

AWARD NO. 321
Case No. 321

File No. System File Hurley-C-07-19-INV/MW-BLUE-19-63-LM-463 SOU

SPECIAL BOARD OF ADJUSTMENT NO. 1049

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
) DIVISION – IBT RAIL CONFERENCE
TO)
)
DISPUTE) NORFOLK SOUTHERN RAILWAY COMPANY
) (FORMER SOUTHERN RAILWAY COMPANY)

STATEMENT OF CLAIM:

Claim on behalf of the System Committee of the Brotherhood that:

1. The Carrier's discipline [twenty-five (25) day actual suspension] of Mr. C, Hurley, issued by letter dated August 5, 2019, in connection with his alleged improper performance of duty in that on July 10, 2019, the boom on a contractor's material handling truck was not secured to prevent movement and struck contract employee R. Bostic in the back while Claimant was in the crow's nest of the truck operating a pole saw was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File Hurley-C-07-19-INV/MW-BLUE-19-63-LM-463 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant C. Hurley shall now have his suspension set aside with all notations thereof removed from all Carrier records and he shall also be restored all seniority and all financial and benefit losses, such as vacation and health insurance benefits occasioned as a result of the violation, including: (1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of suspension from service (this amount is not reduced by earnings from alternate employment obtained by Claimant while wrongfully suspended); (2) any general lump-sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service; (3) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was suspended from service, or on overtime paid to any junior employee for work Claimant could have bid on and performed had Claimant not been suspended from service; and (4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly suspended."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement, that this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

On July 10, 2019, Claimant C. Hurley, who was assigned to a foreman position, was working with a contractor employee to remove trees and limbs that had been reported as contacting rolling stock near MP 59PC on the Appalachia District. Claimant had been using a pole saw to cut the lower limbs near the track, and the contractor employee had been using his material handling truck and boom to reach the higher limbs. At one point, the contractor employee was experiencing issues in bringing down a limb, and Claimant got in the crow's nest of the truck to use the pole saw for that purpose. While Claimant was in the crow's nest cutting limbs, the boom of the truck moved, striking the contractor employee in the back.

By notice dated July 15, 2019, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with improper performance of duty during the incident described above in that the boom of the contractor's material handling truck was not secured to prevent movement and struck the contractor employee in the back while Claimant was in the crow's nest of the truck operating a pole saw. The hearing was held July 30, 2019, after which Claimant was found to be guilty as charged, and by notice dated August 5, 2019, he was assessed a 25-day actual suspension.

The Organization challenges the discipline assessment on both procedural and substantive grounds. It first contends that Claimant was denied his right to a fair and impartial hearing when the Carrier failed to issue precise charges, stating that the notice of investigation did not reference the specific rule Claimant was alleged to have violated. The Organization asserts that the lack of a rule citation is a violation of the applicable agreement, and it argues that the discipline should be overturned on that basis alone. It further objects that the hearing officer had prejudged Claimant based on his own prehearing conduct, and it asserts that the discipline should be overturned on that

basis as well.

With respect to the merits, the Organization maintains that the discipline assessment was unwarranted, arguing that the Carrier failed to meet its burden of proof in connection with all of the charges. It contends that the Carrier did not provide sufficient evidence to establish that Claimant was at fault for the incident, but rather he performed his assigned duties to the best of his abilities. The Organization states that the contractor employee was solely responsible for the operation of the truck and its equipment, and it cites Claimant's testimony that the contractor told him the entire machine would be inoperable after Claimant turned it off. It avers that Claimant should not be held responsible for the reckless actions of the contractor employee.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. It notes Claimant's testimony that he is a member of the safety committee who takes safety seriously and encourages others to do the same. The Organization points out that Claimant has 12 years of service with no prior discipline and it contends that, even if the charges had been proven, which it denies, the suspension imposed was harsh and excessive, rather than progressive, for a first offense of this nature. The Organization concludes that the suspension was not warranted, and that the claim should be sustained.

The Carrier, on the other hand, maintains that there is no reason to disturb the discipline assessment. It states that Claimant received a fair and impartial hearing, and it argues that there is no agreement requirement to cite a specific rule in a notice of investigation. The Carrier states that the purpose of a notice of investigation is to make the employee aware of the matter to be investigated so that a defense may be prepared, and it avers that the notice of investigation in this case did just that. It also states that the hearing officer conducted the hearing in a fair and impartial manner, and it denies that he had prejudged Claimant's guilt.

With respect to the merits, the Carrier maintains that the record contains substantial evidence to support the discipline assessed, stating that there is no question that Claimant was guilty of the charges levied. It asserts that the evidence, including the testimony of the charging manager,

establish that Claimant was in charge of the work group, and that he failed to properly perform his duty when the boom of the contractor's truck was not secured to prevent movement during the work in question. The Carrier notes that it was Claimant who made the decision to move the boom from the bed of the truck to a position where it was no longer safely knuckled in, and it points to his testimony that he was not qualified to operate a material handling truck. The Carrier posits that the incident would not have happened if Claimant had not made the decision to operate the truck himself.

With respect to the level of discipline imposed, the Carrier states that Claimant's actions were dangerous and life threatening. It states that significant discipline is warranted, citing prior cases in which dismissal was upheld when employees failed to safely perform their duties. The Carrier states that there are no mitigating circumstances which warrant modification of the discipline, and it asserts that the suspension assessed is appropriate in light of the significance of the infraction.

We have carefully reviewed the record in this case and the parties' arguments, and we find no procedural barrier to our consideration of the merits. We find that the notice of investigation adequately apprised Claimant and his representative of the matter to be investigated. On the specific facts of this case, we also find no indication that the hearing was not fair and impartial.

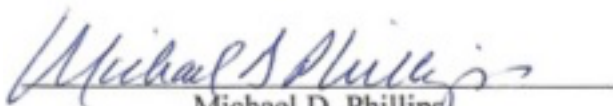
With respect to the merits, we find that the Carrier has provided sufficient evidence to establish that Claimant was in violation of the cited rules. The Carrier's burden in matters such as this is not proof beyond a reasonable doubt, but merely the production of substantial evidence to support the discipline assessment, which has been defined in prior awards as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.


Here, we believe that the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that Claimant improvidently attempted to operate the material handling truck which he was not qualified to operate, resulting in the boom being left unsecured and the injury to the contractor employee. While it is apparent that the contractor employee's actions contributed to the matter, it has been observed many times that the failure of one employee does not relieve


other employees of their own obligations to comply with relevant rules.

The next question before us concerns the level of discipline assessed. The Carrier's concern regarding compliance with all applicable safety rules is obviously well founded. We do believe, however, that the record contains mitigating factors which warrant a lesser degree of discipline than was imposed here, not least of which is Claimant's 12-year service record which contains no prior discipline events. And as noted above, it is also apparent that the contractor employee bore some responsibility for the incident. For Claimant's first offense, we believe a suspension of 10 days would be appropriate in these circumstances, and that Claimant should be paid for time lost in excess of 10 days.

AWARD: Claim sustained in accordance with the findings. The Carrier is directed to comply with this Award on or before thirty (30) days following the Award date below.


Michael D. Phillips
Chairman and Neutral Member


Adam Gilmour
Employee Member


Scott Goodspeed
Carrier Member

Dated: November 13, 2023