August 7, 2012, and it further argued that if you even used the July 30 date the Investigation should have been held no later than August 13th. Additionally, it argued that the Notice of Investigation was not specific making it difficult for the Organization to prepare a proper defense and that it was improper for Manager Delamater to preside over the Hearing because he was subordinate to Superintendent Track Renewal and Work Equipment, S. Mayne who was the charging officer. Moreover, all of the Carrier witnesses were direct subordinates to the Hearing Officer. Because of all of the aforementioned reasons the Organization requested that the discipline be set aside without reviewing the merits.

Turning to the merits the Organization argued that the Carrier did not meet its burden of proof that the Claimant violated any Carrier Rule. It asserted that at no point in the Notice of Investigation or at the Investigation was the Claimant alleged to have violated a specific Rule and Carrier's failure to enter the alleged Rule violated into the record of the transcript was a fatal error. Lastly, it argued that if the Carrier had proven any violations (which it did not do) the

discipline was excessive. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that there were no procedural errors in the handling of the Claimant's Investigation and it was "fair and impartial". Contrary to the Organization's assertion that the Hearing was untimely it argued that the record confirms that the actual date that the Carrier was informed of the collision was on August 6, 2012, the date Mr. Hammac returned from vacation and was questioned by the Carrier and confirmed the incident occurred and that it was not reported to the Carrier which means that the Investigation was held within the time limits of Rule 25.1 as it was a conduct matter. It further argued that it is clear by a reading of the transcript that the Claimant and the Organization understood the charges and were well prepared and there is no merit to the argument that the Hearing Officer was biased in his handling of the Investigation.

Regarding the facts of the incident the Carrier asserted that the record is clear that the Claimant's machine struck Mr. Blair Hammac's stationary machine showing that he did not comply with cited Safety Rules in that he did not move at a speed that allowed him to stop within half the range of vision. It argued that the Claimant acknowledged his errors on page 64 of the transcript wherein he testified that he struck the equipment operated by Mr. Hammac and he did not report the collision to any Supervisor, Manager or Foreman which was a violation of Safety Rules. Lastly, it argued that the discipline imposed was fair and reasonable and it closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and the record of evidence and will first address the Organization's procedural argument that the Carrier's calling of the Investigation was untimely. Examination of the record reveals that on July 31, 2012, Supervisor Vanderpool heard secondhand information that Claimant's machine may have struck Mr. Blair Hammac's motionless machine on July 24th. On July 31st Mr. Vanderpool began to investigate the matter and he requested statements from the Claimant's co-workers L. Fisk, T. Vanderpool and S. Finch, all of whom stated they did not witness the incident. On that date Mr. Hammac was on vacation and could not be contacted and was not available for questioning until he returned to work on August 6, 2012, at which time he was questioned and confirmed that the incident occurred and that he assumed the Claimant reported the incident to the Carrier. On August 7th the Carrier instituted the Notice of Investigation. Contrary to the Organization's argument that the Carrier should have filed the charges on either July 31 or August 1 the evidence substantiates that if the Carrier had filed its charges prior to August 7th it would have been pre-mature and the Organization could have argued that the Carrier made a rush to judgment based upon hearsay. Carrier did not have actual "first knowledge" that the incident of July 24 actually transpired until August 6, therefore, the calling of the Investigation was done in a timely manner. The Board has reviewed the remaining procedural arguments raised by the Organization and is not persuaded

that there were any other discernible procedural irregularities that tainted the Organization's ability to effectively defend the Claimant. It is determined that the formal Investigation was conducted in a fair and impartial manner and Claimant was afforded all of his "due process" Agreement rights. The dispute will be resolved on its merits.

On page 59 of the transcript the Claimant was questioned as follows:

"Q: Okay. Mr. Bryant, whose responsibility is it on Canadian Pacific Railway to have control of a piece of equipment?"

A: The Operator's a hundred percent. *(Underlining Board's emphasis)*

On page 64 of the transcript the questioning of the Claimant continued as follows:

"Q: Mr. Bryant, there was a collision on the morning of the 24th, correct?"

A: Yes, Sir, there was.

Q: You contacted the machine in front of you, correct?"

A: Yes, sir.

Q: You did not report it, correct?"

A: No, Sir I did not. *Underlining Board's emphasis)*

The testimony above confirms that the Claimant admitted he struck the equipment operated by Hammac and then failed to report the incident to any Supervisor, Manager or Foreman. Employee Hammac wrote in his statement of August 6th that as he was exiting the machine the collision occurred and it knocked him back into his seat and he further stated that his **"...back was tweaked-out for a couple of days..."**. Substantial evidence was adduced at the Hearing that the Claimant was guilty as charged.

The only issue remaining is whether the discipline assessed was appropriate. Claimant's violations were of a serious nature and had the potential for catastrophic results. The Carrier utilizes a point system in its application of discipline. The system is commonly referred to as the Brown System of Discipline that uses a combination of demerits for negative actions and merits for actions that go beyond the normal requirements of employee's duties and it further allows employees to work off 20 demerits marks for each 12 consecutive months service free from discipline. The discipline exercised by the Carrier was in accordance with its disciplinary policy. The Board finds and holds the discipline of 50 Demerits that was administered by the Carrier in

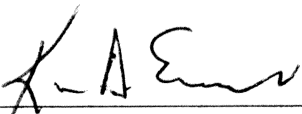
this case will not be rescinded because it was not arbitrary, excessive or capricious nor will the dismissal be set aside because the Board determined that the 20 Demerits assessed in Award No. 20 of this tribunal was appropriate, therefore, because the Brown System allows for dismissal when an employee has 60 Demerits or more the dismissal is upheld and the claim will remain denied because the Claimant had accumulated 70 Demerits.

AWARD

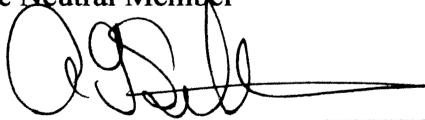
Claim denied.



William R. Miller, Chairman & Neutral Member



Kevin D. Evanski, Employee Member



Anthony Stillittano, Carrier Member

Award Date: Feb 13, 2014