

PUBLIC LAW BOARD NO. 7988

**CASE NO. 13
AWARD NO. 13**

**Brotherhood of Maintenance of Way Employees
Division - IBT Rail Conference**

and

SOO Line Railroad Company

**Claimant M. Haddon
System File No. D-27-21-390-08
Carrier File No. 2021-00023480**

BACKGROUND

Claimant M. Haddon occupied a Section Foreman position for approximately two (2) months as of March 20, 2021. On that date Claimant supervised a crew - - Loader Operator and Speed Swing Operator - - as the Employee in Charge ("EIC") and he reported to the Roadmaster - Bensenville (IL).

On March 31, 2021 the Manager - Workforce Planning & Support issued to Claimant a notice of formal investigation and hearing stating:

The purpose of this investigation/hearing is to determine the facts and circumstances and to place your responsibility, if any, in connection with your alleged failure to discuss specific procedures to protect against a hazard, you identified, with a Loader Operator working under your supervision, that lead to property damage of an Air Line while on duty Saturday, March 20, 2021. This indicates a possible violation of, but is not limited to, the following rules:

- **Engineering Safety Rule Book E-0 Job Briefings**
- **US Rulebook for Engineering Employees 29.3 Employee in Charge**

By mutual agreement the investigation/hearing convened on April 28, 2021 wherein Claimant and his representative presented testimony and examined the Carrier's witness and four (4) exhibits.

On May 12, 2021 the Assistant Chief Engineer - Chicago notified Claimant that "a review of the transcript of the investigation . . . contains substantial evidence and proof that you violated . . . **US Rulebook for Engineering Employees 29.3(B) Responsibilities of Employee in Charge**" and based on "the severity of the incident, and your past discipline history, and as Managerial Leniency you are hereby issued discipline of fifteen (15) demerits for a Second Non-Major Offense."

On July 9, 2021 the Organization appealed Claimant's discipline labeling it arbitrary and capricious and requesting expungement of the fifteen (15) demerits and restoration of any and all financial and benefit losses. Claimant was denied due process with a fair and impartial hearing as the record is incomplete and inaccurate as the transcript reports Claimant's testimony as "[indiscernible]" on multiple occasions. As required by Rule 29.3(B) Responsibilities of Employee in Charge, subsection 1.b, Claimant as the EIC "[made] definite work assignments" to the operators on March 20, 2021. The Speed Swing Operator did not perform his duties as assigned; he signed a "Waiver of Investigation" accepting responsibility for the incident. Responsibility and discipline have been assessed; imposing discipline on Claimant in this situation is not reasonable.

On September 3, 2021 the Carrier denied the appeal noting that Claimant received a fair and impartial hearing with no merit to the Organization's concern about the transcript. The Carrier established by substantial evidence that Claimant violated Rule 29.3(B) Responsibilities of Employee in Charge because he acknowledged not discussing the hazard posed by the Air Line with the Speed Swing Operator. The Carrier's response denying the appeal sets forth relevant portions of the Hybrid Discipline and Accountability Guidelines showing fifteen (15) demerits is an appropriate and lenient penalty. Any remedy granted by the Board must align with longstanding practice and Interpretation No. 1 of First Division Award 24718 which limits payment to an "actual wage loss" offset.

Following conference on April 19, 2022 and exchange of post-conference letters, the dispute remains unresolved and has been advanced to the Board for review and decision.

FINDINGS

Public Law Board No. 7988, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of this hearing and did participate therein.

This proceeding before the Board was conducted pursuant to the PLB Agreement dated December 16, 2021 where Paragraph (H) states, in part, as follows:

The parties agree that their . . . documentation will be limited to the notice of investigation, transcript of investigation, letter assessing discipline, and correspondence exchanged on the property, as applicable. . . . However, the Neutral Member shall have the authority to require the production of such additional evidence, either oral or written, as he or she may desire from the parties. The parties anticipate that cases will be routinely handled by the Board without any oral argument . . . In the event of an oral hearing . . . [n]o new evidence will be presented[.]

The Board's findings are drawn from the record defined in Paragraph (H) and evaluated in accordance with recognized and enduring precedent in railroad arbitration where the Board exercises its authority in an appellate forum. The scope of that authority is described in Third Division Award 21299 quoted in the Carrier's letter denying the appeal:

Numerous prior awards of this Board set forth our function in discipline cases. Our function in discipline cases is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question whether, without weighing it, there is substantial evidence to sustain a finding of guilty. If that violation is a matter which rests in the sound discretion of the Carrier. We are not warranted in disturbing Carrier's penalty unless we can say it clearly appears from the record that the Carrier's action with respect thereto was discriminatory, unjust or unreasonable, capricious or arbitrary, so as to constitute an abuse of that discretion.

The Carrier determined Claimant violated Rule 29.3 Employee in Charge, Section B Responsibilities of Employee in Charge, subsection B(5) - - "Supervise any work involving hazards and discuss specific procedures to protect against such hazards." There is substantial evidence that Claimant conducted a job briefing and made defined work assignments in work areas for the operators he supervised. He discussed the Air Line with the Loader Operator as it was in the operator's defined work area. Claimant did not discuss the Air Line with the Speed Swing Operator; it was not in the operator's defined work area; this operator was assigned to a defined work area; he exited his assigned area contrary to the EIC's job brief; he acknowledged misconduct and accepted responsibility assessed by the Carrier. The Hearing Officer attempted a speculative inquiry that had Claimant job briefed the Speed Swing Operator on the hazard there would have been no incident. The Hearing Officer's function is to construct a record of facts relevant to the incident and avoid constructing a record of hypothetical forecasting - - what may have occurred. This type of inquiry is not construed favorably for the Carrier.

The Board finds substantial evidence that Claimant performed EIC duties on the incident date in accordance with Rule 29.3(B)(5); the assessment of discipline is an abuse of managerial discretion. On that basis the claim is sustained. Claimant's record is expunged of any reference to demerits and the Carrier is ordered to restore, as appropriate, any loss of monies and benefits.

Award

Claim sustained.

The Carrier is ordered to make the Award effective on or before thirty (30) days following the date of the Award.

/s/ Patrick Halter

Patrick Halter

Neutral Member

Dated: March 15, 2023



Brian Scudds

Carrier Member

Dated: March 15, 2023



John Schlismann

Employee Member

Dated: March 15, 2023