

AWARD NO. 330  
Case No. 330

File No. Hale-D-K-09-21-INV/MW-BHAM-21-53-LM-714 SOU

**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

PARTIES ) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES  
          ) 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. D. Hale, issued by letter dated September 30, 2021, in connection with his alleged: (1) improper performance of duty in that while working as the Roadway Worker in Charge (RWIC) at approximately 1:00 P.M. on August 19, 2021, at/near Tenbridge (Mile Post 331.2) in Chattanooga, Tennessee, he failed to ensure that proper limits were being used under the Tack Authority (TA) issued, TA 8010, thereby leaving himself and the members of his work group unprotected from oncoming train movements and (2) improper performance of duty in connection with the above charge in that he failed to conduct a proper job briefing, to include the correct working limits, prior to work commencing to weld joints on the open deck bridge at Tenbridge was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File Hale-D-K-09-21-INV/MW-BHAM-21-53-LM-714 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Hale shall now have his dismissal 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 removed from service.”

#### 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 19, 2021, Claimant D. K. Hale was acting as a Roadway Working in Charge (RWIC), protecting two welders who were assigned to perform welds on a bridge over the Tennessee River, at Tenbridge, in Chattanooga, Tennessee. Claimant obtained track authority for Tenbridge to Tenbridge on track CS2, but the work to be performed required protection from Tenbridge to Boyce on CS2. Consequently, Claimant and the welders worked for over an hour performing a weld on CS2 without track authority protection.

By notice dated August 25, 2021, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with:

1. Improper performance of duty in that while working as RWIC on the date in question, he failed to ensure that the proper limits were being used under the Track Authority (TA) issued, TA 8010, thereby leaving himself and the members of his work group unprotected from oncoming train movements, and that he and his work group exceeded the limits of TA 8010 and performed work on the open deck at Tenbridge without protection.
2. Improper performance of duty in connection with the above charge in that he failed to conduct a proper job briefing, to include the correct working limits, prior to work commencing to weld joints on the open deck bridge at Tenbridge.

The hearing was held September 16, 2021, after which Claimant was found to be guilty as charged, and by notice dated September 30, 2021, 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 entered evidence in the form of written statements from several witnesses, including the two welders and a track inspector who had also obtained authority on track CS2 ahead of Claimant. The Organization states that it was improper to enter the hearsay statements of witnesses who were not subject to cross-examination, citing prior awards, and it argues that the discipline should be overturned on that basis alone.

The Organization also submits that the Carrier failed to meet its burden of proof in connection with all of the charges. It states that Claimant had multiple discussions with the dispatcher throughout the five hours he was at the work location, and that the dispatcher knew that Claimant and his workgroup were going to be working on the bridge. It asserts that Claimant therefore believed he had the proper protection necessary to perform the work under the track authority he had been issued by the dispatcher. The Organization also notes that Claimant had not been issued a phone which would give him access to the Carrier's track view, so that the only way he could obtain track time was through communications with the dispatcher.

The Organization also notes Claimant's testimony that he believed he had conducted a thorough job briefing and clearly defined the limits of track authority as he understood them. It adds that testimony confirmed Claimant's dedication to ensuring a safe work environment and to upholding the Carrier's safety rules, when he obtained fall protection for the welders. The Organization avers that there is no evidence to suggest that Claimant knowingly and willingly violated any Carrier rules, and that the Carrier therefore failed to meet its burden of proof that Claimant was guilty of the charges.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. It states that Claimant had approximately 11 years of service, and that he was honest and forthright

about the events and never tried to hide or deny anything. It reiterates that Claimant genuinely believed, based on his communication with the dispatcher, that he had the correct limits to perform the work. The Organization concludes that dismissal was not warranted, and that Claimant should be returned to service.

The Carrier, on the other hand, maintains that there is no reason to disturb the discipline assessed. It states that Claimant received a fair and impartial hearing, and it points to award authority which has upheld the introduction of written statements in a railroad disciplinary hearing. The Carrier further argues that Claimant's admission to most of the relevant facts obviates any procedural challenges.

The Carrier also asserts that the evidence adduced at the hearing fulfilled its burden of producing substantial evidence to establish Claimant's guilt. It states that the testimony and statements presented during the hearing conclusively proved that Claimant was guilty of failing to obtain necessary track authority, and that he failed to protect his workgroup, who were welding on the bridge for an extended period. The Carrier notes Claimant's testimony that it was just an "oversight" on his part. It maintains that the evidence, including Claimant's own written statement and testimony, leave no doubt that Claimant was guilty of failing to obtain proper protection for the employees he was supposed to be protecting, that he failed to conduct a proper job briefing to ensure that proper protection was provided, and that there are no mitigating circumstances.

With respect to the level of discipline imposed, the Carrier states that prior awards have upheld dismissal for similar conduct. It states that it is well within its rights to treat the violation as it did, and that it has no obligation to retain in its employ an individual who commits such misconduct. It further states that Claimant has repeatedly demonstrated an inability to follow the rules in question, noting that Claimant's record contains two previous assessments, including a prior dismissal, associated with occupying track without proper protection. 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 seriousness of the offense.

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. While there is no absolute bar to the entry of written statements in a disciplinary hearing, in this case we do not find that the hearing officer's allowance of the written statements deprived Claimant of a fair and impartial hearing. Claimant himself stated that he took no exception to the contents of the statements, and Claimant's ultimate admission to the relevant facts obviates any issue with respect to statements from other employees.


Turning to the merits, we find that the Carrier has provided sufficient evidence to establish that Claimant was guilty of the alleged violations. 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.

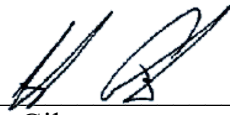
Here, we believe that the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that Claimant failed to ensure that the proper limits were obtained for his track authority, and that he and the members of his workgroup therefore were working without necessary protection. While Claimant characterized the matter as simply a mistake and an oversight, he ultimately admitted to not having obtained adequate protection for the work to be performed. We also find adequate evidence to establish that the job briefing was inadequate.

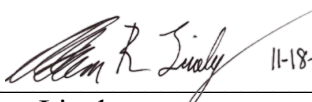
The next question before us concerns the level of discipline assessed. To overturn the Carrier's assessment would require the Board to find that the Carrier acted arbitrarily or capriciously so as to constitute an abuse of discretion. Perhaps if Claimant's record did not contain two prior entries for similar rule violations, we might find the Organization's arguments regarding mitigating factors to be more compelling, but we believe the Carrier could rightfully take into consideration the fact that this was not Claimant's first such infraction. Claimant's candor about the event is noteworthy, but on this record, we cannot find that the Carrier's actions were an abuse of

discretion, so we will not substitute our judgment for the Carrier's now.

AWARD: Claim denied.

  
Michael D. Phillips  
Chairman and Neutral Member

  
Adam Gilmour  
Employee Member

 11-18-2024  
Adam Lively  
Carrier Member

Dated: November 18, 2024