

BEFORE PUBLIC LAW BOARD NO. 7566

CASE NO. 115

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

and

CANADIAN NATIONAL RAILWAY, WISCONSIN CENTRAL

Carrier's File WC-BMWED-2016-00045

Claimant: J. SMITH

STATEMENT OF CLAIM

"Claim of the System Committee of the Brotherhood that:

1. The discipline (suspension, deferred suspension and disqualification) imposed upon Mr. J. Smith for alleged violation of Carrier rules in connection with a run through switch on July 1, 2016 was arbitrary, capricious and in violation of the Agreement (Carrier's File WC-BMWED-2016-00045 WCR).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Smith'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 dated July 07, 2016:

To develop the facts and to determine your responsibility, if any, in connection with an incident that occurred at approximately 0915 hours July 01, 2016 at or near the Neenah Yard, when you allegedly ran through a switch, and whether you violated any Company rules, regulations and/or policies in connection with the incident."

As a result of facts developed at the investigation, the Claimant was notified by letter dated August 1, 2016, that he was accessed discipline of “20 days actual suspension from service and 10 days deferred suspension and Disqualified as Employee-in-charge for a period of one (1) year,” for violating USOR General Rule C-Alert and Attentive, USOR General Rule W-Job Briefings, USOR Rule 0520-Movement on Non-Main Track, USOR Rule 0701-Position of Switches and Derails and USOR Rule 0710-Switches Run Through.

The Carrier maintains that the evidence showed that Claimant ran through a switch with the dump truck. Witnesses testified that the switch was not lined for Claimant’s movement. After Claimant moved the dump through the switch, the switch was bent and threw much harder than it did prior to the run-through. Moreover, the video shows Claimant moving the dump through the switch and immediately exiting the cab and looking at the switch. Moreover, Claimant admitted that there was a loud bang and the dump truck shook as they operated through the switch.

The Carrier asserts no procedural violation because an administrator placed the video of the incident into Drop Box and was never told that the Organization could not access it during the appeal. The Organization cannot assert a procedural violation when they never alerted the Carrier that the electronic transfer was not working.

The Organization argues a procedural violation because the Carrier failed to supply all the evidence from the hearing at the appeal. Although the Carrier placed heavy reliance upon the video of the incident, the Carrier did not supply a copy of the video to the Organization. This is a fatal error which voids the instant discipline.

On the merits, the Organization asserts that although witnesses testified that the switch was run through by the Claimant while operating the dump, there were no eyewitnesses. Further, the Carrier witnesses could not explain why no photographs of the run-through switch were taken – suggesting that the photos would not have supported the allegations.

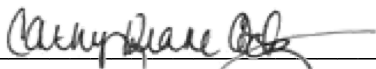
The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier’s judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is 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.

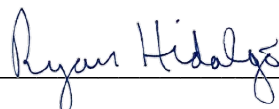
Rule 31G requires that a disciplined employee be given a true copy of the hearing and exhibits used to determine culpability and discipline. Here, a review of the evidence indicates that the Carrier did not comply with that Rule. The Carrier relied upon a video of the incident from a Company camera, but did not tender that piece of evidence to the Organization or to the Board. There is nothing in the record of the video being made available. The Organization cannot defend and this Board cannot review a disciplinary matter with an incomplete record of what the Carrier determined was inculpatory evidence.

The Organization has an Agreement right to the evidence used to determine culpability. The Carrier did not comply with the Rule.


Claim sustained.



Carrier Member
Cathy Cortez



Organization Member
Ryan Hidalgo



Neutral Member
Brian Clauss

Dated: November 19, 2019