

PUBLIC LAW BOARD NO. 7544

**Brotherhood of Maintenance of Way
Employees Division - IBT
Rail Conference**

and

SOO Line Railroad Company (CP)

Case No. 26
Award No. 26
System File No. D-62-15-580-06

Background

On August 3, 2015 the Carrier issued to Claimant G. Swenson a notice of formal investigation and hearing which stated, 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 failure to wear your safety glasses on duty on Thursday, July 30, 2015. This indicates a possible violation of, but is not limited to, the following rules:

Engineering Safety Rule Book - E23 Rule 6, Eye and Face Protection"

On August 20, 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 evaluate six (6) exhibits and cross-examine the Carrier's witness.

On September 1, 2015 the Director of Track issued a discipline assessment letter to Claimant stating as follows:

"During the investigation it was determined that you were performing work in an area which required safety glasses. A manager observed and provided testimony that you were not in compliance with the rule as you were not wearing the required safety glasses properly. This is a clear violation of the rule listed above and also shown in Carrier Exhibit #4.

Based on the facts and evidence in the hearing record and your past discipline record, including recent violations of rules on July 14 and June 19th, 2015, I am issuing you a **5 day suspension** for violation of Engineering Safety Rule E2[3], Rule 6 - Eye and Face Protection."

On October 28, 2015 the Organization submitted a letter to the Carrier's AVP - Labor Relations addressing CP's Efficiency Testing Program on Operating Rules undertaken in compliance with FRA Rule 217.9, Program of operational tests and inspections; recordkeeping. BMWED relied on the record developed during Claimant's investigative hearing to illustrate its concerns.

On October 30, 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.

On July 30, 2015 Assistant Chief Engineer ("ACE") Harter observed Claimant in a CP truck parked in the lot of a commercial business. One of the truck doors was open with Claimant's leg hanging out as he was using a cell phone with his safety helmet removed and safety eyewear on top of his head. Prior to ACE Harter approaching Claimant, he [Claimant] had informed the dispatcher by radio to release his track and time. By the time ACE Harter intervened, Claimant was on the Carrier-issued cell phone responding to a call from a track inspector.

ACE Harter states the incident on July 30, 2015 involved an efficiency test conducted with Claimant for compliance with FRA Rule 217. ACE Harter issued Claimant a failing mark "on the proper wearing of safety eyewear" and determined Claimant was "compliant on other areas in the vehicle in regards to cleanliness, in regards to having an emergency fire extinguisher and the proper tool set." Claimant's testing record shows a failing mark on eyewear safety but no recordation of passing marks for the other tests.

On or about August 3, 2015 a supervisor conducted a follow-up test with Claimant on safety eyewear; Claimant received a passing mark. At the same time the Director of Track issued a notice of formal investigation and hearing "to develop all facts and circumstances and place responsibility, if any, for your alleged failure to wear your safety glasses on duty on Thursday, July 30, 2015" as "[t]his indicates a possible violation of, but is not limited to, the following rules: **Engineering Safety Rule Book - E23 Rule 6, Eye and Face Protection.**"

On September 1, 2015 the Director of Track issued a 5-day suspension notice to Claimant asserting that: "A manager observed and provided testimony that you were not in compliance with the rule as you were not wearing the required safety glasses properly. This is a clear violation of the rule listed above and also shown in Carrier Exhibit #4." That is, Engineering Safety Rule Book - E23, Personal Protective Equipment and Clothing, Rule 6, Eye and Face Protection.

Engineering Safety Rule Book E23, item 6, sets forth the minimum requirements for "[s]afety eyewear used on CP or customer property[.]" Item 6 also identifies exceptions for when an employee is not required to don the required safety eyewear. "You are exempted from wearing approved safety eyewear in . . . [d]esignated lunch break and parking areas[.]" In other words, an employee on duty "on

CP or customer property" is exempted from wearing safety eyewear when that employee is in "designated . . . parking areas."

When observed by ACE Harter on July 30, 2015, Claimant was not "on CP or customer property." He had stationed or parked the Carrier's truck in the parking lot of a business. According to ACE Harter, Claimant was not positioned within the exemption because he was on "private property" and "not attempting to go into the [business] to purchase anything." Since Claimant did not have permission of the "owner" to park in the lot, he was not in a designated parking area. ACE Harter states Claimant was not in a "public location to go into a grocery store or go to hardware store to get parts for work." In those situations, the parking lots are designated parking areas within the meaning of Engineering Safety Rule Book E23, Item 6 and the exemption applies. ACE Harter interprets Item 6 as addressing a "private" business and "public location" of a business where the employee may engage in business for work (hardware store) or not engage in business (grocery store). The wording in item 6 does not address these distinctions. There may be other rules or even practices that address or encompass this matter but those rules or practices are not established in this record or, if testified to during the hearing, were withdrawn as they do not appear in the decision letter as rules violations. Safety is a paramount concern and focus in the railroad industry and recognized as such by all those testifying at the hearing; however, the circumstances established in this claim do not support a violation as presented. The claim will be sustained and the suspension rescinded from Claimant's record.

Award

Claim sustained.


Patrick Halter
Neutral Member

Dated on this 28th day of
November 2016