

**PUBLIC LAW BOARD NO. 7988**

**CASE NO. 8  
AWARD NO. 8**

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

**and**

**Soo Line Railroad Company**

**Claimant: A. Ochoa  
System File No. D-18-21-445-11  
Carrier File No. 2021-00022227**

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**BACKGROUND:**

On February 16, 2021 the Carrier issued to Claimant A. Ochoa 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 fouling of Live Rail Road Tracks without protection while on duty on Tuesday, February 9, 2021. This indicates a possible violation of, but not limited to, the following rules:

➤ **GCOR Rule 21.2 OTS for Non-Controlled Tracks**

On the agreed-upon date February 24, 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-17, 2 Material and Personnel Handling Equipment
- Engineering Safety Rule Book E-22, 2 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 July 8, 2021. The dispute remains following conference on September 1, 2021. In accordance with the Agreement dated December 16, 2021 this dispute is before the Board for review and decision.

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## **FINDINGS:**

Public Law Board No. 7988, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee 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. As stated in Second Division Award No. 7492 substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." 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 9, 2021 the Roadmaster observed and witnessed Claimant foul live railroad tracks without protection. The definition for "Fouling a track" is - -

The placement of an individual or an item of equipment in such proximity to a track that the individual or equipment could be struck by a moving train or on-track equipment, or in any case is within four feet of the field side of the near running rail.

Claimant was delivering rail material using a crane. Upon arriving at the worksite he did not stop for a job briefing with his Foreman. The rails were positioned sideways in the grapple of the crane. Given this position the rails were hanging over the track and swinging between the two (2) pieces of rail with Claimant's crane in the right-of-way area next to the track but not on the tracks. Claimant was within four (4) feet of the track and fouling track without protection. The Roadmaster contacted the General to remove the track from service until this situation was resolved prior to incurring train delays or a grave accident involving personnel.

Claimant is rules qualified on track safety, OTS, GCOR and Engineering Safety. The notice of investigation/hearing identified his actions on February 9, 2021 as a possible violation of GCOR Rule 21.2 OTS for Non-Controlled Tracks. The facts developed at the investigation/hearing led the Carrier to determine that Claimant violated Engineering Safety Rule Book E-17, Material and Personnel Handling Equipment, number 2 ("Do not carry or swing loads over people or unprotected track") and Engineering Safety Rule Book E-22, On or About Tracks, number 2 ("Ensures that proper protection is in place prior to working on a track"). The change in the rule violation set forth in the notice to different rules in the decision letter is inconsequential in the circumstances of this appeal. The Board finds substantial evidence that Claimant violated the rules in the decision letter.


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. There is substantial evidence that the Carrier's assessment of a twenty (20) day unpaid suspension was appropriate.

The Hybrid Discipline and Accountability Guidelines identifies Claimant's infractions as a major rule violation and the 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.

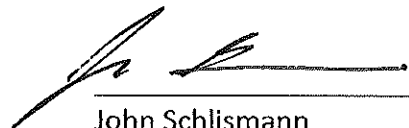


Patrick Halter  
Neutral Referee

Dated: 8.11.2022



Erica Barnard  
Carrier Member  
Dated: August 11, 2022



John Schlismann  
Employee Member  
Dated: August 11, 2022