

AWARD NO. 325
Case No. 325

File No. Polizzi-AG-09-19-INV/MW-BHAM-19-33-LM-628 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 [sixty (60) day actual suspension] of Mr. A. Polizzi, issued by letter dated October 16, 2019, in connection with improper performance of duty, in that on August 28, 2019, while working as the Roadway Worker in Charge on the NONE district south of Meridian, Mississippi, you acted upon Mandatory Directive/TA 1489, although he was not the named employee to whom the mandatory directive was addressed was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File Polizzi-AG-09-19-INV/MW-BHAM-19-33-LM-628 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant A. Polizzi shall now have his dismissal set aside with all notations thereof removed from all Carrier records and he shall also be restored to the Carrier's service with all seniority and restored to 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 removal from service (this amount is not reduced by earnings from alternate employment obtained by Claimant while wrongfully dismissed); (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 removed from service, or on overtime paid to any junior employee for work Claimant could have bid on and performed had Claimant not been removed 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 August 28, 2019, Claimant A. G. Polizzi was working as the Roadway Worker in Charge on the NONE District south of Meridian, Mississippi, obtaining track time for a welding crew to do thermite welds. When Claimant was obtaining Track Authority 1489 from the dispatcher, although Claimant stated his own name, the dispatcher issued the OK Time to employee R. W. Pettit rather than to Claimant. Claimant copied and read the OK Time, but he did not note the discrepancy in the named employee portion of the TA. The discrepancy was noted by the second shift dispatcher when Claimant contacted him to release the TA.

By notice dated September 4, 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 acted upon Mandatory Directive/TA 1489, although he was not the named employee to whom the Mandatory Directive was addressed. The hearing was held September 27, 2019, at which a screen capture of the dispatcher's computer screen was introduced, as was the TA which Claimant completed. An audio recording of the communication between Claimant and the dispatcher was also introduced. Following the hearing, Claimant was found to be guilty as charged, and by notice dated October 17, 2019, he was assessed a 60-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.

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 it was the dispatcher who said Claimant's name wrong who was at fault. The Organization notes Claimant's testimony that the radio transmission in the area was not crystal clear, in contrast to the recording from the dispatcher's office played at the hearing. It states that Claimant never had any reason to take exception to what he heard over the radio, pointing out that the transmission was "double copied" by the welding supervisor, who also took no exception to the dispatcher's transmission. The Organization posits that the incident was the result of two employees having similar names, coupled with questionable radio transmission.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. It notes Claimant's testimony that it would not have been possible for anyone else to clear the specific numbered track authority Claimant had been given, and it emphasizes that the dispatcher shared responsibility. The Organization points out that Claimant has 29 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.

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 radio transmissions and Claimant's written TA, establish that he was not attentive to his responsibilities as a RWIC when he acted upon a TA issued to another employee. It cites Operating Rules 506 and 510 as providing that information contained in a mandatory directive such as a TA can only be acted upon by the person to whom it is addressed. The Carrier states that Claimant took no exception to the quality of the radio transmission on the date of the incident, and it questions how he could reasonably have understood the dispatcher to say his name when it contains three syllables, and the name the dispatcher stated had only two.

With respect to the level of discipline imposed, the Carrier states that Claimant's actions equated to a failure to ensure that the members of his workgroup were properly protected. 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.

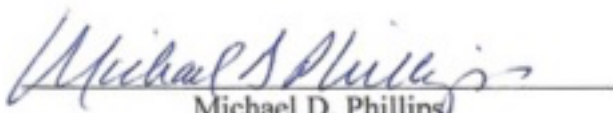
With respect to the merits, we find that the Carrier has provided sufficient evidence to establish that Claimant was in violation of the cited rules. The Carrier's burden in matters such as this is not proof beyond a reasonable doubt, but merely the production of substantial evidence to support the discipline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

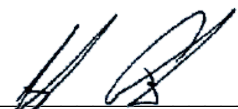
Here, we believe that the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that Claimant improperly acted upon a TA which had been issued to another employee. While it is apparent that the dispatcher's actions contributed to the matter, it has been observed many 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 accurate handling of TAs 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 29 years of service with no prior discipline events of record. For Claimant's first offense, we believe a suspension of 15 days would be appropriate in these circumstances, and that Claimant should be paid for time lost in excess of 15 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