

PUBLIC LAW BOARD NO. 7544

Brotherhood of Maintenance of Way)
Employees Division - IBT)
Rail Conference)
)
and)
)
)
)
SOO Line Railroad Company (CP))

Case No. 19
Award No. 19
System File No. D-25-15-390-28

Background

On April 17, 2015 the Carrier issued to Claimant A. Nygaard a notice of formal investigation and hearing which states, in part, the following:

"The purpose of the investigation and hearing is to develop all facts and circumstances and place responsibility, if any, for your alleged occupying main track without authority near Hoffman, MN on Thursday, April 16th. This indicates a possible violation of, but is not limited to, the following rules:

GCOR 1.1.1 - Maintaining a Safe Course
GCOR 1.1.2 - Alert and Attentive
OTS 21.1 - On-Track Safety for Controlled Track
OTS 21.1.3 - Releasing Authorities"

On April 21, 2015 the formal investigation and hearing convened wherein Claimant and his representative were afforded the opportunity to present testimony and other evidence as well as cross-examine the Carrier's two (2) witnesses and evaluate CP's seven (7) exhibits.

On May 4, 2015 the Director of Track - Glenwood issued to Claimant a discipline assessment letter finding Claimant in violation of OTS 21.1 – On-Track Safety for Controlled Track and assessing a thirty (30) day actual working day suspension.

On May 21, 2015 the Organization and the Carrier agreed to progress Claimant's discipline dispute for resolution before this Board "utilizing the abbreviated procedure provided for in Paragraph (K) of [the] PLB Agreement."

Findings

Public Law Board No. 7544, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Consistent with the PLB Agreement for this Board, the evidentiary record in this proceeding is comprised of the following: (A) notice of investigation, (B) transcript of investigation and all related exhibits, (C) discipline assessment letter and (D) on-property correspondence related to progression of the claim.

With respect to the alleged rules violations, the Carrier determined that Claimant violated OTS 21.1 – On-Track Safety for Controlled Tracks which states “[b]efore occupying or fouling a controlled track, protection or warning must be established.” Claimant acknowledges in his written statement that he occupied the main track near Hoffman, MN, on Thursday, April 16, 2015 without “track and time” authority as follows:

“I was on the track and wanted to get Hoffman East to CP 162 however I was incorrect I thought that the governing signal short of Hoffman East was Hoffman East. I was incorrect. Manager Baily called over the radio and asked me to set the work truck off informed me I was out of my limits so I canceled my track & time set my cones and waited for [Roadmaster] Craig Helgaas to arrive[.]”

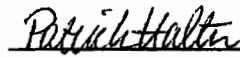
Notwithstanding Claimant’s violation of OTS 21.1 – On-Track Safety for Controlled Tracks, the Organization objected to the hearing as unfair with a predetermined outcome because Claimant acknowledged culpability prior to the hearing and was held out of service without reason.

A fair and impartial hearing is due process for Claimant and prejudgment undermines the process. This is the Organization’s objection. Fairness and impartiality are at risk when multiple roles are performed by a singular Carrier official. In this claim Director of Track Swenson performed multiple roles. He was present for and participated in the investigation or inquiry of Claimant with Roadmaster Helgaas on April 16 in the Director’s conference room. The next day Director Swenson issued the formal, written charges levied against the Claimant alleging rules violations. Director Swenson served as the presiding official at the investigative hearing. He questioned Roadmaster Helgaas about the Roadmaster’s and Director’s inquiry of Claimant on April 16. When a point was not testified to by Roadmaster Helgaas -- Claimant not having Order A20 -- the Director conducted further examination. When testimony not supportive of Director Swenson’s charging letter was testified to by Roadmaster Bailey -- Bailey told Claimant “you’re out of your limits and that was *no problem*” -- further examination or clarification of that testimony was not conducted by the presiding official. After the hearing, Director Swenson determined Claimant violated OTS 21.1 and assessed discipline.

In the circumstances of this claim, the Organization’s concern for a fair and impartial hearing without a predetermined outcome are assessed in the context of the problematic nature posed by Director Swenson serving as investigator, prosecutor, jury and judge with the responsibility to objectively weigh all the evidence. Given that context, the violation of OTS 21.1 by Claimant warrants a written reprimand rather than the thirty (30) day actual work day suspension.

Award

Claimant receives written reprimand for violating OTS 21.1.



Patrick Halter
Neutral Member

Dated on this 28th day of
November 2016