

PUBLIC LAW BOARD NO. 7293

**PARTIES) SMART - TRANSPORTATION DIVISION
TO)
DISPUTE) BNSF RAILWAY COMPANY**

STATEMENT OF CLAIM:

Appeal on behalf of St. Louis, Missouri Conductor B. M. Tourigney for removal of a Level S 30 Day Record Suspension and 3 Year Review Period from his personal record and pay for all time lost as the result of an investigation held on January 28, 2011. (Organization File D-1936; Carrier File 55-11-0031)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

The Level S discipline here on appeal was assessed the Claimant in a Carrier determination that the facts of record as developed at a January 28, 2011 hearing show that while working as the Conductor on Train Q-STLLACI-26A he failed to stop his train and protect movement over a public road crossing that was clearly listed in a General Track Bulletin (GTB) and on a Form C 7756 as having disabled and inoperative warning equipment. The incident took place at 12:01 p.m. on December 26, 2010, with the Claimant's train entering and moving over the crossing at 25 mph. This failure to take required action held to be in violation of General Code of Operating Rule (GCOR) 6.32.2.

GCOR 6.32.2, Automatic Warning Devices, reads in part here pertinent:

A. Automatic Warning Devices Malfunctioning

Use the following table to properly complete movement over the crossing:

If . . . The crew is notified that the crossing warning system has an activation failure or that the crossing warning system has been disabled and an equipped flagger is not at the crossing to provide warning

Then . . . Stop before occupying crossing. After a crew member is on the ground at the crossing to warn highway traffic, proceed over the crossing as directed by that crew member. Then proceed at normal speed.

It is the position of the Carrier that severity of the incident cannot be overlooked, the crossing being three or four vehicle lanes in width; located within the city limits of St. Louis; and, one of the busiest at grade crossings on the Cuba Subdivision. The Carrier thus says it is fortunate collision with a vehicle did not occur with consequential injuries or fatalities.

The Carrier also submits that when questioned at the hearing as to whether he had complied with the dictates of above mentioned GCOR 6.32.2, the response of the Claimant was: "No."

In substance, the Organization contends (1) the Carrier's preemptive denial of Alternative Handling was improper; (2) the guilt of the Claimant was prejudged; (3) the hearing was not conducted in a fair and impartial manner in accordance with the Uniform Investigation Rule; (4) the Carrier notice of hearing not having included in the statement of charge an alleged violation of GCOR 6.32.2, it did not the right to introduce the rule into evidence at the hearing; (5) the Carrier failed in its obligation of burden of proof; and, (6) even assuming, *arguendo*, discipline was merited, the penalty assessed is harsh and unreasonable.

The Board finds no merit in Organization argument that the incident should have been handled as Alternative Handling under the Safety Summit Agreement as opposed to the incident being the subject of a formal disciplinary hearing. The incident was of a serious nature.

As concerns Organization prejudgment argument, the Board does not find in study of the hearing record that the conducting officer or the Carrier engaged in a prejudgment of the charges against the Claimant. Moreover, the Claimant having admitted guilt to the charge of record, it is difficult to accept Organization argument that there had been a Carrier prejudgment of guilt.

Contrary to Organization contentions, study of the record supports a finding that the hearing was conducted in a fair and impartial manner. The Claimant had been provided timely notice of the hearing; the nature of the offense was set forth in writing so as to enable the Claimant to prepare a defense against the charge; the hearing was scheduled to begin within the time limit prescribed by agreement; the Claimant had benefit of a three-week hearing postponement to further prepare a defense against the charge; a reading of the transcript of hearing shows the Claimant and his representative came to the hearing prepared to defend against the charge; and, the Claimant and his representative were given opportunity to examine

all witnesses and offer argument in a defense against the charge. Further, notwithstanding the Claimant's admission of guilt, the formal hearing commenced at 9:02 a.m. and closed at 1:05 p.m., a four hour hearing with a 142 page transcript and numerous exhibits.

Although the Board believes it helpful for the preparation of a defense against a charge for a hearing notice to include mention of rules alleged to have been violated, we find lacking agreement support of record Organization argument that the Carrier violated provisions of the Uniform Investigation Rule by not including in the notice of charge alleged violation of GCOR 6.32.2. We find nothing contained in the Uniform Investigation Rule that mandates a notice of hearing include specific rules alleged to have been violated by an employee. The Uniform Investigation Rule only requires that the notice "contain a clear and specific statement of the matters to be investigated and the nature of the charge or charges which are brought against those named as principals" and "shall include the date, time, place and nature of the occurrence or incident." The record shows that the Carrier notice contained such appropriate information, and we believe the Claimant knew or should have known what rules might well be involved in the subject and nature of the charge.

In this respect, as stated in the Findings of Award No. 16266, First Division, NRAB, BLF&E v FW&D Rwy, Arbitrator E. B. Chappell, in citing from prior Award No. 5253 of the First Division, noted: "Upon trial, the accused may be disciplined for any rule violations disclosed by the investigation." A further citation from Award No. 13207 of the First Division that was referenced stated: "Employees are deemed to know the rules and as facts are developed upon the hearing in connection with the charged offense, the rules find their own application." Similar findings can be found in numerous other awards, including First Division Award Nos. 11443, 11667, 12156, 12288, 13008 and 23006.

It is noteworthy that the Claimant and his Engineer on recognizing that they were not going to be able to stop movement of their train in advance of the crossing that the Engineer sounded the engine horn as a warning to any oncoming traffic, and it is commendable that the Claimant and his Engineer promptly reported the incident to the Dispatcher. However, such happenstance does not overcome the overall seriousness of the offense.

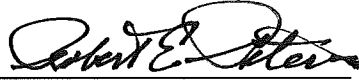
Certainly, the Carrier has a right and responsibility to enforce its rules and instructions for the operation of its trains in a manner to secure the highest degree of safety for its employees, the public, its property, and the property entrusted to it by its customers.

The record before the Board revealing sufficient evidence of probative force upon which the Carrier based its disciplinary decision that the Claimant was guilty as charged of a failure to perform his assigned duties in compliance with GCOR 6.32,2,


we find no basis to conclude, as the Organization asserts, that discipline as assessed was harsh and excessive. It was rather lenient.

AWARD:

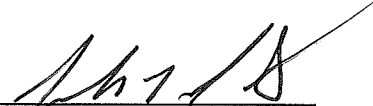
Claim denied.



Robert E. Peterson
Chair & Neutral Member



Andrea N. Smith
Carrier Member



J. Michael LaPresta
Organization Member

Fort Worth, TX

Dated: 9/26/17