

PUBLIC LAW BOARD NO. 7988

**CASE NO. 7
AWARD NO. 7**

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

and

Soo Line Railroad Company

**Claimant: D. Frederiksen
System File No. D-15-21-445-10
Carrier File No. 2021-00022226**

BACKGROUND:

On February 12, 2021 the Carrier issued to Claimant D. Frederiksen a notice of formal investigation and hearing which stated, in part, as follows:

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 yield for rolling stock while on or about the tracks at the Bensenville Hump Lead while on duty on Tuesday, February 2, 2021. This indicates a possible violation of, but not limited to, the following rules:

➤ **Engineering Safety Rule Book E-22 On or About Tracks**

On the agreed-upon date February 25, 2021 the investigation/hearing convened. Claimant, with representation assistance, presented testimony and examined the Carrier's witness and five (5) exhibits.

On March 11, 2021 the Assistant Chief Engineer - Chicago notified Claimant of the following:

Upon a review of the transcript of the investigation it has been determined that the hearing record contains substantial evidence and proof that you violated the following rules:

➤ **Engineering Safety Rule Book E-22 On or About Tracks**

Based on the facts and evidence in the hearing record, the severity of the incident, and your past discipline history, you will serve a twenty (20) day unpaid suspension.

On May 10, 2021 the Organization filed an appeal; the Carrier denied the appeal on May 17, 2021. The dispute remains following conference on September 1, 2021. In accordance with the Agreement dated December 16, 2021 the 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.

As stipulated in Paragraph (H) of the Agreement, the record in this proceeding "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." Additional oral or written evidence was not required.

In this appellate forum the Board's role and function is to review the record. The scope of that review is set forth in Third Division Award No. 21299 as reported by the Carrier in its 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 dispute is a discipline case. The Carrier's responsibility is to present substantial evidence that establishes facts supporting the incident at issue and show that the assessed discipline is appropriate under the circumstances. The Carrier's response refers to Second Division Award No. 7492 where substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Substantial evidence may be direct, eyewitness observation or indirect and circumstantial. 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.

On February 2, 2021 at approximately 5:30 p.m. Claimant operated a front-end loader through a crossing without yielding for rolling stock that was approximately fifty (50) feet from Claimant. In this regard, the Trainmaster observed the hump job pulling west. As soon as it stopped, the Conductor pulled the pin to separate some cars. The cars started rolling down the lead towards the bowl and, at that time, the Trainmaster observed Claimant drive the front end loader across or through the crossing. When that occurred the Trainmaster observed the Conductor throwing his hands up in the air which the Trainmaster viewed as the Conductor wondering why Claimant pulled out in front of the cars. The Carrier states Claimant must look out for moving cars or rolling stock when on or about the tracks and his failure to do so on February 2, 2021 violates Engineering Safety Rule Book E-22 - - On or About Tracks ("Expect movement of any train, engine, car, or equipment/track unit at any time, on any track, and in either direction, when approaching a crossing, or fouling tracks.")

The Trainmaster observed this incident from his second-floor office located in the General Yard Office which provides a clear view of the hump yard; he had an unobstructed view of the incident; a tower nearby provides light at the crossing. Claimant states that the rolling cars were approximately one hundred (100) distant when he traversed the crossing. He states he and the Conductor looked at each other but did not express any words; Claimant interpreted this silent eye exchange as the Conductor approving of Claimant driving through the crossing. Claimant states he exercised his discretion when approaching and moving through the crossing; he denies the charged rule violation.

Notwithstanding the competing versions of the incident, the Board's review of the record is undertaken in the framework of Third Division Award No. 21299 which shows the Carrier did not act in an arbitrary, capricious or discriminatory manner nor abuse its discretion. In developing the record the Carrier provided Claimant with notice of the charged rule, a description of the incident under investigation, afforded Claimant due process and a fair and impartial hearing prior to rendering a decision to assess discipline. The assessment of a twenty (20) day unpaid suspension comports with the Hybrid Discipline and Accountability Guidelines where Claimant's infraction is a major rule violation and a 20-day suspension is the minimum sanction.

Since the Claimant received due process, a fair and impartial hearing and the Carrier's actions and decision are not arbitrary, capricious, discriminatory or an abuse of its discretion, the Board will deny this appeal.

AWARD:

Appeal denied.



Patrick Halter

Neutral Referee

Dated: 8/11/2022



Erica Barnard

Carrier Member

Dated: August 11, 2022



John Schlismann

Employee Member

Dated: August 11, 2022