

PUBLIC LAW BOARD NO. 7544

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

and

SOO Line Railroad Company (CP)

Case No. 67
Award No. 67
System File No. D-03-17-445-02

Background

On January 20, 2017, the Carrier issued to Claimant D. Noble 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 of fouling a controlled track on January 16, 2017 without the proper track protection. This indicates a possible violation of, but is not limited to, the following rules:

- **OTS 29.2 Roadway Worker (Employees)**
- **OTS 31.2 Responsibilities of the Roadway Worker***

On February 16, 2017, the formal investigation and hearing convened wherein Claimant and his representative presented testimony and six (6) exhibits and examined the Carrier's witness and eight (8) exhibits.

On March 3, 2017, the Director Track and Structures - Chicago notified Claimant that the evidentiary record established Claimant's violation of the charged rules. Based on the violations, severity of the incident and Claimant's past disciplinary record, CP assessed Claimant a thirty (30) day actual suspension.

On March 17, 2017, 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 recordation of the proceeding with the transcriptionist located at an off-site, remote location. Experience shows, BMW states, this method of transcription can result in an inaccurate and incomplete record. The Organization requested the transcriptionist be physically present to record the proceedings. CP denied the request stating an off-site transcriptionist is often used for these proceedings. The Board finds the transcript of the proceeding complete and accurate which is sufficient for this tribunal's use in rendering a decision. The Board also finds that the incident date of January 16, 2017, in the notice of formal investigation is a typographical error; the correct date is January 17, 2017. This typographical error did not affect the Organization's and Claimant's presentation of a defense to the charged rules violations.

On January 17, 2017, Claimant was a member on a five (5) person distribution crew with an assignment to pick up scrap rail ties on the Carrier's main line two (CP 2) in the Bensenville Yard. The distribution crew foreman was unfamiliar with the territory and train movements within the Yard; the crew's foreman requested assistance through his supervisor for train movement and track protection. The crew foreman's supervisor contacted the Yard's Roadmaster whereupon Foreman Martinez was assigned to assist the distribution crew with protection and movement. During Claimant's forty-one (41) years of service with the Carrier performing Maintenance-of-Way work from the Canadian border in North Dakota and Minnesota towards Bensenville Yard, he has incurred no track protection rules violations and no CP official has instructed him that signal indicators are not proper protection for Maintenance-of-Way employees. There is no dispute that Claimant, a crane operator, had proper track protection with Form B for performing work on CP 2.

The issue for the Board is whether there is substantial evidence supporting the Carrier's decision that Claimant did not have proper track protection on January 17, 2017, when he was a member of a crew that entered a manual interlock based on a signal indicator thereby fouling a controlled track (metra one, metra two) beyond absolute signals. CP states that proper protection would have been "9.5.3" verbal or written permission, track and time beyond metra main, Form B or services of a conductor pilot. CP states that red signal indicators stop trains but provide no protection for employees.

The Organization states that Claimant received proper protection based on the B-17 tower operator instruction for the crew to enter the manual interlock on signal indicators with shunted equipment (road rail and attached cars) obstructing track. Once the green signal was issued, the tower operator placed red stops at the eastward and westward signal blocks to keep trains from entering the interlock. The Organization notes that Claimant's track protection west of the B-17 interlock was the absolute signal that stopped. The absolute signal provided the track authority in On Track Safety for Controlled Track, 9.5.3 ("absolute signals at stop"). As BMW notes, the Roadmaster acknowledged there is no specific rule prohibiting Maintenance-of-Way employees from operating on signal indicators.

Notwithstanding the green signal, the Carrier states that signal indication is not track protection for Maintenance-of-Way employees because they are not qualified on operating rules for signal tests. Proper protection would have been track and time or Form B. CP states that Claimant could have challenged and refused the tower operator's instruction to proceed as violating on-track safety

procedure or rule. Since Claimant did not challenge the tower operator's instruction and violated on-track safety procedures or rule by not having proper track protection to proceed, Claimant violated the following rules:

OTS 29.2 - Roadway Worker (Employees)

4. Each employee has the right to challenge, in good faith, any instruction to violate an on-track safety procedure or rule. They shall inform the Employee In Charge that the necessary on track safety provisions to be used at the job location do not comply with the Rules. They shall remain clear of the track until the conflict is resolved. Conflict resolution procedures are found in OTS Rule 31.0 (Right to Challenge On Track Safety).
5. Employees must not perform any work that will interfere with the safe Passage of trains, unless on track protection is provided.

OTS 31.2 - Responsibilities of the Roadway Worker

Each Roadway Worker Must:

Follow On-Track Safety procedures.

Do not foul a track except when necessary in the performance of duty. Ascertain that On-Track Safety is being provided before fouling a track.

Refuse any directive to violate an On-Track Safety rule and promptly notify your Supervisor when the safety provisions, to be applied at the job site, do not comply with the rules.

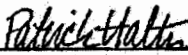
The Board finds there is insufficient evidence that Claimant violated OTS 29.2, ¶ 4. In this regard, given Claimant's 41 years of experience and the assistance provided by the Roadmaster's staff to obtain track protection, there is no good faith basis for challenging and refusing the B-17 tower operator's instruction. The tower operator granted verbal permission ("go ahead proceed with the signals") for the crew to enter the manual interlock and traverse track to absolute signals. The Board finds there is insufficient evidence that Claimant violated ¶ 5 because, as written and applied literally, Claimant only passed through the manual interlock and did not perform any work within it. Claimant performed work on CP 2 with proper protection -- Form B. For the reasons and findings that Claimant did not violate OTS 29.2, ¶¶ 4 and 5, the Board finds there is insufficient evidence to find Claimant violated OTS 31.2 - Responsibilities of the Roadway Worker.

Since there are no rules violations, the Board will sustain the claim and grant the Organization's requested remedy. In doing so, however, the Board recognizes the enduring and daily emphasis for on track safety such that having proper track protection before fouling track is reinforced throughout the territory. Claimant is on notice that the circumstances presented in this claim are considered a rules violation by CP and will be treated accordingly should Claimant repeat these circumstances.

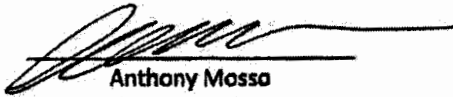
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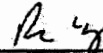
Claim sustained.



Patrick Halter
Neutral Member



Anthony Mosso
Carrier Member



Ryan Hidalgo
Organization Member

Dated on this 5th day
of June, 2018