

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7357  
AWARD NO. 20, (Case No. 20)**

**BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYES 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 [twenty (20) demerits] assessed Mr. N. Bryant by letter dated August 13, 2012 in connection with allegations that the Claimant was in violation of a Life Saving Rule [Lock Out Tag Out (LOTO)] while completing his tour of duty on July 25, 2012 was without just and sufficient cause and in violation of the Agreement (Carrier's File No. 8-00879).**
- 2. As a consequence of the Carrier's violation in Part 1 above, we request that Mr. Bryant must have the discipline removed from his record and compensated for any 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.

The facts indicate that on July 25, 2012, the Claimant was assigned to operate OTM Reclaimer. Claimant performed his job without incident at the first job site. Claimant then relocated to a second job site where he continued to operate the same machine. Subsequently, a spike became lodged between the conveyer belt and a metal plate. The Claimant attempted to dislodge the spike by hand during which time his finger was injured. After going to the emergency room for treatment of the injury, the damaged area of the Claimant's finger was amputated. Subsequently, the Carrier made charges wherein it was alleged that the Claimant did

not follow the lock out tag out procedures, required before he place his hand in a pinch point area.

On July 25, 2012, Claimant was directed to attend a formal Investigation on August 1, 2012, concerning in pertinent part the following charge:

**"The purpose of this Investigation will be to determine your responsibility, if any, for your alleged violation of a Lifesaving rule. While performing your Duties on DHRail 1 on July 25, 2012 as a System Equipment Operator."**

On August 13, 2012, Claimant was notified that he had been found guilty as charged and was assessed 20 Demerits.

The Board notes this is the second of two cases involving the same Claimant before this tribunal, the other being Award No. 18. The instant case arose one day after the aforementioned case, but the decision on this matter was issued prior to the other Award.

It is the Organization's position that the Investigation was not "fair and impartial" because the Notice of Investigation was improper and insufficient as it did not specify the charge against the Claimant. Additionally, it argued that it was improper for Manager Delamater to preside over the Hearing because he is subordinate to Superintendent Track Renewal and Work Equipment, S. Mayne, who was the charging officer. It further asserted that the Hearing Officer's conduct during the Hearing was improper as he failed to allow the Organization to make an opening statement, he continually disallowed any question related to the Claimant's injury of July 25th and he did not allow the Claimant to confer with his representative until the Hearing Officer got the information that he wanted. Simply put the Hearing Officer bullied and intimidated the Claimant and acted as a prosecutor rather than a fact finder. Based upon those multiple procedural errors the Organization asked 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 as they provided no documentation to support the charges and their own witness the Superintendent of Track Production, Mr. Raymer, testified that the LOTO procedure was not necessary to remove a lodged spike (See Transcript Page 23), therefore, according to the Organization the Claimant acted properly and the accident was unavoidable. It further suggested that the Carrier had not provided the Claimant with adequate training in the LOTO procedure. Lastly, it argued that if the Carrier had proven a violation (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 the Claimant received a "fair and impartial" Hearing, during which he was proven guilty of violating Engineering Service Life Saving Rules specifically Lock Out/Tag Out Protection. It argued the record verifies that the Claimant had been properly trained in Lock Out/Tag Out procedures and the equipment he was operating required LOTO before any adjustment should have been made such as the removal of a jammed spike. It asserted that none of the Lock Out/Tag Out procedures were followed when the Claimant made the unsafe decision to place his hand in a pinch point area. It pointed out that the Superintendent of Track Production testified on Page 23 of the Transcript that the proper way to dislodge a spike was to reverse the belt, (all functions performed in the cab) and if that failed call a Maintainer, none of which the Claimant did. It reasoned that the Claimant's injury was due to his carelessness and failure to follow the appropriate Safety Rule. Additionally, the Carrier argued that during the on-property handling of the claim the Claimant signed a Release Agreement with the Carrier on September 5, 2012, whereby the Claimant fully released and waived any employment claims he had, thereby making the instant claim moot. It closed by stating that the discipline imposed was fair and reasonable and asked that the discipline not be disturbed and the claim remain denied and/or dismissed.

The Board has thoroughly reviewed the transcript and record of evidence and determined based upon the unique facts of the case and on a non-precedential basis that allegations of procedural errors and/or the signing of a Release Agreement are not persuasive in the settlement of the dispute, therefore, the case will be resolved on its merits.

Evidence and the testimony of Carrier witness P. Raymer on page eight of the transcript confirmed that the Claimant had been trained in Lock Out Tag Out procedures and had been issued a LOTO kit during the crew startup safety meetings. It was not refuted that Claimant signed an acknowledgement sheet for having been trained in the LOTO procedures.

The record was not refuted that during the Claimant's operation of the OTM Reclaimer a track spike jammed and clogged the functioning of the machine. Claimant rather than using the lock out tag out procedures or any other that procedure that would not have endangered himself for the removal of the spike chose to make a unsafe decision and placed his hand in a pinch point area. On page 23 of the transcript Supervisor Raymer testified that the proper way to dislodge a spike is by reversing the belt wherein all functions can be performed from inside the cab of the machine. Mr. Raymer went on to testify that if the aforementioned procedure failed the Claimant should have called a Maintainer to examine the situation and repair the machine. The testimony of Superintendent of Track Production, P. Raymer was not effectively refuted.

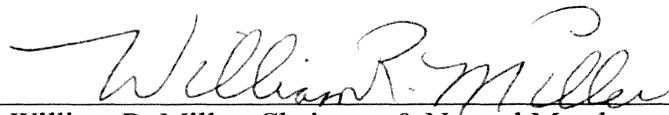
Despite the fact that the record shows that Claimant was given LOTO training the Claimant testified that he did not understand the procedures. Assuming for the sake of argument that the Claimant's statement was correct he still had a responsibility, in accordance with the

Carrier's Lifesaving Rules not to attempt to perform his duties if he did not understand how to perform a task. The record was not rebutted that the Claimant failed to contact his immediate Supervisor if he needed assistance with the lock out tag out procedures identified in the Lifesaving Rules and the Carrier lock out tag out procedure checklist that is attached to each of the machines. Contrary to the Organization's argument the accident could have been avoided if the Claimant had followed the Carrier's Safety Rules, therefore, it is determined that substantial evidence was adduced at the Hearing that the Claimant was guilty as charged.

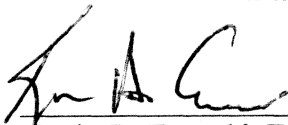
The only issue remaining is whether the discipline assessed was appropriate. Claimant's error in judgment could have resulted in a far worse injury and was a serious violation of Safety Rules. The discipline exercised by the Carrier was in accordance with its disciplinary policy and it will not be rescinded because it was not arbitrary, excessive or capricious. The claim will remain denied.

**AWARD**

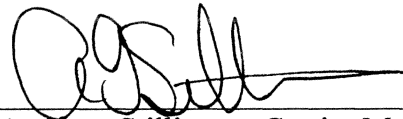
Claim denied.



William R. Miller, Chairman & Neutral Member



Kevin D. Evanski, Employee Member



Anthony Stillittano, Carrier Member

Award Date: Feb 13, 2014