

PUBLIC LAW BOARD NO. 7425

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

STATEMENT OF CLAIM:

Claim of Memphis, TN Yard Helper M. D. Woods for removal of Level S Thirty (30) Day Record Suspension and Three (3) Year Review Period from his personal record and pay for all time lost as a result of an investigation held on June 30, 2015. (Organization File No. D1420-475-15A; Carrier File No. 55-16-0036D)

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.

On June 1, 2015 the Claimant and the Foreman of a yard job in Memphis Yard on which both had been assigned on June 1, 2015 were jointly notified that an investigation was scheduled for June 17, 2015 for the purpose of ascertaining the facts and determining their responsibility, if any, with an alleged failure to properly protect a shoving movement through the Hub Track 102 switch at approximately 0209 hours, resulting in a derailment and extensive equipment and track damage in addition to a hazmat spill and environmental damage.

Following several postponements, a joint investigation was conducted on June 30, 2015. Both the Claimant and his Foreman were present for the investigation and with their respective representatives provided opportunity to offer a defense against the charge of record. Thereafter, by letter of July 7, 2015 the Carrier notified the Claimant that it found testimony and exhibits presented at the investigation to show that he was guilty as charged and was being assessed a Level S 30-Day Record Suspension and Three Year Review Period, the discipline here on appeal. A subsequent letter of July 10, 2015 was sent to the Claimant to correct an administrative oversight in the prior letter so as to include rules that the Carrier had determined the Claimant to have violated, the July 7, 2015 not having completed a sentence that clearly intended to identify the rule violations.

The record shows that the Claimant had moved two light engines through the Hub 2 switch, which the Claimant says required him to twice handle the switch; first to set the switch for movement through it, and, second, to go back down the lead. About

five hours later, train TULMEM in entering the yard had nine tank cars derail after three locomotives and 22 of 29 cars of that train had proceeded through the Hub 2 switch without incident.

It is the position of the Carrier that derailment of the TULMEM was due to what it contends was the Claimant's light engine RCO movement having run through the Hub 2 switch without having set the switch for his forward movement. The Carrier says its findings of the Claimant having run through the switch is supported by testimony of supervisory officials who investigated the derailment and a video of the Claimant's handling of his train's movement at the Hub 2 switch. In this respect, the Carrier maintains the video shows the Claimant having first moved through the Hub 2 switch without setting the Hub 2 switch for his train's forward movement, stopping, and backing the light engines over the Hub 2 switch, and then again moving forward. The Claimant acknowledges that he had backed the engines, but only one engine length onto the Hub 2 switch because he had overshot where he had first intended to stop before again moving forward. The Claimant is adamant that he had properly handled the Hub 2 switch for his train's movements.

Contrary to the Carrier contentions, the Organization says, the record is replete with the Carrier's principal witness offering opinion, assumption and conjecture as to the basis for the decision that the Claimant is responsible for a run through switch.

In study of the record the Board finds sufficient merit in Organization argument that the Carrier has failed to meet its burden of proof that the Claimant was guilty as charged, and we therefore concur with the Organization that, as held in a long number of awards, discipline cannot be based on speculation, assumption or conjecture; discipline must be grounded on factual probative evidence of record.

The Carrier's principal witness is found to have offered opinion as concerns a number of statements, as opposed to factual support. For example, this witness said: "In my opinion I do not think he lined the switch;" "In my professional opinion the switch was run through;" "I know the switch was lined for the lead;" etc. This witness stated, on the one hand, that the Claimant's light power move was the only one that took place the morning of June 1, 2015 concerning operations through the Hub 2 switch. This witness subsequently acknowledged, on the other hand, that about four hours after the Claimant had operated through the Hub 2 switch, and at least one hour prior to the TULMEM coming upon the Hub 2 switch, that another train with 68 cars operated over the Hub 2 switch without incident.

It is also noted that during questioning that this witness on four separate occasions during the hearing said that he had interviewed the Conductor of the TULMEM, who said "he did have to stop to line the Hub 2 switch" and that the Conductor had told him that "he did not notice a gap in the Hub 2 switch." On subsequent recall

just before the close of the hearing, when this witness was questioned as to why the TULMEM had stopped if Hub 2 was already lined for the lead, then said he was “mistaken, that the crew of the TULMEM did not line the switch.”

This Carrier witness initially testified that “the point of the derailment was on the Hub 2 switch is where one flange went behind the west side of the rail, dropped in, and that’s when it derailed.” In subsequent testimony this witness said:

As far as explaining how, how 68 cars on one train can get over, uh, the 312 locomotives got over and then the Tulsa train had 22 cars get over. The only, uh, thing I can come up with is maybe that Tulsa had been at a sharp flange, maybe the, since there were so many tank cars, it was sloshing. Like I said, stated before, it was only 3/8 to half inch, inch gap. So it wasn’t, it wasn’t a very big gap, but it was still a gap.

When subsequently questioned about having said the flange of a sloshing tank car on the TULMEM may have caused the switch to gap, this Carrier witness said: “No. The, the point was already gapped.” Further, as concerns the size of the gap, this witness first said it was a “small gap;” a “slight gap;” then “3/8ths to half an inch;” and, lastly, “3/8ths to one-half inches, an inch.”

The Board also agrees with the Organization as concerns the Carrier presentation of a video at the hearing that reason exists to question witness testimony that the showing of engine lights of the Claimant’s train movements and the Claimant getting down off the lead engine with a lantern or flashlight supports a finding that the Claimant had run through the switch. Clearly, in view of the dispute, the absence of the video being made a part of the record placed an undue burden on the Organization to make a full defense of the Claimant.

The Carrier witness sought to defend that no other crew could have run through switch since he had watched four or five hours of the video of other crews up to the time of the Claimant’s movement at the Hub 2 switch. However, at the hearing this witness described the Hub 2 switch to be as follows: “It was more like a floating switch point. It did not come up next to the stock rail tight but did allow movement to go in both directions.” Questioned as to whether the switch did line in both ways even though it was broken, this witness said: “That’s correct.” Further, this witness said: “It was lined every time I lined it.” As the Organization offers, this suggests that the Hub 2 may have been a defective switch that went undetected by other crews and only came to light with the derailment of TULMEM.

The absence of the video also makes it difficult for the Board to determine not only the guilt or innocence of the Claimant, but, as importantly, whether a particular penalty as administered is justified, harsh or unreasonable. Those responsible for reviewing the transcript of an investigation should have full benefit of all exhibits

and not be left to surmise in deciding whether or not the charges that gave rise to both the investigation and the administration of discipline are supported by relevant facts and witness testimony.


Under the circumstances we find the Carrier's action in holding the Claimant responsible for a run through switch, track and equipment damage, etc., to be an arbitrary exercise of its power to discipline. The claim will therefore be sustained.

Award:

Claim Sustained.


Robert E. Peterson
Chair & Neutral Member


Melissa A. Beasley-Coke
Carrier Member


J. Michael LaPresta
Organization Member

Fort Worth, TX
Dated: March 27, 2018