

PUBLIC LAW BOARD NO. 7988

**CASE NO. 6
AWARD NO. 6**

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

and

Soo Line Railroad Company

**Claimant: D. Shoopman
System File No. D-09-21-445-07
Carrier File No. 2021-00021893**

BACKGROUND:

On January 21, 2021 the Carrier issued to Claimant D. Shoopman a notice of formal investigation and hearing which stated, in part, as follows:

The purpose of this investigation/hearing is to develop the facts and circumstances and to place your responsibility, if any, in connection with your alleged failure to identify the work perimeter while using a Crane/Boom while on duty Friday, January 15, 2021. This indicates a possible violation of, but not limited to, the following rules:

- **GCOR 1.1 Safety**
- **GCOR 1.3.1 Rules, Regulations and Instructions**

On the agreed-upon date February 9, 2021 the investigation/hearing convened. Claimant, with representation assistance, presented testimony and examined the Carrier's witness and five (5) exhibits.

On February 24, 2021 the Assistant Chief Engineer - Chicago determined that Claimant violated GCOR 1.3.1 - Rules, Regulations and Instructions. "The incident is considered a Major Rule Violation under the Company Discipline process" and "[b]ased on the facts and evidence in the

hearing record, the severity of the incident, and your past discipline history and as Managerial Leniency you are hereby issued discipline of twenty (20) demerits."

On April 23, 2021 the Organization filed an appeal; the Carrier denied the appeal on May 14, 2021. The dispute remains following conference on September 1, 2021 as confirmed in the Organization's letter dated September 2, 2021. In accordance with the Agreement dated December 16, 2021 this dispute is before 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 the hearing and did participate therein.

Paragraph (H) in the Agreement states that documentation comprising the record "will be limited to the notice of investigation, transcript of investigation, letter assessing discipline, and correspondence exchanged on-property, as applicable." Additionally "[t]he 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." No additional oral or written evidence was required.

In this appellate forum, the Board's role and function is to review the record. The scope of the review is recited in Third Division Award No. 21299 and referenced in the Carrier's response to 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 question is decided in the affirmative, the penalty imposed for the 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 Carrier's action with respect thereto was discriminatory, unjust, unreasonable, capricious or arbitrary, so as to constitute an abuse of that discretion.

This is a discipline case. The responsibility to establish, by substantial evidence, facts in support of the charged rules violations and show that the discipline assessed is appropriate resides with the Carrier. Substantial evidence resides at the base of the evidence pyramid, an unexceptional level or threshold compared to preponderance of the evidence, clear and convincing evidence or beyond a reasonable doubt. Substantial evidence may be direct and firsthand, eyewitness observation or indirect and circumstantial.

Claimant acknowledged understanding safety requirements; he has witnessed cones placed around a crane to designate the work perimeter. Claimant is rules qualified including the charged GCOR 1.3.1 - Rules, Regulations and Instructions which states under "Safety Rules" that "[e]mployees must have a copy of, be familiar with, and comply with all safety rules issued in a separate book or in another form." GCOR 1.3.1, standing alone, is notice about compliance with all safety rules and, when placed in the context of the incident identified or described in the notice of formal investigation and hearing, serves as a specific charge of safety tied to a specific safety incident involving cones designating a work perimeter around the crane. Based on Claimant's understanding of safety and awareness that cones are a protective measure, the record shows he did not comply with GCOR 1.3.1 - Rules, Regulations and Instructions.

The deciding official determined that "the incident is considered a Major Rule Violation under the Company Discipline process" and "[b]ased on the facts and evidence in the hearing record, the severity of the incident, and your past discipline history and as Managerial Leniency you are hereby issued discipline of twenty (20) demerits." The Organization points out that under the "Company Discipline Process" (the Process), GCOR 1.3.1 is not a Major Rule Violation - Life Threatening and Conduct Unbecoming because it is not one (1) of the seven (7) incidents listed under that category and the Process states that "[d]emerits only apply to Non-Major Offences and/or Attendance related matters[.]" The Process provides that an employee "may be assessed [ten] 10 demerits" for a first time, non-major offense. The Carrier states that departmental Critical Life Saving rules and events elevate a first time non-major offense to a major offense. Other than a sentence referring to the Critical Life Saving rules and events, they are not set forth in the record. The Board will follow the Process for a first time non-major offense. Applying the Carrier's managerial leniency in the decision letter, the Board will assess Claimant five (5) demerits.

AWARD:

Claimant is assessed five (5) demerits.

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



Patrick Halter
Neutral Referee

Dated: 8.11.2022



Erica Barnard
Carrier Member
Dated: August 11, 2022



John Schlismann
Employee Member
Dated: August 11, 2022