

BEFORE PUBLIC LAW BOARD NO. 7566
CASE NO. 210/Award No. 210

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE

and

WISCONSIN CENTRAL LTD./
CANADIAN NATIONAL

Carrier's File WC-BMWED-2019-00049
Claimant: Johnell Smith

Statement of Claim

“Claim of the System committee of the Brotherhood that:

1. The dismissal imposed upon Mr. J. Smith for alleged violation of USOR General Rule A - Safety, CT04 - Crane Operation and Material Handling and OTS 905 - Safety Precautions for Working On or Around Roadway Machines was arbitrary, capricious and in violation of the Agreement (Carrier's File WC-BMWED-2019-00049 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. 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 including, medical, dental and vision premiums, co-pays, deductibles and all other out of pocket expenses as well as 401(k) and CN Stock Purchase incentives.”

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

The Claimant has established and holds seniority in the Carrier's Maintenance of Way Department. His date of hire is June 7, 2011 and his Personal Work Record includes a Level 3, 45-day actual suspension effective July 16, 2019. The Carrier has stated that on May 22, 2019, then assigned as a Tractor Operator, Mr. Smith failed to use a tag line, as required, when

transferring a rail from a truck to the ground. By letter dated June 4, 2019 the Claimant was directed to attend an investigation, which after four (4) postponements took place on October 9, 2019. By letter dated October 29, 2019 the Carrier informed the Claimant that he had been found in violation of USOR General Rule A – Safety, CT04 – Crane Operation and Material Handling and OTS 905 – Safety Precautions for Working on or Around Roadway Machines and that he was immediately dismissed from service. On November 6, 2019 the Organization filed a timely claim on Mr. Smith’s behalf. The claim was properly progressed on the property without resolution and advanced to this Board for final and binding adjudication.

Carrier Position

There is substantial evidence of the Claimant’s guilt in the form of testimony from Sr. Eng. Mgr. Patrick Jones, adduced during the investigation, and written statements from Mr. Johnson and his co-worker that day, Mr. J. Smith, that they did not use a tag line on the rail. The audit done by Mgr. Jones and Field Health and Safety Specialist Hartlep, not the only audit these two performed, showed the unsafe procedure that was used. The investigation 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. There was just and sufficient cause for the dismissal, particularly given Mr. Smith’s previous suspension. There are no mitigating factors. In this appellate system, the Board is not to substitute its judgment for that of the Carrier once the Claimant’s violation has been shown.

Organization Position

The Carrier has not met the required burden of proof. USOR General Rule A is just that—a general rule—one that should not be used as a determining factor. There is no substantial evidence showing a violation of CT04 or OTS 905. The Claimant determined that using a tag line would be unsafe because the crane was not operating properly. He and Mr. Johnson could not have remained out of the line of fire during the entire transfer of the rail. The auditors were three hundred (300) feet away; too far to see if the crane was operating correctly. Moreover, Claimant Smith and Mr. Johnson were singled out for an audit. The dismissal was arbitrary and unwarranted, punitive rather than progressive, an example of disparate treatment.

Findings

USOR General Rule A Safety states that “Safety and a commitment to obey the rules are the most important elements in performing duties. If in doubt, the safe course must be taken.” CT04 – Crane Operation & Material Handling is actually a five-item checklist, the items being 1. Crane Inspection, 2. Load, 3. Ground and Environmental Hazards, 4. Load Securement and 5. Crane/Machine Travel. The instructions on the form state that “Each item **MUST** have final verification and Peer-to-Peer review to ensure completed correctly. Form is applicable when lifting with a mechanical device.” OTS 905 includes, among many other items, “5. When duties

require being near equipment stay outside the 15-foot line of fire zone.” The rule goes on to define the zone and to set forth related procedures. Included as part of the CN Discipline Policy is Appendix B, Consequences of Mixed Levels of Rules Violations. Mr. Smith was found by the Carrier to have committed a Level 2 violation. His prior Level 3 suspension was assessed within the last three years. Appendix B indicates that the combination of the two may result in discharge.

That Claimant Smith and Mr. M. Johnson failed to use a tag line as required is established by the written admissions of both men. Mr. Smith testified that there was a tag line in their truck. The explanation that they did not use the tag line because the crane was not operating properly, in essence an affirmative defense, is unpersuasive for three reasons: 1) Manager Jones testified that when asked on May 22, 2019 why they did not use the tag line Claimant Smith and Mr. Johnson “didn’t have a good response” (TR-19, l. 5); 2) there is no explanation for why not using the tag line increased rather than decreased safety; and 3) there is no record evidence that either Claimant Smith or Mr. Johnson reported problems with the crane to their supervisor. The Board finds substantial evidence that the Claimant violated CT04, Item 2, Tag line required and USOR General Rule A. Safety.

As for OTS 905, when asked by the Claimant’s representative if he still felt “that there’s no way they could be in the line of fire zone legally?” Manager Jones responded: “I think there’s no way they can be in the line of fire zone with the rail tilted and way out of balance and hanging up in a rail tongs. There no way (sic) you can get that. It’s just an unsafe practice” (TR-38, ll-12-19). Having considered the distance Mgr. Jones and Safety Specialist Hartlep were from the two men unloading the rail and testimony that Claimant Smith and Mr. Johnson might not have been able to remain out of the line of fire zone at all times, this Board finds that the violation of OTS 905 has not been established.

Finally, when considering the validity of the Organization’s allegations, this Board finds no support for the contention that the men were singled out and notes, further, solely for the sake of argument, that had they been singled out and had they been using the required tag line, making it easier to control the rail, an investigation and discipline would seem highly unlikely. Also, the Board has considered the prior awards submitted by the Organization and finds them inapplicable to the dispute considered herein.

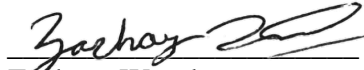
In considering the appropriateness of the dismissal, the record established that the Claimant received a Level 3 actual suspension effective July 16, 2019 for violations of several rules and policies, including OTS 905. Only three weeks after committing the infractions that resulted in the Level 3 actual suspension, the Claimant committed the violations considered herein. While discipline had not yet been assessed for the earlier violations, surely the Claimant had been made aware of the Carrier’s concern with his work performance, yet he committed the most recent unsafe act. The assessed dismissal is consistent with the CN Discipline Policy and the record, in the Board’s judgment, contains no mitigation.

Award

Claim denied.



John K. Ingoldsby
Carrier Member



Zachary Wood
Organization Member



I.B. Helburn
Neutral Member

Dated: December 9, 2021