

BEFORE PUBLIC LAW BOARD NO. 7566

CASE NO. 114

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

and

CANADIAN NATIONAL RAILWAY, WISCONSIN CENTRAL

Carrier's File WC-BMWED-2016-00049

Claimant: D. WAAGE

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STATEMENT OF CLAIM

"Claim of the System Committee of the Brotherhood that:

1. The discipline (suspension and deferred suspension) imposed upon Mr. M. Waage for alleged violation of Carrier rules in connection with an incident that occurred on July 26, 2016 when he allegedly failed to properly protect on-track equipment was arbitrary, capricious and in violation of the Agreement (Carrier's File WC-BMWED-2016-00049 WCR).
2. As a consequence of the violation referred to in Part 1 above, Claimant M. Waage's personal record shall be cleared of the charges immediately and he shall be provided the remedy prescribed in Rule 31 of the Agreement."

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7566 has jurisdiction over the parties and the dispute involved herein.

Claimant received proper notice of the hearing in this claim.

Claimant received a notice to appear for an investigation for the purpose of ascertaining the facts for allegedly failing to properly protect his equipment, on July 26, 2016, at or near the Pokegama Yard.

Following the investigation, Claimant was notified that he was in violation of On-Track Safety Rules-Rule 101-Authority for Protection and On-Track Safety rules-Rule 500-Work on Non-Controlled Track-Types of Protection, in connection with failing to properly provide protection for his equipment. Claimant was assessed discipline of thirty days actual suspension from service and 15 Days Deferred Suspension.

The Carrier maintains that there is substantial evidence in the record of the cited Rule violation. Claimant failed to properly lock out the switch or derail for the parked equipment and left the area with equipment in the foul. Rule 520 does not apply because the equipment was parked and left unattended at the end of a shift and improperly secured. The Carrier refutes the Organization's argument that a co-worker took responsibility and that Claimant should be exonerated in their submission:

[T]he appeal outlines that Claimant's co-worker accepted full responsibility for the incident through a waiver. This is true, that he took full responsibility for his part in the incident, but this does not negate Claimant's involvement in the situation or determine Claimant's guilt or innocence related to the situation. If the Organization felt that this was the case, they had ample opportunity to call Mr. Johnson as a witness to support Claimant's case, which they did not.

The Organization argues that the Carrier violated Rule 31 because the time and location of the alleged infraction was not contained in the notice of investigation. On the merits, the Organization argues that the location of the alleged rule violation was protected pursuant to Rule 520. The protection was proper. Further, another Employee took full responsibility for the violation and Claimant cannot be held liable for another employee's rule violation.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

Although Rule 520 does apply when equipment is operating over the non-controlled track at issue, it does not cover this incident where the equipment was parked and secured in the yard. Rule 500 Section 5, entitled Work on Non-Controlled Track: Types of Protection, provides:

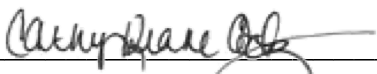
To establish working limits on non-controlled track, the EIC must make the track inaccessible to trains by using one or more of the following:

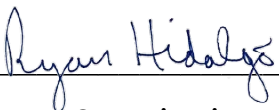
- Lining a switch or derail to prevent access to the working limits. The switch or derail must be securely locked and tagged.....
- On Non-Main Track, place a portable derail with a red sign at the location of the derail;...
- In non-signaled Yard limits, use red sign and portable derail as prescribed by On-Track Safety Rule 501;...


The evidence in the instant matter establishes that Claimant failed to affix the derail to the track but did not have a lock with which to secure the derail. The evidence also shows that Claimant spoke with a co-worker about having to be at an appointment. The co-worker stayed at the equipment waiting for the lock to be brought to the site in order to secure the derail. The co-worker admitted responsibility for not then affixing the lock to the derail.

Claimant secured the derail and arranged with a co-worker from his gang to place the lock on the derail. There is no substantial evidence in the record that Claimant violated the cited Rule where the co-worker was to affix the lock and did not do as he said.

Claim sustained.

  
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Carrier Member  
Cathy Cortez

  
\_\_\_\_\_  
Organization Member  
Ryan Hidalgo

  
\_\_\_\_\_  
Neutral Member  
Brian Clauss

Dated: November 19, 2019