

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYEES' DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

Roadmaster Tim Magargle, by letter dated February 19, 2008, notified four employees, including Claimant herein Gary E. Shipley, to attend a formal Investigation on March 6, 2008, "to determine the facts and place your responsibility, if any, in connection with the accident that allegedly occurred on February 9, 2008 at approximately 13:30 hours at the Allendale Road Crossing . . . on the Miami Subdivision, with vehicle N3022D." "In connection with the above," the letter stated, "you are charged with failure to properly operate a company vehicle in your care to avoid hitting another object and causing damage to CSXT equipment, specifically damaging the base of the crossing gate." The actions of the four employees, the letter asserted, "appear to be in possible violation of, but not limited to Operating Rules A, F, L, S, GR2, GR5, GR6, GR16, General Safety Rule GS7, MofW MWI G025 and CSXT Vehicle Policy."

Following receipt of the charge letter, a copy of which had been sent to the General Chairman each of the Seaboard Federation and the Allied Federation, the Claimant's representative, the Vice Chairman of the Allied Federation, discussed the possibility of the employees involved accepting a waiver to the Investigation. In the meantime the March 6th scheduled Investigation was postponed by the agreement of the parties. On March 3, 2008, the Roadmaster wrote a letter to the Claimant and the driver of the vehicle involved in the February accident informing them of the new hearing date for the Investigation and including the following paragraph:

Mr. Traywick [Vice Chairman Allied Federation] also indicated that each of you may be inclined to accept a waiver to this investigation but were reluctant to sign with all of the rules, regulations and instructions listed in the original charge letter. I have reviewed them and am willing to strike Operating Rule F, General regulation GR16, and General Safety Rule GS7 and modify GR2 to read in possible violation of GR2(4) to read careless. Should you choose, you may elect to accept a Waiver in lieu of this investigation by signing the option below and return this form to me by the end of the work day on March 12, 2008. You may fax the form to [fax number], otherwise, the hearing will be held on March 27, 2008.

At the bottom of the letter was a signature line for the recipient of the letter to agree to “Participate in the ‘Waiver’ process by accepting 10 days actual suspension. The suspension dates to be determined by Division Engineer.” In the alternative he could accept “Customary handling under the Railway Labor Act and the applicable Collective Bargaining Agreement.”

At the Investigation the Roadmaster explained that the reason that the second letter was addressed to only two of the employees involved in the accident, instead of all four as in the original letter, was the Carrier’s determination that the foreman (Claimant Shipley) and the truck driver (the second addressee on the letter, T. Bocchimuzzo) had greater responsibility with regard to the accident. The other two employees, who were sitting in the back of the truck, received formal coaching and counseling with regard to the incident. The Claimant and Mr. Bocchimuzzo, according to their testimony, have each been employed by the Carrier since October, 1997.

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was the foreman of a team that was repairing rail defects on February 9, 2008. They had finished their last repair for the day and were sitting in their truck doing paperwork. The crew member who had driven to the job site had a headache and asked Tom Bocchimuzzo if he would drive back to the hotel. Mr. Bocchimuzzo agreed to do so. The original driver sat in the back with the fourth member of the crew, and Mr. Bocchimuzzo, the new driver, was behind the wheel. The Claimant sat in the front of the truck with the driver.

The truck was parked on a narrow, spur road to the side of the railroad tracks about 50 feet from the main road. In order to get to the main road the truck had to back up until it reached the road. Mr. Bocchimuzzo backed up the truck, using both side mirrors to avoid hitting anything. The Claimant also was watching through the side mirror on his side. While the vehicle was being backed up, it hit the base of one side of a crossing gate that was installed near where the road intersects with the railroad tracks. The object was not visible in the mirrors. The bottom of the gate pole broke off, as it was designed to do, when contact was made.

Another employee, who maintains signals, was working in the same area, and he took the necessary steps to protect the crossing. The Claimant called the Roadmaster and reported the incident to him. Arrangements were also made to have the necessary repairs done to put the crossing gate back into operation. The repairs were completed by the following morning. There was no damage to the vehicle, and nobody was injured in the incident. One arm of the crossing gate was broken, and there was some damage to the lights on the gate. The signal supervisor estimated the total damage as \$2,000.

The Roadmaster testified that the Claimant and Mr. Bocchimuzzo are charged with violation of Engineering Department Safety Rule ES-13b, which states:

ES-13. Motor Vehicles

...

- b. If two or more people are occupying the motor vehicle designate one person to guide backing movements from the ground.

When the February 9 accident occurred, the Roadmaster stated, there was nobody that was outside of the truck while the driver was moving the truck back. There were two or more people occupying the vehicle, the Roadmaster testified, and nobody was designated as the “back-up” person. The Organization objected to the Roadmaster’s reliance on ES-13 since it was not mentioned in the charge letter as a rule that was violated. The Organization’s objection was noted.

The Roadmaster testified that the truck barely hit the pole of the crossing gate but that the poles are made with break-away bottoms to reduce the amount of damage to the crossing gate. Asked why the Claimant and Mr. Bocchimuzzo were charged, the Roadmaster testified, “Mr. Bocchimuzzo was charged because he was driving the vehicle at the time. And Mr. Shipley was charged because he was the foreman and is responsible for the entire gang’s actions. In between the two of them, one of them should’ve made sure that somebody was on the ground backing them out of the location that they were at.”

Although ES-13. is the main rule, the Roadmaster testified, another rule that applies is General Safety Rule GS-4., which states: “**GS-4. Warning other Employees** Warn co-workers of unsafe acts and hazards.” Nobody warned anybody of the hazard of backing up, the Roadmaster stated, or the possibility of having somebody get out on the

ground and watch them back up. The paragraph in the Code of Ethics addressing workplace safety, the Roadmaster testified, is also pertinent. It states as follows:

Workplace Safety

CSX is committed to providing a safe and secure work environment. Safety is a way of life in everything we do, both on and off the job. Each of us is responsible for our own safety and the safety of others. You must be alert to safety risks in your daily work, know your job's safety requirements, and follow all safety and operating rules.

References:

- CSXT's *Safe Way Rules*
- CSXT's *Operating Rules*

The Organization's objections to the references both to Rule GS-4. and the Code of Ethics, on the ground that neither was mentioned in the charge letter, were noted by the hearing officer. The final rule relied on by the Roadmaster as applicable in this case was General Regulations GR-2. 4., which states:

GR-2. All employees must behave in a civil and courteous manner when dealing with customers, fellow employees and the public. Employees must not

...

4. Be disloyal, dishonest, insubordinate, immoral, quarrelsome, vicious, careless, or incompetent.

Of the items listed in paragraph 4 of GR-2, the Roadmaster testified, the only one that applied in this case was "careless." Both the Claimant and Mr. Bocchimuzzo were operating rules qualified in 2007 and had safety certification in 2008.

The Roadmaster testified that each time that he has observed the Claimant or Mr. Bocchimuzzo backing a vehicle in the past, there was always a ground man guiding the

vehicle. "I believe this was an isolated case," the Roadmaster testified. He added:

I appreciate the fact that they called me right away. That they were very honest and up front about it. I've never had any problems out of them, very good workers. And, I believe this was an isolated case in which they let their guard down and this specific incident did not have a ground man to back them up.

When questioned by the Claimant, the Roadmaster acknowledged that at the time of the accident, there was nothing on the job briefing form that stated that a ground man should be designated when backing up a vehicle. About three or four weeks after the accident, however, the Carrier decided to require the crew to designate someone for vehicle backing purposes and enter that person's name on the daily Job Briefing Safety Form. This was done, according to the Roadmaster, because around the same time as the present accident there were about three other accidents involving backing vehicles.

Mr. Bocchimuzzo asked the Roadmaster why, if the Code of Ethics says that each employee is responsible for his own safety and the safety of others, he and the Claimant were the only names on the second charge letter. Why isn't everybody's name on the letter, Mr. Bocchimuzzo inquired, considering that they were all in the truck and anyone could have said, "Stop"? The Roadmaster answered that the Carrier felt that Mr. Bocchimuzzo as the truck driver and the Claimant as the foreman had "a higher amount of responsibility." The Roadmaster acknowledged that the other two members of the crew should have said something and that "they are being handled under the CSX policy with a formal coaching and counseling for this."

In his testimony the Claimant acknowledged that in classes that he has attended it was stated to avoid backing up but, when backing up, to use a ground man when possible. He did know, the Claimant testified, that if you have two or more people in a truck, to

designate somebody as a ground man. On the Monday following the accident, the Claimant stated, in a conversation with Division Engineer Foster, he (the Claimant) said, "Believe it or not, Mr. Foster, you can ask anybody that's ever observed us we have always used a ground man. What happened that day, why we didn't, I have no idea."

The reason that they could not see the base of the pole in the truck mirrors, the Claimant explained, was because there is a large toolbox on the back of the truck that obscured sight of the base. The Claimant acknowledged that as a foreman it is his responsibility to make sure that all of the employees working under him follow the CSX rules and policies and regulations.

In response to the hearing officer's question whether he felt that he did everything in his power to prevent the accident, the Claimant answered, "At that time, and that day, yes." If so, he was asked, could he explain how the accident happened. He answered, "I can't explain how it happened other than loss of focus or . . . [a] lapse" Asked whether he complied "with all of these rules," the Claimant testified that he felt that he complied with all of the different rules listed in the original charge letter and the revised one. It is obvious, he stated, that he did not comply with ES-13. or he would have had a ground man, who would have seen the crossing mechanism.

Thomas Bocchimuzzo, a Trackman, testified that he has been on the Claimant's team since June, 2007. With regard to the February 9 accident, Mr. Bocchimuzzo stated that he looked out both mirrors and saw that it was clear but could not see directly behind him that the other signal was there. He backed up only a few feet, he testified, and felt a slight tap. He and the Claimant got out of the truck, and the signal was lying on the ground.

Mr. Bocchimuzzo testified that he takes the responsibility that he backed the truck

up and hit the pole. "I didn't want to hit it," he stated. "I didn't intentionally hit it. I couldn't see it, it was directly behind me and it was an accident." Mr. Bocchimuzzo attributed the lapse to the fact that on that day he was not the normal driver but was asked at the last minute to drive the truck because the regular driver was not feeling well.

Prior to the accident on February 9, 2008, Mr. Bocchimuzzo testified, the normal practice for their gang was that one of the guys in the rear would get out of the vehicle and back the driver out. "We normally just don't tell them, you have to do it," Mr. Bocchimuzzo stated. "It's just like a known normal thing. We just get out and back each other up." On the date of the accident, Mr. Bocchimuzzo testified, they sat in the truck a long time because they were going over the paperwork. "And that is where we . . . probably . . . got this lapse in our thinking and somebody didn't get out to be the back up man and that's what caused the accident."

Mr. Bocchimuzzo was asked by the hearing officer why he did not accept a waiver when his union representative had indicated that he (Mr. Bocchimuzzo) might accept one if the charges were reduced. He answered that he did not feel that he had broken all of the rules listed, that he feels that he broke ES-13. by not using a back up man and that that is what caused the accident. "I didn't yell or curse at anybody," Mr. Mocchimuzzo stated. "And a lot of these rules have implications to all those different things." All four people in the truck had a lapse, Mr. Mocchimuzzo stated. Asked if he thought that he was being careless, Mr. Bocchimuzzo stated that he did not feel that he was being careless, that he just could not see the pole and that is why it got hit.

In his closing statement the Claimant noted that the Code of Ethics declares that each one is responsible for his own safety and the safety of others. He asserted that there were four people in the truck and that he is having a hard time understanding why it went

from four individuals down to two individuals. He also stated that he wanted to comment on why he did not sign the waiver. When Rule ES-13. was entered into evidence, he explained, it became clear to him that that is the rule that was violated. "But I had a hard time signing off on that waiver for all these different rules," the Claimant said, "which as we sat here today other than the GR-2. rule I believe where it states careless we really haven't addressed any of these other rule violations other than the new rules that were added to GS-13. [sic, ES-13.], the code of ethics and the ES-4 [sic GS-4], which is another one that states warning other employees, warn co-workers of unsafe acts or hazards. I mean anybody who's on that job site has the responsibility that that's my interpretation to warn the other people. . . ."

By letter dated April 10, 2008, from Ron Foster, Division Engineer, the Claimant was informed of the results of the Investigation. The letter stated in pertinent part:

. . .

Testimony brought out in the investigation revealed that you admitted and took responsibility for hitting the signal equipment as the foreman of the team. You admitted to violating ES-13 b and that you knew of the rule even if you didn't know the specific rule number. Testimony also revealed that GR2 (4) was also violated in that it was a careless act that caused your team to back into the signal equipment and you also admitted that you and your team were not focused as the reason the accident occurred. You also testified that it is your responsibility as a foreman to make sure that your team follows all operating rules.

It has been determined to a[ss]ess discipline of fifteen days actual suspension and fifteen (15) days overhead suspension.

The following conditions for discipline have been imposed:

1. Discipline of fifteen (15) calendar days' actual suspension. This suspension will begin on April 21, 2008 and end on May 5, 2008. You will return to work on Tuesday, May 6, 2008.
2. Discipline of fifteen (15) overhead suspension beginning May 6, 2008 thru May 5, 2009.
3. You must meet with the Division Engineer on your first day back to work.

Your failure to comply with any of the above directives may result in additional charges and could lead to your dismissal under IDPAP.

The Board is of the opinion that in the circumstances of this case it would not be appropriate to sustain greater discipline than was originally offered Claimant should he accept a waiver of the Investigation. The Roadmaster's letter dated March 3, 2008, to the Claimant and Mr. Bocchimuzzo noted that their representative had indicated that each of them "may be inclined to accept a waiver to this investigation but were reluctant to sign with all of the rules, regulations and instructions listed in the original charge letter."

The Roadmaster, in the letter, then offered to eliminate some of the alleged violations of rules, regulations, and instructions that they were possibly in violation of, stating as follows:

I have reviewed them and am willing to strike Operating Rule F, General regulation GR16, and General Safety Rule GS7 and modify GR2 to read in possible violation of GR2 (4) to read careless. . . .

That left the following rules and regulations that the Claimant (and Mr. Bocchimuzzo) was being charged with violating:

Operating Rules A, L, S, GR5, GR-2 4, GR6, MofW MWI G025 and CSXT Vehicle Policy.

The only one of the many rules and regulations that the Claimant was specifically charged with possibly violating that he was found guilty of was General Regulation GR-2. 4.¹ He

¹The Claimant was careless in the incident in question because he did not give sufficient attention or thought to avoid the danger inherent in backing up a truck. However, Rule GR-2. 4., even limiting item 4. to the word "careless," deals with more than carelessness. The first sentence of the rule cannot be ignored. It states, "All employees must behave in a civil and courteous manner when dealing with customers, fellow employees, and the public." Very likely it is that which Mr. Bocchimuzzo had in mind when he testified, "I didn't yell or curse at anybody. And a lot of those rules have implications to all those different things. . . ." So, while

was also found guilty of violating Engineering Department Safety Rule ES-13. b., but he was not specifically charged with violating that rule.

The waiver option is expressly provided for in Rule 25, Section 2 of the Agreement:

Section 2 - Alternative to hearings

(a) An employee may be disciplined by reprimand or suspension without a hearing, when the involved employee, his union representative, and the authorized official of the company agree, in writing, to the responsibility of the employee and the discipline to be imposed.

(b) Discipline imposed in accordance with paragraph (a) of this Section is final with no right of appeal.

Here the Claimant, through his union representative, commenced negotiations with the Carrier for a possible waiver of the Investigation and an acknowledgment of responsibility. He expressed to the Carrier his concern about all of the rules, regulations, and instructions listed in the charge letter. In order to be able to make an informed decision of whether to accept a waiver, the Claimant was entitled to know what violations would go on his record as a result of his accepting responsibility for the charges against him. He rejected the offer because he believed that he was not guilty of violating the rules, regulations, and policies listed. It turns out that he was basically correct because he was found guilty of violating only one of the many rules and regulations cited.

In his closing statement at the Investigation the Claimant stated that he wanted to comment on why he did not sign the waiver after some of the rules he was charged with

it is true that the Claimant was careless, it is not clear that he violated General Regulation GR-2.4.

possibly violating were stricken. He stated, "I had a hard time signing off on that waiver for all these different rules." He noted that the only rule of all the rules and regulations listed in the charge letters which was even addressed at the hearing was GR-2., to the extent of carelessness.

Certainly by March 3, 2008, more than three weeks after the accident, the Carrier should have been prepared to inform the Claimant that the most pertinent rule that he appeared to have violated was ES-13. b. Nor does any explanation appear in the record why the Claimant was charged with having possibly violated a large number of rules, regulations, instructions, and/or policies of which no claim has been made during the Investigation that he was guilty and copies of which were not even introduced into the record. On the evidence this Board believes that it is reasonably likely that the Claimant would have accepted a waiver had accurate information been given to him regarding the rules, regulations, etc. that the Carrier, in good faith, after a review of the uncontested facts, reasonably believed that he appeared to have violated. Under these circumstances the Board is of the opinion that the Claimant's discipline should be reduced to what it would have been had he participated in the waiver process, namely, 10 days' actual suspension. The Board so finds. The Claimant shall be made whole for the difference.

A W A R D

Claim sustained in accordance with the findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award

effective on or before 30 days following the postmark date the Award is transmitted to the parties.

A handwritten signature in cursive script, appearing to read "Sinclair Kossoff", written above a horizontal line.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
August 15, 2008