

PUBLIC LAW BOARD NO. 7544

Brotherhood of Maintenance of Way	)	
Employees Division - IBT	)	
Rail Conference	)	
	)	
and	)	Case No. 46
	)	Award No. 46
	)	System File No. D-61-16-390-15
	)	
SOO Line Railroad Company (CP)	)	

Background

On May 13, 2016, the Carrier issued to Claimant T. Meyer a notice of formal investigation and hearing. The notice stated, in part, the following:

"The purpose of this investigation/hearing is to determine the facts and circumstances and to place responsibility, if any, in connection with your alleged failure to protect the equipment you were in charge of from making contact with overhead lines on May 11, 2016. This indicates a possible violation of, but is not limited to, the following rules:

OTS 29.3 - Employee in Charge B #5  
Safety Handbook E-6 Electrical Safety"

On May 19, 2015, the investigation/hearing convened wherein Claimant and his representative were afforded the opportunity to present testimony and other evidence as well as examine the Carrier's witness and six (6) exhibits.

On May 25, 2016, the Assistant Director Production South notified Claimant that the record of the proceeding established Claimant's violations of (1) OTS 29.3, Employee in Charge B, (2) Safety Handbook E-6 Electrical Safety and (3) GCOR 1.1.1, Maintaining a Safe Course. Based on the rules violations, severity of the incident and Claimant's past disciplinary record, the Carrier assessed Claimant a thirty (30) day suspension of which ten (10) days (eighty (80) hours) would be served and twenty (20) days would be held in abeyance. Should Claimant incur another rule infraction during the next twenty-four (24) months, the 20-day suspension held in abeyance would be served as an actual suspension.

On July 11, 2016, the Organization and the Carrier agreed to progress Claimant's discipline dispute for resolution before this Board using 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 Employees 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.

At the outset of the hearing, the Organization objected to the Carrier's decision to remove Claimant from service without explanation and prior to the investigation and hearing. By removing Claimant from service, BMW states the Carrier was unable to conduct a fair and impartial hearing because CP had prejudged Claimant's culpability thereby denying him due process in violation of the collective bargaining agreement. The Board finds no violation of the collective bargaining agreement as that mutually-agreed to contract allows the Carrier to remove an employee from service for serious rules infractions.

The Organization also objected to the hearing officer presiding over the investigation and hearing because that official was a manager and issued instructions to Claimant on the day of the alleged incident. This is a conflict of interest; the hearing officer should recuse himself. The Carrier states the hearing officer was onsite only for the job briefing on the morning of the incident but was not present when the incident occurred. The Board finds no conflict of interest in this situation.

CP decided that Claimant violated OTS 29.3, Employee In Charge, ¶ B, Responsibilities of the Employee In Charge, # 5. That is, "[t]he Employee in Charge is responsible for the safety, instruction, performance and on track safety procedures for all employees under their jurisdiction. They are also responsible for ... 5. Supervis[ing] any work involving hazards and discuss specific procedures to protect against such hazards."

CP also decided that Claimant violated Safety Handbook, E-6, Electrical Safety, # 6, where an employee does "not operate or move any part of material handling equipment (i.e. cranes, aerial boom, man-lifts, elevated work platforms, mobile/work equipment, etc.) any closer than required but never closer than the minimum safe distance from energized overhead power lines." The "minimum safe distance" in this situation was ten (10) feet.

Finally, CP decided that Claimant violated GCOR 1.1.1, Maintaining a Safe Course, which states, essentially, when unsure or in doubt take the safe course of action.

On May 11, 2016, Claimant was the Foreman and Employee In Charge ("EIC") for the MPM train picking up old ties on the C&M Subdivision, Sturdevant Station, WI. The MPM is approximately five hundred (500) feet in length with ten (10) cars between cabs on each end of the train. Moving along a trolley in the cars is excavator-type equipment with a boom capable of a three hundred sixty (360) degree swivel. At one end of the MPM was Claimant in the cab with a radio for contact with the dispatcher and in the cab at the other end of the MPM was the operator of the excavator with boom picking up ties. Claimant

conducted a job briefing with the MPM operator. Claimant informed the operator to stay away from the energized, overhead power lines overhead and discuss any concerns or questions with Claimant.

Claimant was in radio contact with the dispatcher when he turned around and saw the operator, at the other end of the train, strike the energized overhead power line causing it to sag two (2) or three (3) feet from its top holding. Claimant immediately contacted Manager Anderson to inform him of the sagging line; Manager Anderson instructed Claimant to clear the track and wait for management officials to arrive. Claimant never informed the dispatcher of the incident.

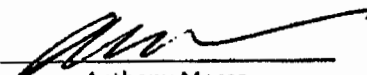
Claimant acknowledges that Safety Handbook, E-6, Electrical Safety, required the operator to maintain a minimum safe distance of ten (10) feet from the overhead power line; Claimant acknowledges the operator did not maintain the minimum safe distance because the operator struck the line. The Board finds that Claimant did conduct a job briefing with the operator and instructed him to stay away from the power lines. Should the operator have a question, such as whether he had sufficient clearance of the power line to reach ties, the operator should contact Claimant. Notwithstanding the Claimant's job briefing and instruction, the operator did not follow the instructions. Without discussing the situation with Claimant, the operator determined he had sufficient clearance to reach some ties and, in attempting to reach those ties, struck the overhead power line causing it to sag. The Board finds that Claimant never contacted the dispatcher to inform him of the incident and Claimant allowed a train to pass under the sagging line.

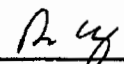
Claimant violated OTS 29.3 and GCOR 1.1.1., Maintaining a Safe Course, because Claimant visually estimated there was clearance for a train but also acknowledged he did not know if, for example, a double stack 198 train would clear. Claimant was required, as EIC and Foreman of the Form B protecting the track, to restrict or halt movement of trains through the area but he did not. The Board finds that Claimant did not violate Safety Handbook E-6, Electrical Safety, because Claimant conducted a job briefing instructing the MPM operator to stay away from the lines. The operator failed to comply with Claimant's job briefing instruction. Given these findings, the Board finds that the 10-day actual suspension is punitive and reduces it to a five (5) day actual suspension (forty (40) work hours).

Award

Claim sustained in accordance with the findings.

  
Patrick Halter  
Neutral Member

  
Anthony Mosso  
Carrier Member

  
Ryan Hidalgo  
Organization Member

Dated on this 24th day  
of January 2018