

PUBLIC LAW BOARD NO. 7104

BROTHERHOOD OF)	
MAINTENANCE OF WAY EMPLOYEES)	
DIVISION – IBT RAIL CONFERENCE)	CASE NO. 19
vs.)	AWARD NO. 19
)	
CSX TRANSPORTATION, INC.)	

STATEMENT OF CLAIM:

Claim of the System Brotherhood that:

1. The dismissal of Foreman D.G. Cooper for his alleged violation of CSXT Operating Rules General Rules A and S, General Regulations GR-2 and GR-16, as well as Section 7 – On Track Worker Rules Section 7, Rule 600, Rule 704-A, FRA Regulations Part 214 and CSX Safe Way Rules GS-1, GS-10 and ES-23 was without just and sufficient cause, based on unproven charges and in violation of the Agreement [System File D&)&13107/12 (07-1195) CSX].
2. As a consequence of the violations referred to in Part (1) above, on behalf of Foreman Cooper, the Organization requests “ . . . that the charge letter and all matters relative thereto be removed from Mr. Cooper’s personal file, and he be made whole for all losses suffered as a result of the Carrier’s actions, and he be returned to the service of CSX Transportation with all rights and seniority.”

FINDINGS:

Public Law Board No. 7104, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, D.G. Cooper, had been employed by the Carrier for approximately 10 years. On August 17, 2007, he was charged to attend an investigation, as follows:

The purpose of this investigation is to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 0942 hours on August 13, 2007, while you were working as

Foreman at Leewood yard in Memphis, Tennessee, repairing a broken rail in the yard track, when I (Roadmaster Reynolds) arrived at the job site and found that you failed to have proper track protection in place for you and your team.

In conjunction with the above, you are charged with willfully neglecting your duties as Foreman, failure to perform the responsibilities of your position in a safe and efficient manner, and with possible violation of (several Carrier Operating Rules and General Regulations) along with Section 7-On Track Worker Rules . . . more particularly the sections that deal with establishing working limits on Non-Controlled Track . . .

Following the investigation, the Carrier found Claimant guilty of the charges and dismissed him from service. The on-property handling indicates that Claimant had a 30-day suspension on June 27, 2006 for violating roadway protection rules.

The facts of this case are not in dispute. On August 13, 2007, Claimant was a Foreman on gang 5MA6, Memphis Section. He was in charge of a project to fix broken rail in Track Number 10 in Leewood Yard, Memphis, Tennessee. Roadmaster Gary Reynolds came to the site that day, and he and Claimant started a job briefing. Mr. Reynolds testified at the investigation that he looked up and down the track and noticed that the switches were not lined against them, and there were no derails on the track, so he questioned Claimant concerning his track protection. He stated that Claimant told him he had a 707 on the main at the south end of the yard, and no trains could get in without his permission. Claimant also told Mr. Reynolds that he was protected on the north end because the Yardmaster had blocked it out. Mr. Reynolds testified that he told Claimant that usually a Yardmaster cannot provide protection, and asked if there was a power switch on the north end. Claimant replied that there was not.

Mr. Reynolds further testified that he could see a locomotive in Track #11 and asked Claimant if he had a derail between the workers and the locomotive, and Claimant replied that he did not. Mr. Reynolds added that Claimant told him that there was no need to have the derails down because the yard engine had been cut off and no one was working in the yard.

Mr. Reynolds also testified that as they were speaking a train came up the middle main at the yard and started switching. He stated that he told Claimant to get his employees off the track, but Claimant insisted they were protected, because he had 707 protection, had spoken to the train's crew and given them permission to make the moves, and the Yardmaster had them blocked out on the south end.

Mr. Reynolds further testified that he told Claimant that this was not sufficient protection; they had to have inaccessible track to change the rail. He stated that it was appropriate to use a 707 for protection if there were no operative locomotives in the yard, but it had to cover the complete entrance to the yard; here, he stated, the 707 only covered the switch at the south end on the main.

Mr. Reynolds explained at the hearing that the Yardmaster controls yard movement, but he had no way to manage unprotected tracks, because he did not control any switches or signals. According to the rules, he added, Yardmaster "block" protection would only be adequate if the Yardmaster had control of a signal or switch permitting entrance to the tracks.

Roadmaster Jerry Thompson testified at the investigation that Claimant was working for him on the day of the incident. He confirmed that the track was non-controlled, so the proper track worker protection was to spike switches out of service and install portable derails. He stated that he never taught employees that it was acceptable to use a Yardmaster's block for protection, as that was not appropriate pursuant to Rule 704-A. In this case, he stated, the track was not blocked out to prevent access from the north end.

Three other Carrier officers also testified that the proper protection method on any non-controlled track, pursuant to 704-A, is derails and blocked switches. While a Yardmaster can give the workers permission to access the track, they stated, that is not protection, as the Yardmaster has no way of making the track inaccessible. Positive protection, they added, is required all the time.

Claimant testified at the investigation that he had a 707 on the south end of the yard. He stated that with respect to the north end, he had spoken to the Yardmaster, who had blocked out the #10 track. He acknowledged that the Yardmaster had no remote switch and thus no physical control, but, he stated, the Yardmaster did control the trains by radio and could therefore keep them from entering the yard.

Claimant testified it was his understanding, from working in different yards, that he could contact the Yardmaster to block out a track. He stated that the practice was acceptable in this case because there were no locomotives or equipment on the track. When asked, at the hearing, how his protection would prevent locomotives from coming onto the track, Claimant replied that there were none there to begin with. He added that he had a clear line of sight and a radio, so there was sufficient protection in the event of an unanticipated arrival.

The Carrier's On-Track Worker Rules provide, in pertinent part:

704-A. Establishing Working Limits on Non-Controlled Tracks

1. When establishing working limits on one or more non-controlled tracks:

- a. Make prior arrangements with the employee responsible for those tracks.

- b. Make certain that the track(s) are not occupied by any equipment that is not under the direction of the employee-in-charge.
- c. Take the steps necessary to make the track(s) inaccessible to all trains, engines and on-track equipment.

2. Making the Work Limits Inaccessible

When establishing working limits on one or more non-controlled tracks, make the work limits inaccessible by either:

- a. Posting a flagman with instructions and capability to hold all trains and equipment clear of the limits.
- b. Lining a switch or applying a derail to prevent access to the working limits and securing the switch or derail with an effective securing device by the employee-in-charge.
- c. Making certain that a remotely controlled switch is lined to prevent access to the limits . . .

In addition, the applicable Federal Regulations provide:

Section 214.327 Inaccessible Track

(a) Working limits on non-controlled track shall be established by rendering the track within working limits physically inaccessible to trains at each possible point of entry by one of the following features:

* * *

(2) A switch or derail aligned to prevent access to the working limits and secured with an effective securing device by the roadway worker in charge of the working limits.

The record establishes that Claimant attended an On-Track Worker Rules Review in 2007. The training document provides, with respect to Establishing Working Limits on Non-Controlled Track:

- Prior arrangements must be made with the employee who is responsible for those tracks.
- The track within the working limits must be clear of and made inaccessible to trains or other equipment, other than those moving under the direction of the employee-in-charge.
- Inaccessible track is physically preventing entry and movement of trains and equipment.

PRIOR ARRANGEMENTS MUST BE MADE WITH THE DESIGNATED EMPLOYEE WHO IS RESPONSIBLE FOR (THE) TRACKS. This person may be a Yardmaster or Trainmaster, etc. The contact gives permission, but remember, that conveys no protection. The EIC must still make the track inaccessible. (Emphasis in original).

Remember, making a track inaccessible must be done before occupying the track. First notify the person in charge of the track, make the track inaccessible, and then you may occupy the track.

The Carrier first asserts that all of the Claimant's procedural rights were fully protected and the hearing was conducted in a fair and impartial manner. On the merits, the Carrier contends that substantial evidence supports the conclusion that Claimant was guilty of the asserted Rules violations. The Carrier points to the testimony of Roadmaster Reynolds that Claimant did not have derails down, nor did he have switches spiked and lined. The Carrier also notes that a train entered the middle main at the yards, notwithstanding Claimant's assertion he had sufficient protection. The Carrier stresses that it was necessary to render the track inaccessible, and it was not adequate to have the Yardmaster block out the south end. The Carrier states that Claimant's explanations for his actions were unpersuasive, and he violated Carrier safety rules and subjected himself and his fellow employees to potential harm. Given the serious nature of the violation and the fact that Claimant had a similar incident only 14 months earlier, the Carrier urges that dismissal was appropriate.

The Organization asserts that the record demonstrates that Claimant's supervisor, who preferred the charges, was unfamiliar with worker protection in the yard. Moreover, the Organization states, Claimant's testimony shows that he indeed had worker protection in place guaranteeing the safety of all workers at the location, himself included. The Organization contends that although Claimant attempted to explain the sufficiency of the protection, the supervisor was not satisfied and believed an alternative method should have been employed.

Claimant's testimony, the Organization states, shows he took the safest course for his gang by ensuring that the Yardmaster controlled train movement in non-work areas. There is, the Organization stresses, no evidence that Claimant willfully neglected his duty or endangered life on property. On the contrary, the Organization states, Claimant performed his assigned duties safely and in compliance with all applicable rules, and the Carrier has not demonstrated otherwise. Therefore, the Organization concludes, the discipline must be set aside.

The Board has carefully reviewed the record in its entirety. Claimant and his workers were on non-controlled track. The Carrier's Rules are clear, as five Carrier witnesses testified, that non-controlled track must be made physically inaccessible, by having switches or derails preventing entry and movement, before employees may work on the track. No such protection was in place here. The five Carrier witnesses also testified, as was stressed to employees in training Claimant attended, that although a

Yardmaster can give workers access to the tracks, his "block" does not convey protection.

Carrier's track worker protection rules are in place to prevent accidents and, to put it plainly, keep employees from being hit by trains. The rules seek to minimize the possibility of human error by clearly delineating the specific protections that must be in place. While Claimant might have believed his protection was adequate, that was not his determination to make. He was required to take the safest course, as specified in the Carrier's rules, and make the track physically inaccessible. Clearly, he did not. Thus, his guilt has been proven by substantial evidence.

As the Carrier asserts, Claimant committed a serious safety violation. In these circumstances, where Claimant's record includes a previous similar offense, we cannot say that the Carrier's determination that dismissal is appropriate is an unfair, arbitrary or discriminatory exercise of the Carrier's discretion.

AWARD

Claim denied.


JACALYN J. ZIMMERMAN
Neutral Member


MATTHEW BORZILLERI
Carrier Member 3/23/09


TIMOTHY KREKE
Organization Member 3-23-09

Dated this day of , 2009.