

PUBLIC LAW BOARD NO. 7566

BROTHERHOOD OF MAINTENANCE OF)	Case No. 88
WAY EMPLOYES -- IBT RAIL CONFERENCE)	Award No. 88
)	
and)	
)	
CANADIAN NATIONAL/WISCONSIN)	
CENTRAL LTD.)	
)	Claimant: R. Zoromski

STATEMENT OF CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s decision to dismiss employee R. Zoromski from service for his alleged violation of USOR General Rule A – Safety, USOR General Rule B – Reporting and Complying with Instructions, USOR General Rule C – Alert and Attentive, USOR General Rule M – Railroad Property, LIFE U.S. Safety Rules – Section II: Core Safety Rules – Rights and Responsibilities #1 a through i in connection with alleged damage caused to a pole and power junction box while operating a speed swing on September 9, 2014 at or near Steven’s Point, Wisconsin was arbitrary, excessive and on the basis of unproven charges (Carrier’s File WC-BMWED-2014-00031 WCR).
2. As a consequence of the Carrier’s violation referred to in Part 1 above, Claimant R. Zoromski shall receive the remedy prescribed in Rule 31I of the Agreement, as well as having his seniority restored, his accredited months of service and all benefits that were not received during his time out of service.”

Findings:

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. Parties to said dispute were given due notice of hearing thereon.

A review of the record shows that Claimant was dismissed from service with the Carrier for violating USOR General Rules A- Safety, B – Reporting and Complying, C- Alert and Attentive, M – Railroad Property, LIFE U.S. Safety Rule Section II: Core Safety Rules.

The Carrier maintains that Claimant admitted striking the pole with the speedswing machine while moving rail and because of Claimant’s admission, there is no need to resort to any further analysis. Claimant’s testimony is evidence of guilt and in support, the Carrier points to Claimant’s statements and cites them as admissions:

Q. Do you take any exception to Mr. Amundson’s, I guess, interpretation of what he believes happened that day, the day of the alleged incident?

A. As far as the rail picked three-quarters of the way on the south end of the rail, whatever, I—I don't; know how – how far ahead it picked up.

Q. Uh-huh.

A. I mean, it could have been a foot. It could have been whatever. And the miscalculation I agree with because I did struck - - strike the telephone pole.

The Organization contends that Claimant was not provided a fair hearing in accordance with the Agreement because of prejudgment that was indicated by the bulletining of his position.. The Organization further claims that the Carrierwitness J. Jacobsen should have been called because he was on the Carrier's witness list, and when the Carrier did not call him, the Organization sought a continuance to obtain the witness. That request was denied by the hearing officer. Further, all the evidence showed was a minor accident – something that is a frequent occurrence in the yard. Further, the Carrier's witness opined that there was a safer method for Claimant to perform his task, however, he did not offer any thoughts on what that safer course was for the rail moving operation.

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.

After a review of the record, the Board finds that there was error at the investigation. The Carrier listed the EIC J. Jacobsen as a witness. At the hearing, the Organization requested that the witness be produced as follows:

H.O. Mr. Jacobsen will not be – we won't be able to – we won't be able to call him. He is currently unavailable.

Organization: Okay. Well, like I said, as he was listed as a witness, we fully expected to be able to question him. Furthermore, it came out in the investigation that he is – was in fact, the EIC, which certainly has ramification in this incident. And we would suggest that we postpone until Mr. Jacobsen is available or cancel the investigation altogether.

H.O: Your statement is taken. We will not postpone the investigation. Lets continue.

Organization: Okay. I'd like the objection noted for the record that the organization would protest going forward without the witness being made available.

H.O.: Objection noted.

Organization: Thank you. Are you going to rule on my objection?

H.O: I will.

Organization: And what's your ruling?

H.O: Denied.

Organization: Okay. We proceed under protest.

Mr. Johnson was a necessary witness to the Organization's defense. He was the only other employee with knowledge. Absent his testimony, the only other person with direct knowledge was Claimant. He did not deny striking the pole with the boom. However, he admitted to a miscalculation on the record and nothing more.

This Board has found in other matters before this Board that absent more, an incident does not automatically mean a Rule violation. Here, the Carrier was required to show the violation of the applicable Rules. The instant evidence established an admitted miscalculation. EIC Jacobsen would have testified to what actually occurred prior to the incident and during the incident – something that the Carrier's substantive witness could not discuss in testimony. The only direct witness of the job briefing and the work on-site was the Claimant.

On the facts of the instant matter, it was error for the hearing officer to deny the Organization's request for continuance to obtain EIC Jacobsen - a material witness that was listed on the Carrier's notice of investigation.

Award:

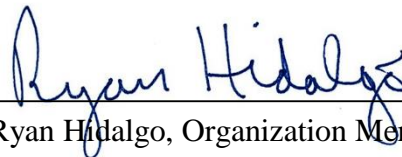
Claim sustained.



Brian Clauss, Chairman



Cathy Cortez, Carrier Member



Ryan Hidalgo, Organization Member

Signed on July 24, 2018