

BEFORE PUBLIC LAW BOARD NO. 7566
CASE NO. 162/Award No. 162

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE

and

WISCONSIN CENTRAL LTD.

Carrier's File WC-BMWED-2018-00012
Claimant: Joseph Burclaw

Statement of Claim

“Claim of the System committee of the Brotherhood that:

1. The discipline [thirty (30) day actual suspension from service and disqualified from working as an EIC for a period of one (1) year] imposed upon Mr. J. Burclaw for alleged violation of U.S. Operating Rules - Position of Switches and Derails, U.S. Operating Rules - Main Track Switches, U.S. Operating Rules - Hand Operation of Switches, U.S. Operating Rules - Releasing Authority in Non-Signaled Territory was arbitrary, capricious and in violation of the Agreement (Carrier's File WC-BMWED-2018-00012 WCR).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Burclaw's personal record shall be cleared of the charges immediately and he shall be provided the remedy prescribed in Rule 31 of the Agreement. Additionally, the Claimant shall have his seniority restored, his accredited months of service and all benefits that were not received during his time out of service.”

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.

Facts

Claimant Joseph Burclaw, with approximately six and one-half (6 ½) years of service, has established and holds seniority in the Carrier's Maintenance of Way Department.¹ On January 9,

¹ The record does not include Mr. Burclaw's Personal Work History; therefore, his exact date of hire and any prior discipline are unknown.

2018 the Claimant, while assigned as a Track Foreman, and a co-worker, failed to properly align a main track switch in its normal position for mainline service at or near MP 78.12 on the Valley Subdivision, causing train L588/NS 9304 to be placed in emergency braking application upon noticing the improperly aligned switch. The alleged track authority violation resulted in a January 10, 2018 letter directing the Claimant to attend an investigation, held on February 28, 2018 after a February 8, 2018 postponement, to obtain the presence of the Claimant's co-worker. By letter dated March 19, 2018, the Carrier informed the Claimant of its conclusion that he had committed a Level 3 violation by violating the above-noted U.S. Operating Rules (USORs). The Claimant was assessed a thirty (30) day actual suspension and disqualified from working as an EIC for a one (1) year period. On April 5, 2018 the Organization filed a timely claim on Mr. Burclaw's behalf. The claim was properly progressed on the property without resolution and advanced to this Board for final and binding adjudication.

Carrier Position

The Claimant has been proven guilty as charged. He was the EIC. While Mr. Solinsky told the Claimant that the switch was properly aligned for main track movement, the Claimant had the ultimate responsibility to verify the alignment of the switch. He signed the job briefing indicating that the switch had been properly aligned. His supposed verification was insufficient. The hearing was fair and impartial without prejudgment, with the Claimant afforded representation, with a Hearing Officer who acted professionally and who did not commit procedural violations. The actual suspension and disqualification were just and for sufficient cause, as the Claimant violated several rules amounting to a Level 3 violation. The Carrier had the right to disqualify the Claimant. IC-Manager Sr. Engineering Robert Bennett was not solely responsible for the decision to discipline the Claimant, but consulted with others. With this appellate process, the Board should not substitute its judgment for that of the Carrier once guilt is determined.

Organization Position

The investigation was not fair and impartial as there was no preliminary investigation into the facts, there were no interviews with the train crew that reported the improper alignment and none of the crew were called to testify. The Carrier has not met its burden of proof as there is no evidence of a rules violation and no evidence that the Claimant and Mr. Solinsky were responsible for the misaligned switch. There was no lock on the switch. Keys to the lock are easily obtained and plentiful. Mr. Solinsky cannot remember if he aligned the switch, although the Claimant stated that his co-worker, in fact, handled the switch. Mr. Bennett was the charging officer and was involved in the decision to discipline, which made him "judge and jury."

Findings

The Claimant's conduct on January 9, 2018 must be measured against the USORs allegedly violated. USOR 700. Hand Operation of Switches requires that job briefings be conducted before employees use hand operated switches and what information is to be included in such briefings. USOR 701. Position of Switches states that the "employee handling a switch . . . is responsible for the position of the switch . . . and must . . . visually check to see that switches . . . are properly positioned for the intended movement . . ." USOR 702. Main Track Switches notes that "The normal position of a main track switch is for main track movement, and it must be lined and locked in that position when not in use. . . . Roadway Workers must confirm the position of the switch with the EIC or a designated employee who will notify the EIC." USOR 703. Releasing Authority in Non-Signaled Territory states that employees must confirm the position of a switch before releasing authority, "Report to the RTC when switch is in its normal position," and receive and confirm the RTC's acknowledgement.

The Board finds that the absence of questions for the crew of train L588 did not violate the fair and impartial requirement of Rule 31.A. The Trainmaster had been questioned and there is no dispute that the switch was not aligned for main line travel so that an emergency braking application was necessary. The crew could not have provided any insight into the actions of the Claimant or Trackman Paul Solinsky and it is the Claimant's actions or lack thereof that are at the heart of this case.

While USOR 700 is technically in the record, that is only because it is on the same page as Rule 701 that was referenced and referred to by the Carrier. Nor is Rule 700 listed in the notice of discipline as one of the rules the Claimant violated. It is not considered applicable.

While neither of the above-noted facets of this case are found to have resulted in an unfair and partial hearing, a third element requires a sustaining award. The record unambiguously establishes IC-Manager Sr Engineering Robert Bennett as the Charging Officer. The Claimant testified that during a January 12, 2018 phone call, Manager Bennett asked if the Claimant was "really taking this to investigation" and when Claimant Burclaw responded affirmatively, Manager Bennett said "You're both guilty" and hung up (TR-106, ll. 9-13). Manager Bennett's comments were confirmed by Track Inspector Arnold Waldburger. The only reasonable conclusion that this Board can draw is that Manager Bennett pre-judged the Claimant and Trackman Solinsky. The problem creating the need for a sustaining award arose when Manager Bennett participated in the decision to discipline the Claimant and, furthermore, signed the notice of discipline. Simply because Manager Bennett was one of three deciding on the discipline rather than the sole decision-maker, the problem does not go away. The Rule 31.A. requirement that the investigation be fair and impartial demands not only that this be objectively so but also that there must be an impression of fairness and impartiality. These things cannot occur when even one (1) of three (3) decision-makers has announced his determination of the Claimant's guilt prior to the investigation. It is critical that the record amassed during the investigation be reviewed and considered with fresh

eyes and an open mind. The Board will not put its stamp of approval on the process afforded Claimant Burclaw, thus the claim is sustained without consideration of the substance.

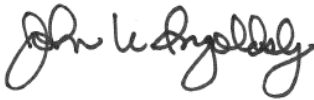
Award

Claim sustained.

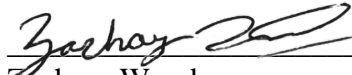
Order

The Carrier is hereby ordered to make an Award favorable to the Claimant in accordance with Rule 31.

In Dissent:



John K. Ingoldsby
Carrier Member



Zachary Wood
Organization Member



I.B. Helburn
Neutral Member

Dated: December 9, 2021