

PUBLIC LAW BOARD NO. 7293

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

STATEMENT OF CLAIM:

Appeal on behalf of Tulsa, Oklahoma Conductor E. S. Pannell and Brakeman D. M. Smith for removal of a Level S 30 Day Record Suspension and 3 Year Review Period from their personal records and pay for all time lost as the result of an investigation held on August 17, 2011. (Organization File D-1970; Carrier File 55-12-0001)

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.

At a formal hearing conducted on August 17, 2011 it was the testimony of two Carrier supervisory officials that while they were performing crew safety operations testing that they had observed on August 3, 2011 Claimants Pannell and Smith, who were working as crew members on Train L-Tex6521, to ride a freight car into a designated close clearance track location at Tyson Foods Industry at Holdenville, Oklahoma. Track signage at the facility as presented into evidence at the hearing was shown to clearly state in bold lettering: "WARNING STRUCTURES ON THIS TRACK WILL NOT CLEAR MAN ON SIDE OF CAR."

Testimony of Trainmaster Orlikowski at the hearing in describing his observations of the Claimants was in part pertinent as follows:

[The] crew was pulling forward to spot their one spot car inside this building. As they, uh, pulled forward, they pulled into the structure and, uh, stopped about 10 feet inside of the building. Both crew members got off and then they pulled forward another three or four feet.

As concerns Trainmaster Orlikowski's observation of Claimant Pannell, among other things, he said the following during examination at the hearing:

I'm coming over here, the car is by me, Mr. Pannell is not on the ground there, he didn't get off the moving equipment, he didn't stop the move. I pull, I go to pull out my radio, the rest of the car goes in the building. I turn around and go inside.

Upon being questioned by a representative for the Claimant as to whether he was face to face with Claimant Smith, Trainmaster Orlikowski said the following:

No, we wouldn't be face to face. When you ride this car, you face this direction. He's facing east and I'm facing, we're both facing the same direction which puts his back to me the whole time. Now, he's looking this way.

As the car is moving that way but he's not looking at me, he's looking inside the structure.

Testimony of Superintendent of Operations Atkins was basically the same as that of Trainmaster Orlikowski, it being noteworthy that in relating his observations of the Claimants said the following:

I observed both the Conductor and the Brakeman on the job, Foreman and Helper, uh, mount the car outside the building and ride, uh, the car back into the building at Tyson Foods.

Specifically asked whether he saw either one of the crew members dismount the car prior to entering the building, Superintendent of Operations Atkins said: "No Sir, I didn't"

It is significant as concerns consideration of Organization argument that the Claimants were not guilty as charged that Claimant Pannell admitted at the hearing that he did in fact ride the freight car into the Tyson Foods building notwithstanding the track being a designated a close clearance location. In part, Claimant Pannell said:

The events that took, took place that day is that Mr. Smith was on the north end. We pulled forward. Upon entering the building, I realized that I made a mistake, stopping the movement, we both got off. I was inside the building, Mr. Smith was outside the building. I climbed down then I, uh, had the Engineer pull them ahead for a spot. And that's when, uh I was, uh, confronted, uh, by Mr. Atkins and, uh, Mr. Orli -, Orlinski, Orlikowski, sorry. . . .

Yes, once I realized what I had done, I stopped the movement. Luckily, luckily I didn't have trouble getting in my pack set. . . .

I stopped the move, I was inside the building, Mr. Smith was outside the building. We both dismounted the car, then I moved them ahead.

In testimony at the hearing Claimant Smith was adamant about not having ridden the car into the building, offering the following response to a question as to whether when Claimant Pannell stopped the movement the first time he was outside or inside the building when he got off the car:

I was outside the shed, outside the gate. I'll put it to you this way, this is what this picture was taken of, Mr. Orlikowski was right there. When I got off, I turned to my right, Mr. Orlikowski was right there. This is where I got off and this is the closest point, if you go any, any further in the building, you cannot see Mr. Orlikowski. When he walked in, he had his vest in his left hand. That is where I saw him, not here. If he was there, he would be blocking the sign.

Notwithstanding Claimant Smith's diverse description of where both he and Trainmaster Orlikowski were positioned, it is noteworthy that Claimant Smith acknowledges that Trainmaster Orlikowski was in a position to have observed his movements, albeit Claimant Smith limits such observation to when he dismounted the car. However, Claimant Smith then proceeds to state that when Trainmaster Orlikowski "walked in" that is where he saw him. In this later respect it is noted, as hereinbefore referenced, that it was testimony of Trainmaster Orlikowski that the shove first stopped about ten feet *inside* the building before being pulled forward another three or four feet and that it was testimony of Superintendent of Operations Atkins that he saw *both* Claimants ride the car into the building.

At the hearing the representative for the Claimants offered into evidence copy of a type-written statement from a Tyson employee who was reportedly present when the spotting of the car was made on August 3, 2011. This statement reads: "I saw the brake man get off the cars before entering the building at Tyson Foods, Inc. in Holdenville, OK. The worker did not ride the cars out of the receiving building."

The conducting officer's response to the introduction of the statement was that he was going to allow it as an exhibit with the understanding that there had been no opportunity to question the writer.

There is no question that it was the sole responsibility of the Organization to have arranged for this Tyson Foods employee to be present at the hearing as a witness on behalf of the Claimants. At the same time, the wording of the statement gives pause to question what was meant by the writer stating he saw the brakeman (Claimant Smith) getting off the "cars" before entering the building. Further, whereas the statement says "the worker" did not ride the cars "out of" the receiving building,

the issue is whether the worker (Claimant Smith) was observed riding the car "into" the building.

The Board finding the record to support the conclusion that the Claimants were guilty as charged, and the several procedural arguments advanced by the Organization being without merit or not of sufficient substance to hold that the Claimants had been denied a fair and impartial hearing, the claim will be denied.

AWARD:

Claim denied.



Robert E. Peterson
Chair & Neutral Member



Andrea N, Smith
Carrier Member



J. Michael LaPresta
Organization Member

Fort Worth, TX

Dated: 9/20/17