

AWARD NO. 322
Case No. 322

File No. Weaver-RJ-08-19-INV/MW-FTW-19-90-SG-577 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 (dismissal) of Mr. R. Weaver, issued by letter dated October 1, 2019, in connection with his alleged improper performance of duty in that at approximately 4:50 P.M. on August 13, 2019, while operating a rail heater over the South Pearl Road Grade Crossing at Mile Post B437.3 when he allegedly failed to stop short of a private vehicle fouling the crossing, resulting in a collision between his machine and the vehicle was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File Weaver-RJ-08-19-INV/MW-FTW-19-90-SG-577 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant R. Weaver 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 dismissed."

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 August 13, 2019, Claimant R. J. Weaver was working as a machine operator on R3 Dual Rail Gang, operating a rail heater. When Claimant approached the grade crossing at South Pearl Road, MP B437.3, he was unable to stop before colliding with a private vehicle that was fouling the crossing.

By notice dated August 21, 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 he failed to stop short of a private vehicle fouling the crossing, resulting in a collision between his machine and the vehicle. The hearing was held September 17, 2019, after which Claimant was found to be guilty as charged, and by notice dated October 1, 2019, he was dismissed from service.

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.

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 substantially at fault for the alleged violation. It states that record reflects that Claimant threw his machine in reverse, threw the parking brake and blew his horn on approaching

the crossing, and that the charging officer, who was riding in the machine behind Claimant, confirmed that he saw Claimant's brake lights prior to the collision. The Organization asserts that the driver of the vehicle was at fault for the incident, as he violated state law by going around the gates at the crossing when they were pumping up and down as the machines in the gang went through.

The Organization states that Claimant was only required to be prepared to stop at a highway grade crossing, but that Rule 813 does not require a stop if the operator knows the way to be clear. It states that the way appeared clear to Claimant, but that the incident occurred because of independent acts of another. The Organization avers that Claimant was appropriately careful in his actions, but that the minor incident occurred solely because of the reckless conduct of the vehicle driver. It asserts that Claimant should not be held liable in these circumstances.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. The Organization points out that Claimant has 14 years of service and it contends that, even if the charges had been proven, which it denies, dismissal was harsh and excessive, rather than progressive, for an offense of this nature. The Organization cites prior awards involving crossing collisions in which discipline was reversed or reduced, and it concludes 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.

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 Claimant's own admissions, establish that

he failed to comply with Operating Rule 813, which required him to stop short of colliding with the vehicle. It points to testimony that Claimant could see the vehicle well in advance, and that he had seen the vehicle edging forward when the machine in front of him went through the crossing. The Carrier states that, regardless of the status of the crossing protection at South Pearl Road, Claimant was required to be prepared to stop short and refrain from entering the crossing until it was known that the way was clear. It adds that, despite Claimant being aware that the gates had been pumping, he actually sped up in an attempt to get closer to the machine in front of him. The Carrier contends that, regardless of the driver's alleged violation of state law, Claimant was not relieved of his own responsibility to operate his machine safely and in compliance with Rule 813.

With respect to the level of discipline imposed, the Carrier states that Claimant's actions equated to carelessness and neglect of relevant operating rules, and it states that significant discipline is warranted, citing prior cases in which dismissal was upheld when employees failed to safely perform their duties. It states that Claimant endangered himself and the traveling public, and that he was fortunate no more serious injuries occurred. The Carrier cites prior awards which have upheld dismissal for machine operators who were involved in similar collisions, and it also notes that Claimant's record includes a prior dismissal involving a machine collision. The Carrier states that there are no mitigating circumstances which warrant modification of the discipline, and it asserts that dismissal is appropriate in light of the significance of the infraction and Claimant's record.


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.

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 was in violation of Operating Rule 813 when he was not prepared to stop short of the crossing and when he entered it before knowing that the way was clear. The record establishes that Claimant could see the vehicle well in advance, and that he had seen the vehicle edging forward when the gates pumped, and we concur with the Carrier that Claimant should have operated the machine prepared to stop rather than speeding up when the vehicle actually did enter the crossing. There is no doubt that the vehicle driver was also at fault, but we do not find that such a factor absolves Claimant of his own contributing responsibility for the incident.

Having found substantial evidence to support the finding of guilt, the next question before us concerns the level of discipline assessed. The Carrier's concern regarding safe operation of track machinery 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, including Claimant's 14 years of service with apparently one prior discipline event of record. On the specific facts of this case, we believe that Claimant should be afforded one last chance to continue his career and to demonstrate that he can be a safe and productive employee, but in consideration of his record involving machine collisions and his prior dismissal for such an incident, we condition that return on his disqualification from operating track machinery. Claimant is therefore to be returned to service, with seniority intact, but without pay for time out of service.

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
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