

PUBLIC LAW BOARD NO. 7988

**CASE NO. 14
AWARD NO. 14**

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

and

SOO Line Railroad Company

**Claimant A. Seielstad
System File No. D-31-21-390-11
Carrier File No. 2021-00023621**

BACKGROUND

Claimant A. Seielstad has ten (10) years of service with the Carrier with all time served as the Bridge Tender at the Mississippi Swing Bridge. His duties involve opening and closing the bridge for traffic flowing north and south and inspecting trains traversing the bridge east and west. On April 3, 2021 Claimant opened the bridge at 0400 hours to allow passage of a barge. After the barge passed the bridge did not close until 0830 hours.

On April 7, 2021 the Assistant Chief Engineer - Structures issued to Claimant a notice of formal investigation and hearing stating:

The purpose of the investigation and hearing is to determine all facts and circumstances and place your responsibility, if any, in connection with your alleged failure to safely operate the bridge on April 3, 2021 resulting in significant damages to bridge and delays to train operations. This indicates a possible violation of, but is not limited to, the following rules:

- **US Rulebook for Engineering Employees 1.1 Safety**
- **US Rulebook for Engineering Employees 1.1.1 Maintaining a Safe Course**
- **US Rulebook for Engineering Employees 1.6 Conduct**
- **Mississippi Swing Bridge Opening and Closing Procedures**
- **Engineering Safety Book CORE Safety Rules 1 Rights and Responsibilities**

By mutual agreement the investigation and hearing convened on May 11, 2021 wherein Claimant and his representative presented testimony and examined the Carrier's witness and thirteen (13) exhibits.

On May 21, 2021 the Assistant Chief Engineer - St. Paul notified Claimant that "the hearing record contains substantial evidence and proof that you violated" the US Rulebook for Engineering Employees Rules 1.1 - Safety, 1.1.1 - Maintaining a Safe Course and 1.6 - Conduct as well as Mississippi Swing Bridge Opening and Closing Procedures. "Based on the facts and evidence in the hearing record and your past discipline history, you are hereby **dismissed from CP effective immediately.**"

On July 19, 2021 the Organization appealed Claimant's dismissal seeking his "reinstatement to service with seniority unimpaired and made whole for all financial losses and/or benefits . . . and to expunge his record of the dismissal . . . the same as if he was never affected by the Carrier's assessment of this capricious, arbitrary and excessive discipline."

Claimant was denied a fair and impartial hearing when the Hearing Officer noted for the record, but did not answer, all of the Organization's objections. Examples are (1) denial of due process by prejudging culpability when Claimant was removed from service prior to a hearing, (2) material change to the nature of the charge after the notice of hearing issued and (3) self-serving training certifications created by the Manager - Bridge Maintenance - St. Paul.

There is no evidence establishing the charged violations, only conjecture and speculation by the Manager. Claimant considered safety and acted without doubt or uncertainty by reporting the incident. Claimant operated the bridge at night; the only lights lifting the darkness were those attached to the bridge; he was disoriented when the bridge rotated in the dark. The Manager, with no personal knowledge why or how the bridge rotated improperly, concludes Claimant engaged in willful disregard or negligence of bridge opening and closing procedures. Retention of the rotational light switches, removed two (2) years past, would have prevented this incident.

On September 16, 2021 the Carrier denied the appeal noting that Claimant received a fair and impartial hearing. Rule 18 (Milwaukee Agreement) and Rule 20 (SOO Agreement) authorize the Carrier to withhold an employee from service "for serious rules infractions" such as this incident involving over-rotation of the bridge when closing it. Claimant's representative badgered the Hearing Officer with objections of no value. For example, changing the description of damages in the notice of hearing and training records in the record did not deny Claimant due process and fair and impartial hearing.

The correct operation of the bridge is constant - - the bridge opens to the right and it closes to the left. Claimant is rules qualified; he received annual training in the shape of one-on-one instruction from the Manager on March 16, 2021 addressing movable bridge operations including the opening and closing procedures. Claimant attempted to close the bridge by

rotating it one hundred seventy (170) degrees in the wrong direction. Human error caused the incident, as Claimant noted in his damage report, and the resulting damage rendered the bridge inoperable thereby delaying train traffic.

Discipline is warranted for this major rule violation. Claimant's prior discipline is a major violation with thirty (30) day suspension (July 20, 2019), major rule violation with twenty (20) day suspension (April 22, 2019) and Formal Reprimand (November 19, 2018). This incident is Claimant's third major rule violation within 2 years. The next progressive disciplinary measure is dismissal. Should any remedy be granted by the Board, payment is limited to "actual wage loss" offset consistent with longstanding practice and Interpretation No. 1 of First Division Award 24718.

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.

Substantial evidence resides at the lower end of the evidentiary scale; it is not onerous to attain compared to clear and convincing evidence and beyond a reasonable doubt. Substantial evidence may be direct as in eye-witness observation and personal knowledge or indirect such as circumstantial and inferential.

The record reflects Claimant's receipt of due process and a fair and impartial hearing in accordance with the controlling Agreement and industry conventions. As for the procedures to open and close the bridge, they have not changed during Claimant's tenure as Bridge Tender at the Mississippi Swing Bridge. The bridge opens to the right and closes to the left. On the incident date April 3, 2021 Claimant opened the bridge in accordance with procedure but did not close the bridge in accordance with procedure as he over-rotated the bridge 170 degrees in the wrong direction which damaged the bridge and delayed traffic. Claimant's damage report identified "human error" as the cause; the Organization's closing at the hearing counters that "human error" would not have occurred in this situation had the Carrier retained rotational limit switches which it removed 2 years ago. Regardless. Claimant testified to his error in closing procedure - - "Obviously, I closed the wrong direction which indicates . . . in turns, broke the ladder that gets down to the side of the bridge. Hung up on walkway." Aside from not following closing procedures by rotating the bridge in the correct direction, Claimant noticed the bridge rotating in the wrong direction and allowed it to continue rather than stopping it. This substantial evidence supports the Carrier's determination that Claimant violated the charged rules and procedure.

On March 16, 2021 Claimant received one-on-one annual refresher training from the Manager addressing movable bridge operations including procedures to open and close the bridge. Claimant is knowledgeable about opening and closing procedures by training and experience. This incident is a major rule violation under the Hybrid Discipline and Accountability Guidelines ("Guidelines") and Claimant's third major rule violation within 2 years. With prior discipline for major rule infractions, progressive measures are not correcting his standing as intended under the Guidelines.

Applying the substantial evidence findings on rules violations and incorrect closing procedure withing the structure of Third Division Award 21229, the claim will be denied.

Award

Claim denied.

/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