

PUBLIC LAW BOARD NO. 7425

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

STATEMENT OF CLAIM:

Claim of Memphis, TN Yard Helper Mohammed Swalis for removal of Standard Formal Reprimand and One (1) Year Review Period from his record and pay for all time lost as a result of an investigation held on February 17, 2015. (Organization File No. D1420-473-15A; Carrier File No. 55-16-0040)

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 issue in dispute calls for a determination as to whether the Claimant, while working as a Helper together with a Foreman on a remote control operation (RCO) yard assignment (the 374) on January 7, 2015 is responsible for moving two light engines through a switch not lined for his movement, as the Carrier maintains is supported by testimony and exhibits brought forth at a hearing conducted on February 17, 2015.

According to the record, at 0300 hours on January 7, 2015 after the Claimant and his Foreman completed a shove of rail cars into the RD 4 track in the Memphis Yard, they were instructed by the Yardmaster to depart the RD 4 track with just their light engine power and proceed to the RD 5 track to pull a cut of cars from that track. In making this move the Claimant was on the point of the movement and had control of the RCO box. It was in the process of making this move that the light engine power being controlled by the Claimant was said to have run through what is known as the Engine Running Track Switch without the switch being lined for this movement. An inbound road crew (the Dayton-Memphis) was said to have discovered the run through switch at about 0630 hours as they were attempting to line the Engine Running Track Switch so as to take their engine power to the Diesel Shop after leaving rail cars on the Hub 1 track.

The Claimant was approached the morning after the incident, on January 8, 2015, about the run through switch, and stated that he was in the shanty the entire time and had not participated in the movement that led to the run through switch. About

a week or so later, after the Carrier had obtained witness statements, reviewed video and radio communications and had issued a January 13, 2015 joint notice of hearing to both the Claimant and his Foreman, the Claimant then acknowledged he was involved in movement with the switch at issue.

In defense of the Claimant at both the hearing and to the Board it is urged by the Organization that although the Claimant speaks eight different languages, the Claimant did not fully understand some of the questions posed to him prior to and during the hearing, likely, it is offered as a result of English not being his primary language and confusion existing about the identity of the switch at issue.

When asked by the conducting officer to offer what he knew about the incident, the Claimant said in part as follows:

Well I'm, I'm thoroughly confused about the switches we do because uh, the reason I say uh, the reason we're saying I sound confused we did a lot of moves. I don't know which one I did and which one I didn't do and uh, I know we went to, what I, what I do remember, Chris Boring called . . . I didn't tell everybody a different story because I don't [know] what they're asking me. They uh, some say I was in the bowl. I don't know, but mostly he's right here, my Foreman right here, he tell you don't worry about it because I got this, . . . So they asked me, I said, I was in the shanty. And then uh (inaudible) called me, I'm telling them a different story here. I, I don't know, I mean I'm just totally confused. Maybe now I might tell you a different story. Maybe I (inaudible) I'll tell you a different story. But I know I shoved into 4 and I picked my Trainmaster up. I picked up uh, Foreman up right between 4 and 5 and from that move I didn't know what we do. But, if any, if I have to make any move even if I had the control my Foreman tell me this what we got to do. And I always ask questions what I need to do next.

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So I picked him up and if, I, if I remember from picking him up where it would be, I don't know if it's on the head end or the rear end, I do not remember. So the day Casey calls, when he was talking he was speaking, talking to my Foreman when he calls. He wasn't talking to me, he was talking, I mean he was talking to the team. But he was straightly looking at my Foreman talking to, I was just standing there, I didn't know if was going to be this kind of big issue. I don't understand them, I was listening. Then they didn't ask me any questions, all the questions was asked on the phone.

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And if I, I don't know, I mean I don't think we ran the switch but if it were ran, because and my Foreman, we (inaudible) three times and the way he said this happened but I don't think we run through a switch.

The representative for the Claimant asked the latter: "Did you, were you dishonest about anything today?" The response of the Claimant was:

No, I'm not dishonest about anything, I've never lied to you, not on the crew. I just get asked different questions and I really don't know exactly what he asking me. When (inaudible) calling me, I don't have a clue. I don't have a clue. And the day Casey, he was talking to us I don't have a clue what he was talking about. I was standing there just laughing, I mean, I didn't know. He said we ran through a switch and mostly he was looking, he was telling my Foreman it pisses me off when somebody got a (inaudible) and ran through a switch. So to me it's like he's acting like he's the (inaudible) but obviously I didn't, but I didn't thought it was that, this is my first time with the BN so I don't know nothing about all this stuff, so. But if he ask me any questions I will tell him, but the last move I remember was that move. Before I tell him I didn't go down there then everybody ask me hold on, when you come on duty where you (inaudible) I said my Foreman went down there and get his stuff. I lined the (inaudible) crossing over there and I pulled the (inaudible). They said no, the last move, so they had to explain to me in different way is to really kind of understand what we're talking. So I have to go back, apologize to Casey, tell him look, I told the wrong information. . . . I say I will go to one track but I don't want to run through a switch. If I don't see the gap I'm not going. That's what I told Nate and Scott. So I have to go back and apologize. I said I'm still not understanding. And if you ask me a question I'll give you a different answer, I'm feeling I'm being honest with you.

Upon completion of the Claimant's response to the representative's question as to whether the Claimant was dishonest about anything, the representative said: "I, I couldn't say it better myself."

Although study of the record does reveal some confusion existed about the manner in which switching moves had been made by both the Claimant and his Foreman as well as one other crew in addition to the crew of the Dayton-Memphis train, the Board is satisfied that sufficient testimony is present to conclude that the Claimant

was responsible as the last movement to operate over the switch to have in fact run through a switch not lined for his movement


In the opinion of the Board, even if it was to be assumed, *arguendo*, that confusion existed in the Claimant's comprehension of questions asked of him involving switch identity due to English not being the Claimant's primary language, there should not have been any confusion on the part of the Claimant in presenting a consistent chronology of the shoving movements and, particularly, where he was located when the switching move at issue took place. There is no question that the Claimant lied in saying that he was in the shanty the entire time and had not participated in movement that led to the run through switch. The Claimant also continued to offer completely inconsistent responses to questions in saying that when called, "I'm telling them a different story," and stating to the conducting officer, "Maybe now I might tell you a different story." As the Carrier maintains in its assessment of discipline, the Claimant's conduct in this regard constituted acts of dishonesty.

The Board has given studied consideration to the several procedural arguments advanced by the Organization. We are not persuaded that they are of sufficient substance to hold that the Claimant was denied benefit of a fair and impartial hearing, much less that they give cause to set discipline aside.


In the light of the above considerations and study of the record the Board finds the Carrier to have shown sufficient cause for its assessment of discipline, a penalty that is rather lenient in view of the seriousness of the offense.

Award:

Claim Denied.


Robert E. Peterson
Chair & Neutral Member


Melissa A. Beasley-Coke
Carrier Member


J. Michael LaPresta
Organization Member

Fort Worth, TX

Dated: March 27, 2018