

PUBLIC LAW BOARD NO. 6564

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

CSX TRANSPORTATION, INC.

Case No. 52

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

1. The discipline [actual suspension for thirty (30) days that began on August 3, 2004 and continued through September 2, 2004] imposed upon Mr. G. Farr for allegedly fouling a track without proper authority or positive protection on the adjacent track while operating a tie inserter at Kingston Yard, New York on August 2, 2004 was arbitrary, capricious and in violation of the Agreement [System File D21133604/12 (04-1013) CSX].
2. As a consequence of the violation referred to in Part (1) above, Mr. G. Farr shall have all reference to this discipline removed from his record and he shall be compensated for all lost time.

Background:

Claimant Gerald Douglas Farr was hired by a predecessor of the Carrier on April 28, 1980. In August, 2004,¹ Claimant held a machine operator position and was assigned to operate a TR10 tie inserter on System Tie Team 5XT5. On August 2, at approximately 8:00 p.m., Claimant was operating the TR10 on Track East No. 3 at Kingston Yard, New York, for the purpose of assisting equipment mechanics in making a repair. In order to allow the repair to be made, Claimant was required to extend the TR10's appendage toward Track East No. 2, which fouled that track. While Track East No. 3 was properly protected—locked out and tagged out so that no trains could enter the track—Track East No. 2 was not.

¹ All dates hereafter are 2004 unless otherwise indicated.

By letter dated August 3, the Carrier instructed Claimant to attend an investigation on August 26:

to ascertain the facts and determine your responsibility, if any, in connection with an apparent track authority violation that occurred on the 5XT5 System Tie Team on August 2, 2004, at approximately 2000 hours while assisting equipment mechanics at Kingston Yard, New York. On this date, the Tie Insertor that you were operating allegedly fouled a track without having a proper authority or positive protection on the adjacent track to your machine.

The above referenced incident indicates possible violations of CSXT Operating Rules and/or possible violations of CSXT Safety Rules.

Subsequently, the Carrier amended the letter on August 16, instructing Claimant to appear for the investigation on August 31, at 9:00 a.m., and adding to the last sentence quoted above: "this is a CSXT life critical rule violation."

At hearing, William S. McCauley, Sr., manager of the tie team, testified that Claimant told him the day after the incident "that he knew he had ... messed up and when he fouled ... he didn't talk to them about the track." (Car. Exh. 3 at 8.) However, McCauley also stated that Claimant "is an excellent employee, safety conscious. He is a very good worker, dedicated I mean one of the best guys I had." (Id. at 9.) Claimant admitted at hearing that the adjacent track was not properly protected when he fouled it. He testified that he and the mechanics learned that Track East No. 2 was not protected when a train crew informed them it needed to use the track. Claimant and the mechanics stopped their work activity at that time, and later obtained protection for the adjacent track. Claimant further testified:

Q: Did you honestly know in your mind at that time that you were the responsible ... party in ... the incident?

A: No, not at all no.

Q: Do you think that you're a responsible party in the incident even today?

A: No, I was there, but, ah, I don't know.... I feel that should [have] been the foreman or the person that gets the track.

(Car. Exh. 3 at 27.) Claimant stated that he was only there to assist the mechanics by running the machine as necessary and that he took instruction from them. He also testified:

Q: Will you ensure in the future that when you are working on a piece [of] machinery with a mechanic or with anyone else that any track that your machine is going to foul it's protected...?

A: Yes I will.

(Id. at 33.)

By letter dated September 8, the Carrier assessed Claimant a thirty-day actual suspension. By letter dated September 28, the Organization appealed the suspension. The Carrier subsequently denied the appeal, and the parties exchanged further letters. The matter was discussed in conference on November 17, but was not resolved, and therefore is presented to this Board for final decision.

Carrier's Position:

The Carrier contends that Claimant was afforded a fair and impartial hearing at which facts were developed that demonstrated Claimant's guilt. The Carrier argues that Claimant did not deny his responsibility in the instant case at hearing. He testified that he was unaware that proper protection was not in place on Track East No. 2. He admitted to his supervisor, McCauley, that he had made a mistake in not asking if the track was protected prior to fouling it. According to the Carrier, it is well settled that a claimant's admission of guilt satisfies the Carrier's burden of proof in discipline cases. Moreover, the Carrier argues, while the Organization has attempted to place responsibility for the incident on the equipment mechanics and others, each employee is individually

responsible for safety, and the fact that others may also have been at fault in the August 2, 2004 incident does not absolve Claimant from blame.

It is the Carrier's additional position that the thirty-day suspension assessed Claimant was commensurate with the serious nature of the offense.

Organization's Position:

The Organization contends that at least three mechanics, a supervisor, a foreman and an assistant foreman shared responsibility for the August 2, 2004 incident.

According to the Organization, the thirty-day actual suspension assessed Claimant was therefore inappropriate. Claimant's function as machine operator, the Organization submits, is to operate a machine on the 5XT5 gang as instructed by a manager, foreman or assistant foreman. On August 2, 2004, at 8:00 p.m., Claimant was performing as instructed. The Organization argues, "[t]he duty of obtaining track authorities and providing protection falls on the manager, foreman, or assistant foreman of the gang, not on the machine operator." (Car. Exh. D.)

Findings:

It is undisputed in the instant case that Track East No. 2 in the Kingston Yard was not protected on August 2, 2004, at 8:00 p.m., when the appendage of the TR10 tie inserter Claimant was operating in order to allow mechanics to perform a repair fouled the track. The Organization argues that responsibility for the incident lies with Gang 5XT5's manager, foreman, or assistant foreman, or even with the equipment mechanics from whom Claimant was taking instruction on the evening of August 2—but not with Claimant, who was present only to run the TR10 to assist the mechanics. It is true that McCauley testified at hearing that others were also responsible for the August 2 incident,

and were similarly charged. The Board agrees with the Carrier, however, that the fact others may have shared responsibility—or even had primary responsibility—for ensuring that the adjacent track had proper protection prior to fouling it with the TR10's appendage does not absolve Claimant from responsibility in this case. McCauley also testified:

Q: Did [Claimant] violate a life critical rule?

A: Yes, he occupied track without authority....

Q: Who is responsible for an employee's on track work protection?...

A: Each employee is responsible for his own on track protection....

[Claimant] has a responsibility to make sure that he is properly protected according to the rules. He has to ask if he has the proper protection. If not, he's not to be occupy[ing] the track.

(Car. Exh. B at 9 – 10.) The Board finds that Claimant was in error in assuming that the adjacent track was properly protected, and that it was incumbent on Claimant to ask if it was, prior to operating his machine to extend the appendage and foul the track.


The Board further finds, however, that the penalty assessed Claimant, in light of the responsibility held by others in this case, was too harsh. Award No. 37756, N.R.A.B. (Third Div.) (Conway, 3/21/06), is instructive in this regard. In that case, the claimants fouled an adjacent track with the bucket of a backhoe by working approximately three ties outside their protected limits while trying to avoid a fiber optic cable. The National Railroad Adjustment Board stated:

[W]hile not minimizing the seriousness of the offense, the Board reads the record as clear in demonstrating that the crew's failure was not one of negligent or intentional disregard of critical Safety Rules as charged, but rather attributable to their misunderstanding the scope of their protection. In short, the offense of working beyond prescribed working limits was proved, but the lapse was not, as charged, an act of complete disregard for their own well being and the safety of trains. The Claimants simply mistook the limits of their protection.... [W]e find the suspensions imposed in each instance to be excessive and disproportionate to the nature of the offense.

Similarly, in the instant case, it is clear from the record that Claimant did not intentionally or even negligently disregard the limits of protection. Rather, Claimant mistakenly assumed that protection for the adjacent track, Track East No. 2, had been obtained by whomever had obtained protection for the track he was working on, Track East No. 3. McCauley testified clearly that he considered Claimant to be a very safety-conscious employee. In these circumstances, the Board finds that the penalty assessed Claimant should be reduced to a fifteen-day suspension.

Award:

The claim is sustained in part. The suspension assessed Claimant shall be reduced to fifteen days.


JOAN PARKER, Neutral Member


CARRIER MEMBER


ORGANIZATION MEMBER

DATED: October 6, 2006

DATED: 10-6-06