PUBLIC LAW BOARD NO. 7599

AWARD NO. 27
CASE NO. 27

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes Division
IBT Rail Conference

vs.

Grand Trunk Western Railroad Company

ARBITRATOR: Gerald E. Wallin

DECISION: Claim denied.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of Mr. S. Shepherd for violation of USOR General Rule A – Safety, USOR General Rule B – Reporting and Complying with Instructions, USOR General Rule H – Furnishing Information and Conduct, USOR Rule 100 –Rules, Regulations and Instructions, CN Engineering Life Book US Region Rule E-19 Part 4 Motor Vehicle Operation and CN Engineering Life Book US Region Section 2 Part 1-1 – Core Safety Rules: Rights and Responsibilities in connection with allegedly failing to follow the posted speed limit while operating a Company vehicle and allegedly failing to place a speed restriction was arbitrary, capricious, excessive and based on unproven charges (Carrier's File GTW-BMWED-2015-2016-0001 GTW).
2. As a consequence of the violation referred to in Part l above, Claimant S. Shepherd shall be granted the remedy in accordance with Rule 25, Section 4 of the Agreement."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was dismissed for two (2) forms of misconduct on September 2 and 3, 2015 in the vicinity of South Bend, Indiana. He was also removed from service pending completion of the investigation process. At the time of the incidents in question, Claimant had some thirty-five (35) years of service. His work record contained recent disciplinary entries, one of which was a thirty (30) day deferred suspension for failure to follow the posted speed limit while operating a

company vehicle less than one (1) month previously. Claimant did not challenge the proposed discipline and waived the investigation.

Our review of the transcript of the investigation, as well as the appeal process on the property, revealed several procedural objections advanced by the Organization. Although the record before us shows them to lack merit, the amount of time devoted to them during the investigation was extensive. Accordingly, some discussion of the objections might provide guidance for future investigations.

Rule 25 of the effective Agreement governs "Discipline, Investigations and Appeals." Section 1(d) of the rule provides that a charged employee "... shall be given at least five (5) days advance notice, in writing, of the *precise charge* of which he is accused ..." (Italics supplied) The provision does not contain any language that explicitly requires the Carrier to also include a listing of all rules, by rule number or letter, in a notice of investigation. Literally for decades, the prevailing view of public law boards as well as the National Railroad Adjustment Board is that a notice of investigation is sufficient if it provides enough details about the incident to direct the attention of the accused and his/her representative to the incident. Typically, where the notice accurately describes the date, time, place and the conduct involved, it satisfies the "precise charge" requirement. See, for example, Award No. 4 of Public Law Board No. 206, which dates from 1970. The notice in this case did accurately describe the date, the two milepost locations on the Dearborn Subdivision, and the four (4) aspects of Claimant's performance to be investigated. Moreover, the transcript does not show that the Claimant or his representative were either confused or somehow misled about the scope or nature of the investigation.

When Carrier's do include rule citations under similar Agreement language that does not explicitly require them to do so, it is not uncommon for the affected Organization to turn to the other side of the coin and object on the grounds that the claimant has been prejudged. It is for this reason that "precise charge" language does not require a listing of potential rules violated unless the effective Agreement contains additional terms that explicitly require such a listing or there is a substantial body of past arbitral precedent on the given property between the given parties that has evolved to create the requirement. No such prior awards have been cited to this Board.

Accordingly, the Organization's objection that the notice violated the "precise charge" language is found to lack merit. This finding is without prejudice to the Organization's ability to make this same objection in future similar matters if it can show prior award support between these same parties.

For its second objection, the Organization contended that Claimant was denied a fair and impartial investigation because the Carrier official who signed the notice of investigation was not present at the investigation to justify why the notice was issued. Nowhere in the text of Rule 25

provided to this Board do we find language that requires the notice signer to attend an investigation. We, therefore, find the Organization's objection to lack merit. This finding, again, is without prejudice to the Organization's ability to advance this objection in the future if it has sufficient award support.

The Organization's third objection was related to its second objection. The Organization objected to the Carrier's first witness contending that the witness somehow also became the charging party and, thus, played the dual role of charging party and witness. Not only is the record devoid of Agreement and prior award support for this contention, the record provides no logical rationale for this objection. It must be, and is, rejected.

For its fourth objection, the Organization contended it was entitled to interrogate the conducting officer of the investigation with 26 separate questions to determine whether the conducting officer was qualified to conduct a fair and impartial investigation. Again, nowhere in the text of Rule 25 available to this Board do we find any language that entitles the Organization's representative to determine the conducting officer's qualifications. Indeed, the Organization's effort on this point effectively attempts to usurp the authority of this Board. Among the several responsibilities of this Public Law Board, it is our role to review the transcript and exhibits to determine whether the investigation was conducted in a fair and impartial manner. This duty is performed by us on a case-by-case basis upon examination of the transcript whether the Carrier official is conducting his or her first investigation or the hundreth. It matters not what had gone on before as long as the transcript under review shows that the investigation was fair and impartial. Upon careful review of the transcript, we find that the instant investigation was fair and impartial. Accordingly, this fourth objection must be rejected.

For its fifth objection, the Organization challenged the introduction of all exhibits because they were not provided at least five days in advance of the investigation. Again, nowhere in the text of Rule 25 available to this Board do we find any requirement for the Carrier to provide such pre-hearing discovery. Once again, the Organization did not provide any prior award support between these parties interpreting Rule 25 language as the Organization does. Our finding, therefore, once again without prejudice, is that the Organization's objection lacks merit.

Although the foregoing were not the only objections advanced by the Organization, our review of the investigation does not reveal any that create a procedural barrier to our ability to consider the merits.

The record establishes that Claimant's work truck was equipped with a GPS device that monitored compliance with applicable speed limits. The monitoring capability reported that Claimant's speed reached 51 mph in a 40 mph zone. The capability was triggered when Claimant's speed exceeded 10 mph over the limit. The alert was initiated as Claimant's speed reached 51 mph when he was .42 miles into the speed zone traveling east-bound. This is

consistent with accelerating after entering the 40 mph zone. According to the record, it is undisputed that Claimant was counseled about the need to comply with applicable speed limits only one month beforehand. The record also establishes that the GPS equipment and alert mechanism was functioning properly at the time.

The following day, Claimant and his crew performed spot tie removal and replacement on Main Track 1 and 2 but did not place a temporary slow order over the disturbed segments of main track. The record establishes that it was his responsibility to do so. Indeed, the assistant-foreman-in-training on Claimant's crew showed the written regulations to Claimant that required the slow order to be placed. Nonetheless, Claimant did not do so. Although he believed a 25 mph slow order was already in place, which would obviate the need to place a second slow order on the same track locations, he was wrong. The existing slow order only applied to the crossover between Main Track 1 and Main Track 2 but did not protect the main track itself. It was Claimant's responsibility to check on such slow orders but he admitted that he did not do so. He claimed computer problems prevented him from doing so but the record is clear that he did not seek the required information by alternative means.

According to the record, both forms of the alleged misconduct adversely impacted safety considerations and created dangerous situations. Both forms constitute "Major Offenses" according to the record. As a result, the Carrier did not violate the effective Agreement by removing Claimant from service pending the outcome of the investigation process.

Given the state of the record, we find both charges of misconduct are supported by substantial evidence. In light of Claimant's prior disciplinary record, the Carrier was justified in concluding that previous corrective discipline did not work. Therefore, we do not find the Carrier's disciplinary decision to be excessive or unreasonable.

AWARD:

The Claim is denied.

Gerald E. Wallin, Chairman
and Neutral Member

R. Hidalgo,
Organization Member

C. K. Cortez,
Carrier Member

Date: 2-8-2018