

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:

By letter dated April 3, 2008, L. B. Lapalm ("Claimant"), was instructed to attend a formal Investigation on April 17, 2008, at the Division Engineer's office in Selkirk, New York, to ascertain the facts and determine "your responsibility, if any, in connection with your alleged failure to properly perform your duties as an 'Employee in Charge' when on March 24, 2008 at approximately 1210 hours, in the vicinity of MP QB 96.1 on the Berkshire Sub, Springfield, MA, you gave eastbound train Q 42624 permission to pass your conditional stop sign and enter your working limits without notifying the employees working under your protection." The letter listed a number of rules that the Claimant was "charged with possible violations of." The letter confirmed that the Claimant was "being withheld from service pending the outcome of" the hearing.

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.

Assistant Roadmaster Eric L. Wade testified that on March 24, 2008, at approximately 1210 hours he was observing welds being made on track 1 at QB 92.1 by Foreman Beauvais and his coworker. Foreman Beauvais looked up, Mr. Wade stated, saw a train coming, and alerted his coworker and Mr. Wade to clear the track. After the train had passed, Mr. Wade asked Foreman Beauvais and the coworker if either had been contacted by Employee in Charge ("EIC") Foreman Lapalm ("the Claimant") to clear the track. They said that they had not been notified. The train that had passed on track 1 was train No. Q42624.

According to the testimony of Assistant Roadmaster Wade, at approximately 10:30 a.m.¹ that day the Claimant contacted Foreman Beauvais and asked him to clear the track for a train coming eastbound on track 2. After the train passed by, Foreman Beauvais called the Claimant on the radio and asked permission to resume work on track 1. The Claimant granted the permission and the crew resumed their work. The defective rail had been removed and the new rail installed on track 1 prior to the train passing through the work area on track 2.

Around 11:45 a.m. or noon a Track Inspector on a high rail car approached Mr. Wade and Mr. Beauvais's welding crew on track 2. The Track Inspector was held there by Dispatch because of a train coming eastbound on track 1. The Track Inspector told the welding crew that once the eastbound train passed on track one, he was going to cross over and run behind that train.

When Assistant Roadmaster Wade was told by Foreman Beauvais and the

¹Subsequent testimony by Roadmaster Squires indicated that the train involved was No. Q26423 and that it passed through the protected area between 11:14 and 11:22 hours rather than 10:30 hours.

coworker that they had not been contacted by the Claimant regarding train No. Q42624, Mr. Wade contacted Roadmaster Roy Squires about the incident. Roadmaster Squires came over and interviewed Foreman Beauvais and the other Welder. The Claimant came into the area and Roadmaster Squires asked to see his EC-1 form. The form was not completely filled out. The clear times of the trains were not entered, and the bottom portion of the form where the EIC is supposed to enter the names of the employees working in his authority limits was not filled out. The Roadmaster told the Claimant that he needed to enter the clear times and fill out the bottom portion of the form.

In response to questioning from the Claimant, Assistant Roadmaster Wade acknowledged that from that point on the Claimant continued his job safely and properly for the rest of the day “protecting the 19 men that were the C&S and the 5 men that were on the Boutet gang and the 2 men on my SB gang”

Roadmaster Roy E. Squires testified that on the date of the incident, March 24, 2008, the Claimant was Foreman on the SB gang and was running a 707 order from QB 92 to QB 96 on tracks 1 and 2. As EIC, Roadmaster Squires stated, the Claimant was responsible for running the 707 order and making sure that everybody was clear of the work area before passing trains. The persons under Roadmaster Squires’s jurisdiction for which the Claimant was responsible were a Boutet gang, a subdivision gang changing sperry rail, and an SB gang. In addition, Roadmaster Squires testified, the Claimant had some maintainers working there that did not fall under Roadmaster Squires’s jurisdiction. The purpose of the 707 order, according to Roadmaster Squires, was to protect the employees changing the rail, doing the Boutet welding, and doing the surfacing.

On the part of the EC-1 document headed Record of Others Within Authority 707 - Form W that the Claimant had left blank, he was supposed to write down the name of

every person asking permission to work within the 707 protection, the location where they were working, and what time he authorized them to do the task. If a train was passing through the protected area, the Claimant was supposed to call everyone authorized to work within the area and tell them to clear the track. When the person reported clear, the Claimant was supposed to put the time released.

Roadmaster Squires testified that on the portion of the EC-1 form headed Report of Movements Authorized to Enter Working Limits - 707 not only were the clear times for the trains that had entered the protected area not listed, but train No. Q26423 that, according to the train log, had passed through the area between 11:14 and 11:22 hours was not entered. The Claimant had also failed to cross out an incorrect authority number from the Dispatcher that he had mistakenly entered on another document next to the correct number. In addition, the Claimant had neglected to list all of the work to be performed by the different crews on the Job Briefing Safety Form.

Two tapes of conversations with the Dispatcher were played at the Investigation. The first tape was a conversation between the Claimant and the Dispatcher in which the Claimant states, "Yeah, Dispatcher – just got that sperry rail fixed on track #1. Hey, I want to lift that restriction QB 92.0 to QB 96.1 – speed back to normal." The Dispatcher replied, "Hey. You say the 30 mile an hour we had on #1 track between QB 92.0 and 92.1 [sic] is back to normal speed, over?" The Claimant responded, "That is correct, Brenda."

The second tape is a recording of a conversation between the Dispatcher and the Track Inspector and then between the Dispatcher and the Claimant. In the recording the Track Inspector voices concern to the Dispatcher that he was waiting for a train at QB 92 coming on the opposite track when the Welders were on that track "welding away." The

Dispatcher replies that she did not know that. The Dispatcher then calls the Claimant and states, "I have a train to go on track 1 - to go east on track 1. Will you be able to take him, over?" The Claimant asks if the train has called him. The Dispatcher states, "He will be calling you, yes. . . . I still have Jette [the Track Inspector] on track 2. He's gonna follow him out at 92 then after he goes east." The Claimant states, "Okay, roger that. He's all set to go track 1." The Dispatcher replies, "Roger, okay. And I did get that - just to know that first - instruction on the bulletin. Thank you very much." The Claimant responds, "Okay. Anything I can do for you, you just give me a call." The Dispatcher answers, "Roger, okay. Yeah, the first train you'll see is a Q42624 and he's got the 689 in the lead." The Claimant thanks the Dispatcher, who also thanks the Claimant and ends the conversation. At no time in the conversation did the Dispatcher inform the Claimant that she had just been told by the Track Inspector that there were Welders working on track 1.

Roadmaster Squires testified that during the investigation the Claimant stated that he received a call from Tom Sullivan, the Backhoe Operator who was involved in changing the sperry rail, and that Mr. Sullivan told him that they were done with the sperry rail and had removed the boards for the speed restriction. The Claimant told the Roadmaster that he thought that Mr. Sullivan was clearing everybody, including the Welders, and that he considered the track clear when Mr. Sullivan said that the boards were down. The Roadmaster asked the Claimant if Mr. Beauvais had ever cleared. The Claimant said, no, but that he took it that everybody was clear, that nobody else was working because Mr. Sullivan said that the rail had been changed and that the boards were down.

Roadmaster Squires also spoke with Mr. Sullivan, who said that he did call the

Claimant and told him that the boards were down but never said that the Welders were clear of the track. Roadmaster Squires testified that the Claimant willfully neglected his duty by failing to complete the proper documentation on who was working on the track and the proper follow-through of clearing the people that were under his jurisdiction before he ran the train through the protected part of the track. The Claimant, the Roadmaster testified, endangered the lives of the people working under his jurisdiction by not clearing them and endangered property by creating a situation where a train might have been required to go into an emergency mode.

In response to questioning by the Claimant's representative, the Roadmaster explained that there was a sperry defect in the rail that had to be repaired by cutting out a section of rail with the defect and placing another piece of rail in the track. Usually, the Roadmaster testified, they change the rail and put bars on, but because the Boutet Welders were available and within the work area, he used Welders to join the new section of rail to the existing rail. Welding is the best method. The Roadmaster testified that changing the rail takes the defect out and lifts the speed restriction, but it does not mean that the job is complete. The welding had to be completed before the job was done.

At the Investigation the Claimant asked the Roadmaster whether it was "part of the job briefing that your section gang was going to go out and change the sperry rail and the welders – and they were all going to work together." The Roadmaster answered, "Yes. I did – and that's exactly what they did." The Roadmaster also acknowledged that in the job briefing he instructed the Claimant to lift the sperry rail speed restriction on track 1 once the gang completed that work.

At the Investigation, the Claimant asked the Roadmaster who was to take charge after he gave his instructions in the job briefing. The Roadmaster testified:

Well usually I'd give it [his instructions] to the senior man that was working, which would have been Tom Pais. But since he was working with a qualified Foreman on the same job, which was Mr. Beauvais, Mr. Beauvais was the EIC in charge of that job. So he was the guy that asked for the permission to change the rail and do the welding, and the track should not have been cleared for train movement until Mr. Beauvais said it was clear. Mr. Sullivan's comments to me were irrelevant.

The Claimant asked the Roadmaster why Mr. Sullivan called and told him to lift the restriction, whether Mr. Sullivan took it upon himself to do so. The Roadmaster testified, "I told in the job briefing that if the sperry rail had changed – which it changed – that it was okay to lift the restriction back to normal. I didn't give anybody specific instructions to do it." The Claimant asked if anybody could "just take that upon themselves." The Roadmaster replied, "That would have been Mr. Beauvais, and probably told the gang there to cut the boards."

Thomas Sullivan, a Machine Operator, testified that his assignment on March 24, 2008, was to go out to CP 92 and change a rail with the West Springfield gang. The Employee in Charge of that work group, he stated, was the Claimant. His gang did not have a Foreman that day. Mr. Sullivan testified that he was not the person responsible for contacting the Employee in Charge or clearing all people from his work group if a train approached.

After their job was done, according to Mr. Sullivan, he was asked to take the speed restriction signs (also called boards) down, but he did not recall who asked him to do so. He took them down, he stated, and then called the Claimant. Mr. Sullivan testified that he did not remember word for word what was said in his conversation with the Claimant.

The Claimant, Mr. Sullivan stated, asked him about the speed restriction, and he replied that it was not his authority if the restriction was off or not but that he (Sullivan) was told to take the boards down. The Claimant, Mr. Sullivan testified, asked him, "Are you guys done?" What he remembered saying, Mr. Sullivan stated, was that they were done with that job and were going to their next job. Probably a little bit more was said, Mr. Sullivan testified. Asked, "Did you at any time tell Mr. Lapalm that all employees were clear of the track and the work area?", Mr. Sullivan testified, "No."

In reply to questions by the Claimant's representative, Mr. Sullivan testified that he did not think that he used the word "clear," but that he was not going to say "no," that he did not. When he spoke to the Claimant, Mr. Sullivan stated, he was only speaking for himself and Tommy Pais, who was with him at the time.

Mr. Sullivan was asked if he was working at the same location and at the same time as the Welders. He replied, "I believe they helped us take that rail out." Then, he testified, "we left before they started welding." In response to questions by the Claimant, Mr. Sullivan testified that from what he remembers he called to tell the Claimant one thing, that the signs were being taken down; that the Claimant asked him about the restriction and that he replied to the effect that it was not his authority to take the restriction down, so he was not sure. Mr. Sullivan testified that he remembered the Claimant asking him if they were done and that he said that they were all done with job one and were heading to job two. He added, "Like I say, I don't remember word for word what was said."

Malcolm Beauvais testified that he was a Welder Foreman on the date of the occurrence, March 24, 2008. His assignment that day was with the subdivision gang to change a sperry rail and to weld it in at location CP 92 on track one. The Employee in

Charge of his on-track protection that day, he stated, was the Claimant. When they got the okay to work, Foreman Beauvais testified, they cut in a plug to remove a sperry plug and proceeded to weld it in. According to Foreman Beauvais, he and the other Welder were physically present and did the work with the maintenance crew at the site. When the work of putting the piece of rail in the track was completed, Foreman Beauvais stated, the gang left and he and his partner stayed behind and did the welding. Foreman Beauvais recalled that a train passed on track two during the course of the job and that the Claimant contacted him to clear the track

After the train passed Foreman Beauvais and his coworker resumed work upon getting permission from the Claimant to do so. When they finished making their welds, Foreman Beauvais testified, and were finishing up the grinding he noticed an eastbound train on track one, the track that they were working on. He then instructed his partner who was doing the grinding to get the grinder off the track, and they let the train go by. The Claimant, he stated, did not attempt to contact him at any time to clear the track prior to that train coming through.

The Claimant testified that he has 32 years of service and that on the date of the occurrence he was the Foreman of the SB gang. He stated that he was in charge of four gangs and asked the Roadmaster for help but was told that nobody was available. He testified that he remembers Foreman Beauvais calling to tell him that they wanted to go back to work after a train had gone through. The Claimant gave him permission to go back to work. Subsequently, according to the Claimant, Mr. Sullivan called him and told him that they were clear of all tracks, they were done with their job, they would pick up the speed signs, and to lift the restriction back to normal speed. Mr. Sullivan also stated that they were going to a second job.

The Claimant was asked where on the form he recorded the passing of the train before train Q42624. He stated that he thinks that what happened was that he was driving around, going from job to job, and might have written down on a note pad that the train was coming through. Or else, he surmised, he might have been giving a job briefing to the other three gangs that he was in charge of.

The Claimant could not explain why he did not list the names of the employees working on the tracks under his protection in the part of the EC-1 form designated for that purpose. He stated that he has never used that portion of the EC-1 document because he has done only two or three Rule 89s. He testified that he would normally "just scribble on another piece of paper" the names of the men that were working with him because they were right there with him.

The Claimant was asked how many people were involved in changing the rail and the welding. He stated that he did not know, that he did not count them. He did not feel that he had to count them, he testified, because as a group he gave a job briefing to them, and they understood what they were doing. He did not know that he needed to number them and document how many, he stated, because they were going to be within his responsibility and his sight. He was asked if he did not know how many were working and had not designated anyone to be in charge to be contacted, how would he know who was fouling the track that he was supposed to be protecting. He testified that at the job briefing he told them that they were going to go out and work and that he would be back to clear them.

The Claimant acknowledged that he did not clear the tracks prior to authorizing train Q42624 to move through his working limits. He did not do so, he stated, because he thought that the employees were already clear, that they were gone from the site. He

testified that he had received a call from Mr. Sullivan stating that they were clear of all the tracks and to restore the track back to normal speed. The Claimant produced a written statement from a Mr. Charles Mead, who was the Claimant's driver on the date in question. Mr. Mead wrote:

To Whom It Concerns:

I was personally present on the morning of March 24th when Foreman Lapalm received word from Tom Sullivan via radio that his work crew had finished their task and were clear of all tracks. He also stated that Foreman Lapalm was free to take down the slow order that was in effect at that time.

/s/ Charles Mead

The Claimant testified that he gave Foreman Beauvais and all of the employees who were with him permission to go to work. He told them all that they could start ripping the rail out. He did not specifically single out Foreman Beauvais for notification, he stated, since Beauvais was not the Employee in Charge of that group, which also included the section gang. According to the Claimant, the Roadmaster was present at the job briefing, and the Claimant thought that he would designate someone to be in charge of receiving notification, but the Roadmaster did not do so.

The Claimant testified that in his experience if someone that has been working on changing a rail calls and tells him that the signs have been lifted and to call the Dispatcher to remove the speed restriction it indicates that the job is done and the track is clear. Following his conversation with Roadmaster Squires about the incident in question, the Claimant was allowed to work for the rest of the day. No one else took over his 707.

After the conclusion of the formal Investigation the Claimant was notified by letter dated April 30, 2008, from the Division Engineer that based on "a thorough review of the

transcript . . . and exhibits, it was determined that substantial evidence was established to find you guilty as charged.” The letter concluded, “Based on your prior personal record, a summary of which is attached, and the proven offences in this instance, it has been determined that the appropriate measure of discipline is dismissal in all capacities. The discipline assessed is effective immediately.”

The Individual Development & Personal Accountability Policy of the Carrier lists Occupying Track Without Authority Rule 707 as a Major Offense and permits “Removal from service - Discipline up to dismissal” as the penalty for a first offense. Dismissal is thus permitted but not required for a Rule 707 violation.

Rule 25 (d) of the Agreement between the parties states, “An employee who is accused of an offense shall be given reasonable prompt advance notice, in writing, of the exact offense of which he is accused with copy to the union representative. . . .” The “exact offense” of which the Claimant was accused and given reasonable notice was the “alleged failure to properly perform your duties as an ‘Employee in Charge’ when on March 24, 2008 at approximately 1210 hours, in the vicinity of MP QB 96.1 on the Berkshire Sub, Springfield, MA, you gave eastbound train Q 42624 permission to pass your conditional stop sign and enter your working limits without notifying the employees working under your protection.”

The evidence establishes that the Claimant was guilty of the aforementioned offense when he gave train Q42624 permission to enter the 707 work limits that he was protecting as the Employee in Charge without notifying the Welders to clear the track because of the approaching train. There are, however, mitigating circumstances that must be taken into account.

Roadmaster Squires acknowledged that as part of his (the Roadmaster’s) job

briefing he told the Claimant that the section gang that was going out to change the sperry rail and the Welders were all going to work together (Tr. 58). There is no evidence that the Roadmaster made clear to the Claimant that after the sperry rail was changed the Welders would remain at the site by themselves and weld the newly inserted rail section to the existing track. That fact should have been made clear to the Claimant in the Roadmaster's job briefing.

In addition, the Roadmaster testified that Foreman Beauvais was the EIC in charge of the job with regard to changing the rail and the welding (Tr. 64). The track should not have been clear for train movement, the Roadmaster asserted, until Mr. Beauvais said that it was clear. It is not disputed in the record, however, that the Roadmaster never informed the Claimant that Foreman Beauvais was in charge. Nor is there any evidence that the Roadmaster apprised Foreman Beauvais of that fact. In the Board's opinion the Claimant's culpability is mitigated by the fact that he was not provided with important information that he should have received in the Roadmaster's job briefing.

Mr. Sullivan called the Claimant by radio and informed him that he (Mr. Sullivan) had been instructed to take the speed restriction signs down, that they were done with the job, and that they were going on to a second job. Based on what Mr. Sullivan told him and the Roadmaster's statement to him in the job briefing that the section gang and the Welders were all going to work together, the Claimant understood from Mr. Sullivan's communication that everyone had cleared the tracks.

There is a dispute in the record as to whether Mr. Sullivan specifically said that the employees were clear of the track. The Board does not believe that it is necessary to determine that factual issue since it is not disputed that Mr. Sullivan did state that the employees had finished the job and were going on to a second job at another site.

Obviously they could not go to a second location without clearing the track at their first site.

Nevertheless the Claimant was at fault in the matter. First, he should not have assumed that because the speed restriction was lifted that the job was finished. As it turned out, it was apparently safe to remove the speed restriction even though the welding had not yet been completed. Second he should not have assumed that because the Welders and the section gang started working together on the sperry rail, they would also finish their respective tasks at the same time. As he should have realized, it was possible that the work of the Welders and the section gang would overlap at the beginning of the job but not at the end.

Where lives are at stake, such as in a Rule 707 situation, an Employee in Charge must not conduct himself on the basis of assumptions. The only safe course for the Claimant to have followed would have been to call Foreman Beauvais prior to authorizing train Q42624 to enter the protected working limits. The Claimant had authorized Foreman Beauvais to foul the track earlier that morning, and he should not have permitted a train onto the protected track without communicating directly with him to ascertain if he was still on the track. The Claimant himself testified that nobody had been designated to be in charge with respect to the section gang or the Welders. In that circumstance safe procedure required that the Claimant attempt to make contact with each individual employee. This he failed to do.

Having noted the culpability of the Claimant, nevertheless, because of the mitigating elements present as described above, the Claimant's 32 years of service, and the considerations discussed below, the Board believes that dismissal of the Claimant was an excessive penalty. The Board notes that the Carrier does not invariably dismiss

employees for Rule 707 violations. See, for example, Third Division Awards Nos. 30126 (five-day suspension of Track Foreman, who was the Employee in Charge of surfacing gang, for permitting a Ballast Regulator under his charge to work outside the Track Foreman's Rule 707 authority and therefore to be totally unprotected); 29407 (30-day suspension of Bridge Foreman, who was Employee in Charge supervising mainline work, and permitted his work force to continue to occupy the main track for a period of 15 minutes after expiration of his Rule 707 work order); and 28568 (20-day suspension of Assistant Track Foreman, who was the Employee in Charge of an undercutter gang doing track maintenance and authorized a train to enter the limits of his work authority while the undercutter was still fouling the track, with the result that the train struck the undercutter, damaging the track equipment and the engine).

In finding the dismissal penalty to be excessive the Board has taken into account the Claimant's disciplinary record. In 32 years of service commencing on April 18, 1976 (Tr. 88), the Claimant's record was unblemished until August, 2007, when he received his first discipline, a five-day actual suspension. There were two additional disciplinary offenses of 30 days each, the full details of which are not discernible from the sketchy information in the record regarding prior discipline. However, so far as the Board can make out from the information provided, none of the Claimant's prior infractions would indicate that he has provided a basis for questioning his ability or willingness to perform the duties of his main occupation of Machine Operator (Tr. 120) in a safe, competent, and conscientious manner. Under these circumstances and taking into consideration the Claimant's 32 years of generally satisfactory service, the facts that the train involved did stop in time and that no injury or property damage occurred, the other elements of mitigation previously discussed, and that the Carrier does not invariably penalize Rule

707 violations by dismissal, the Board concludes that dismissal was an excessive penalty in this case.

The board has also considered the evidence regarding the Claimant's faulty record-keeping. Rule 25 (d) of the Agreement between the parties states, "An employee who is accused of an offense shall be given reasonable prompt advance notice, in writing, of the exact offense of which he is accused with copy to the union representative. . . ."

(emphasis added). The exact offense of which the Claimant was accused was improper performance of his duties as Employee in Charge by giving a train permission to enter his working limits without notifying the employees working under his protection.

The charge letter makes no mention of faulty or inadequate documentation or record-keeping. Nor does the statement in the letter of "possible violations" of various Safeway Rules or General Rules satisfy the requirement of "reasonable prompt advance notice, in writing, of the exact offense" of which the employee is accused so far as deficient documentation or record-keeping is concerned. The natural interpretation of the charge letter, as a whole, is that the specific act or omission alleged in the first paragraph of the letter resulted in possible violations of the various Rules listed in the second paragraph of the letter. Neither the first paragraph or the second paragraph of the letter makes any mention of improper record-keeping or documentation although the evidence shows that the Roadmaster was aware of the Claimant's deficiencies in that respect at virtually the same time as he learned of the Claimant's failure to give proper notification to the employees working under his protection. The absence of any mention of any alleged offense with regard to record-keeping or documentation in the charge letter makes it improper to rely on the same in support of the Carrier's dismissal action. See this Board's decision in Public Law Board No. 7120, Award No. 4.

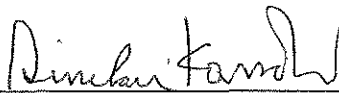
This Board, however, is of the opinion that the totality of the evidence adduced at the Investigation justifies the disqualification of the Claimant from the position of Foreman. The Board recommends that such action be taken by the Carrier with respect to the Claimant based on the facts brought out at the hearing. The Board finds that the Claimant shall be reinstated to employment to a position consistent with his qualifications (other than Foreman) and seniority but without back pay.

A W A R D

Claim sustained in accordance with 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.



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
November 7, 2008