

PUBLIC LAW BOARD NO. 6493

PARTIES TO THE DISPUTE:

DELAWARE & HUDSON RAILWAY COMPANY, INC.

- and -

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES

STATEMENT OF CLAIM:

BMWE now files this appeal, pursuant to Rule 25 of the most current BMWE/D&H agreement:

Appeal of BMWE of Discipline of 30 Demerits plus time served Assessed Against J. A. Radzikowski, Employee No. 684967, for "Failure to comply with NORAC Rules(s) D, S, and 997, effective January 17, 2000, Rules 2.7 (NORAC Rule 141) (p. 18), 2.7.1 {P. 191, 3.0(P.20), 3.1 {P.201, 3.1.1 {P.21}, 3.1.2 {P.211. Rules 1.1, 1.2, and 1.11 (P.1) from the D & H Safety Code and Policy (DHC-1000) effective July 1992, account while performing your duties as a Track Foreman on November 8, 2002 (0700 Hours to 1530 Hours) at Buffalo, New York (SK Yard), which was reported to the Carrier on November 12, 2002 by the Federal Railroad Administration (FRA) and the New York State Department of Transportation (NYSDOT) account you had improper control of the entry to an inaccessible track (no derail installed on the Market Track, improper placement of derail to protect Roadway workers on Lead Track and derail not properly installed on Track 31)".

Public Law Board 6493 upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Board has jurisdiction over the dispute involved herein.

Parties to said dispute exercised the right to appearance at hearing thereon.

OPINION OF BOARD: Mr. J. A. Radzikowski ("Claimant") was working as a Track Foreman on November 8, 2002, assigned to supervise and assist employees working in SK Yard, Buffalo, NY in the repair of damage caused by a November 6, 2002 derailment; which is described with more specificity by this Board in Award No. 11, Case No. 11. Based on alleged safety derelictions in the performance of that work, as observed and reported to Carrier by a NYS DOT Inspector, Claimant was charged with the Safety Rule violations set forth in the Statement of Claim, *supra*. Following a formal hearing at which he appeared and participated with representation by the Organization, Claimant was found culpable as charged by Carrier and assessed discipline of thirty (30) demerits and disqualification as Foreman.

The Organization perfected a timely appeal which was denied at all levels of handling until final appeal to this Board for binding determination in arbitration. We have carefully reviewed the record and find no fatal procedural flaws. Thus, the questions for the Board to consider are: 1) whether Carrier proved its charges by a preponderance of the record evidence and 2) If so, whether the *quantum* of discipline assessed was arbitrary, unreasonable or discriminatory in all of the facts and circumstances.

The disciplinary action under review arose out of a November 12, 2002 report by an official of the NYS DOT, which triggered a joint FRA/NYS DOT citation of Carrier for safety violations observed at the work site which was under Claimant's control and supervision on November 8, 2002. It is undisputed that on Friday, November 8, 2002, NYSDOT Inspector Keith McClain visited the derailment repair work site in SK Yard; where Foreman Radzikowski was Foreman in Charge of repairs being made to the Market Switch. As McClain observed a train approach the work area and a train passing on the lead within six feet of the workers on the Market Switch area, he noticed there

was no lookout protection employee assigned . He also observed that a derail protecting the work was installed only a few feet away from the workers, that another derail on Track 31 was installed backwards and that no derail was applied on the Market Track with cars occupying same. In reporting this incident on November 12, 2002, the NYS DOT Inspector noted that this was, in effect, "the last straw". In that connection, it was also noted that Foreman Radzikowski had previously been orally warned and/or written up for similar safety infractions by FRA and NYS DOT inspectors in April, June and August of 2002.

At the formal investigation, Claimant acknowledged the fundamental factual accuracy of the joint NYS DOT and FRA complaints against him, *i.e.*, "Improper control of entry to inaccessible track. (No derail installed on Market Track, improper placement of derail to protect Roadway Workers on Lead Track, derail not properly installed on track 31)". In that connection, the transcript shows the following testimony:

Q. Mr. Radzikowski, did you install a derail on the Market track switch after the DOT inspector brought it to your attention?

A. Yes, I did, for the grade. Yes, I did. It was a siding. Yes, I did.

Q. And, Mr. Radzikowski, what is it about the grade at this location that would require a derail?

A. I didn't think the grade was that severe because I thought the hand brakes and the wood chocks would be sufficient but he said he had to have a derail. We had the hand brakes and the wood chocks.

Q. And, Mr. Radzikowski, if the cars had had the hand brakes released and the wood chocks removed, would the cars have rolled in your direction?

A. Yes.

* * *

Q. In the first item, the improper control of entry to inaccessible track, no derail installed on the Market track, was a derail installed?

A. After the fact.

Q. After your meeting with Mr. McClain?

A. Yes.

We cannot find that Carrier erred in holding there was no decision for the Claimant to make to forego of a derail on the Market switch, since the rule mandates it to protect the workers from any movement of the cars on the track in question.

Similarly, Claimant conceded that he was the person who had placed the derail backwards from its required position on Track 31.

Q. And, Mr. Radzikowski, specifically on November 8, 2002 were you made aware of or at some point did you become aware of a situation where the FRA or the DOT took exception with the track protection you were using?

A. Yes.

Q. And, Mr. Radzikowski, how did you become aware of that?

A. DOT inspector Keith McClain mentioned to me on one of the derails on track 31, to turn it around, and I did and I needed another derail on the Market switch because of the grade and he said put one on, so I did.

Q And, Mr. Radzikowski, first on Track 31, who installed the derail on this track?

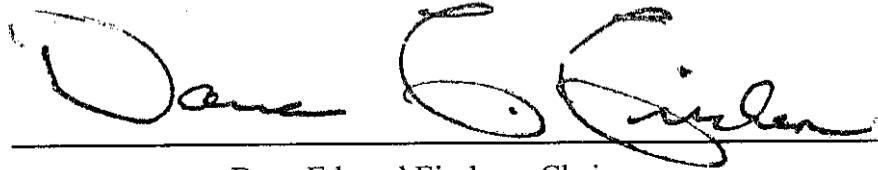
A. I did.

Given the state of this record, Carrier more than carried its burden of persuasion that Claimant was culpable as charged. Nor, given the serious safety issues involved and his evident failure to respond to prior oral and written warnings, can we find that Carrier abused its managerial discretion in assessing 30 demerits and disqualification as the disciplinary penalty for Claimant's proven violations. Based on all of the foregoing, the claim must be denied.

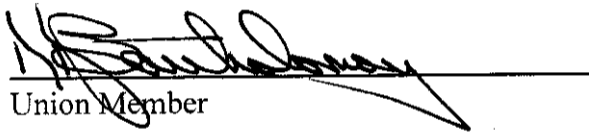
AWARD NO. 12
NMB CASE NO. 12
UNION CASE NO. 12
COMPANY CASE NO. 8-00356

AWARD

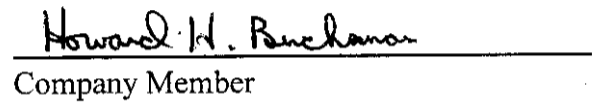
Claim denied.

A handwritten signature in cursive script, appearing to read "Dana Eischen", written over a horizontal line.

Dana Edward Eischen, Chairman

A handwritten signature in cursive script, appearing to read "H. Buchanan", written over a horizontal line.

Union Member

A handwritten signature in cursive script, appearing to read "Howard H. Buchanan", written over a horizontal line.

Company Member