

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

Roadmaster Dave Fauke, by letter dated April 10, 2008, instructed B. R. Maroney (the Claimant) to attend a formal Investigation on April 23, 2008, in the Carrier's conference room in Louisville, Kentucky, in order "to determine the facts and place your responsibility, if any, in connection with an incident that occurred on Monday March 31, 2008 at approximately 1200 hours CSX time at County Line Road 333 at M.P. OZA 222.6 on the CED Subdivision. While working on the 6L38 extra gang," the letter continued, "you allegedly entered the Red Zone of the rail saw while it was being or about to be operated." In connection with the foregoing, the letter stated, the Claimant was "charged with failure to work in a safe and efficient manner, and a Red Zone violation in possible violation of CSX Safety Rule GS-3 and CSXT Operating Rules 700, and 727." By mutual agreement of the parties the hearing was postponed and rescheduled to be held in the Roadmaster's office in Terre Haute, Indiana, on May 8, 2008.

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.

On March 31, 2008, the Claimant was a Trackman on the 6L38 extra gang under Roadmaster Dave Fauke. The gang's assignment that day was to install a new crossing panel just south of Oaktown, Indiana. To accomplish that the gang first had to take out an amount of old track the same length as the panel being installed. To remove the old track four cuts had to be made in the track using a gasoline-powered rail saw. In the course of accomplishing that task sparks caused by the saw cutting the steel rail flew into the Claimant's face.

Roadmaster Fauke was not present for the incident, but he investigated it. Based on his investigation, he described how the incident occurred as follows.

Mr. Maroney had assisted Mr. Gabel in setting up the rail saw on the rail. Mr.

Maroney had put the clamp on the rail which the rail saw is attached to, which

holds it in place while it makes the saw cut. And after they hooked it all up [–] the

saw . . . to the brace or the clamp [–], Mr. Maroney walked away and noticed that

there wasn't a lot of slack in the hydraulic hose coming to the saw for Mr. Gabel.

So he walked over to the section truck and pulled a little bit of slack off the hose reel, and then went back to Mr. Gabel and walked around behind him and pulled the slack that he had pulled off the truck – to pull the hose back to get it away from Mr. Gabel's leg while he [Mr. Gabel] made the saw cut. And while he had bent over to pick the hose up, Mr. Gabel engaged the saw to make the cut and it threw sparks in Mr. Maroney's face.

The hearing officer asked Roadmaster Fauke to state in his own words what he felt that Mr. Maroney did wrong and how he violated the rules. He answered, "I feel Mr. Maroney – what he done wrong was walk back behind Mr. Gabel without letting him know he was going to be behind him and violated his Red Zone while operating the rail saw.

Roadmaster Fauke testified that he talked to Mr. Maroney about the incident and that Mr. Maroney explained that he was going to pull some slack in the hose to give Mr. Gabel a little more room to maneuver with the hose; and that had pulled the slack off the machine from the truck and then walked behind Mr. Gabel to pull the slack back away from him from behind him. According to Roadmaster Fauke, the Claimant told him that Mr. Gabel did not know that he (the Claimant) was behind him.

Mark Allen Gabel testified as follows. He is the Maintenance of Way Track Foreman on 6L38 extra gang. He has almost 34 years on the railroad and has been in his present position for roughly two years. He has held various foreman jobs since 1975. He

held an initial job briefing at the work site and discussed the steps of the job with his men. He gave assignments to the men. He usually runs the rail saw or the cutting torch and did so on this occasion. Claimant Maroney assisted him in setting the rail saw up. He did not know that Mr. Maroney was in a position where he (Mr. Maroney) could be struck with sparks in his face when he (Foreman Gabel) cut the rail.

The hearing officer asked Foreman Gabel how it came about that Mr. Maroney was in a position to be hit by the sparks. He answered, "What he told me – he went around to move the hydraulic line into position. And he walked around and entered the Red Zone." He did not know, Foreman Gabel testified, that Mr. Maroney was behind him. If Mr. Maroney was going to step behind him, Foreman Gabel stated, he should have stopped him (Mr. Gabel), had a job briefing, and discussed the situation with him – told him what his actions were going to be. Foreman Gabel estimated that Claimant Maroney was "probably less than 4 or 5 feet" away from him when struck with the sparks. In making the cut, Foreman Gabel testified, he was between the rails of the track, and Claimant Maroney was outside of the rail.

The Claimant's Organization Representative asked Foreman Gabel, "Can you remember on the day in question if the hoses were wrapped around your leg?" He answered, "No sir, I can't. No, I don't recall them being wrapped around – not wrapped around my leg, no." The Representative then inquired, "Then can you remember Mr. Maroney stating to you that the hoses were wrapped around your leg and he was going to

give you some slack?" He stated, "I don't remember that statement."

The Claimant gave the following testimony. At the time of the incident he worked as a Trackman on gang 6L38 and had been on the gang for six weeks or two months. His hire date with the company was June 8, 1980. On March 31, 2008, Foreman Gabel had a job briefing with the gang before the work started. In the briefing the Foreman did not assign a task to the Claimant. He (the Claimant) knew what to do because he has done the same thing over and over.

He (the Claimant) [to continue with his testimony] screwed the clamp onto the saw, and Foreman Gabel was holding it. Then he (the Claimant) fastened it down to the rail and lined it up. They got everything lined up and tightened up, and had everything set up. But the hose was lying in front of Mr. Gabel. So that Foreman Gabel would not burn up the hose, he (the Claimant) took the hose, and Foreman Gabel bent down, and the Claimant put it over his back. The hose was "real tight across the back of his leg." The Claimant said to Foreman Gabel, "Let me get the slack out."

The Claimant [his testimony proceeded] ran back and "pulled the hose thing away from the truck." The Claimant approached Foreman Gabel, grasped the hose, "and slid it up to get the slack off the back of his leg." Foreman Gabel then hit the trigger on the saw and the Claimant got blasted in the face with sparks from the rail. He was four or five feet away from Foreman Gabel at the time.

The Claimant testified that when he approached Foreman Gabel, the latter was not

running the saw. Asked by the hearing officer whether he was in the Red Zone when he was struck by the sparks, the Claimant testified, "I don't think I'm in the Red Zone because he hadn't been running the saw. He wasn't good to go. He couldn't have ran that saw. It was too tight against the back of his leg."

The hearing officer asked the Claimant if he was within 15 feet of the saw when it was operated. The Claimant stated, "He hit the trigger – when I come within 4 or 5 feet and slid the hose off the back of his leg, he hit the trigger." The hearing officer asked, "Did he know you were behind him?" The Claimant answered, "I don't know if he did or didn't. I, I don't see how he didn't see me to be honest." The hearing officer questioned the Claimant if he said to Roadmaster Fauke that Mr. Gabel did not know that he (the Claimant) was behind Mr. Gabel. He replied, "Well, I was guessing he didn't know that. I might have made that statement, but evidently he didn't know it. I don't think he did it on purpose. I don't believe that."

The Claimant acknowledged that he did not communicate with Foreman Gabel when he walked back into the Foreman's work zone but stated, "Well, I communicated with him before I even walked away. I said let me get the slack out of the hose." The hearing officer asked the Claimant, "And did you initiate a follow-up job briefing with Mr. Gabel when you were going to move that hose off the back of his legs?" He answered, "Well, I said it before I walked away. I'm going to get the slack off of you. That's what I said before I walked away." When he came back to the Red Zone, the

Claimant acknowledged, he said nothing.

The Claimant testified that there was no job briefing between him and Foreman Gabel pertaining to the cutting of the rail. According to the Claimant's testimony, had he not moved the hydraulic hose when it was lying in front of Foreman Gabel, the hose would have burned up.

In response to questioning by the Organization Representative, the Claimant repeated that Foreman Gabel bent down so that the Claimant could get the hose over the Foreman's head. The Organization Representative asked the Claimant, "Now when you got it over his head, is that when he cranked the saw up?" The Claimant answered:

No sir. No, he did not. It was laying across his leg so tight. I said let me get the slack out, and I ran to the truck – didn't run, I went over to the truck , pulled the slack out. And when I came back I was about 4 or 5 feet away from him. I slid the hose, because it was tight on his leg, and slid the hose forward so it would go out and be loose, so it wouldn't be tight on him. He couldn't have cut it – he couldn't have cut.

The Claimant testified that he and everybody on the gang has run the rail saw. When he uses the saw, the Claimant stated, and has all of his safety equipment on, he would always look around to see if everybody is in the clear.

At the conclusion of the hearing, the hearing officer offered the Claimant the opportunity to make a statement in his own behalf, and he stated as follows:

I understand everything that was said here. But I think there is a key point not being hit here. He wasn't running that saw. The machine was running, and I went over there and took that slack out. And I did come within 4 or 5 feet of him and slid the hose off his leg. But to me, my understanding of this, he should have at least looked around and you know – hitting the trigger when somebody is around you – I, I don't know. I don't get this. I don't believe it's fair what you're even doing to me. I took it hard in the face, and I don't think this is fair.

Following the hearing, by letter dated May 28, 2008, Tod Echler, Division Engineer, notified the Claimant that he was found to have violated the rules as charged and that his discipline was a 30-day actual suspension. The Division Engineer explained his decision as follows:

... Substantial evidence was established to show that you failed to work in a safe and efficient manner, and you entered a Red Zone without making the proper notification or job briefing, in violation of CSX Safety Rule GS-3 and CSXT Operating Rules 700, and 727. These violations occurred when you entered the Red Zone of the rail saw while it was being or about to be operated, at County Line Road 333 at M.P. OZA 222.6 on the CED Subdivision.

Based on the proven offenses in this instance, and on your prior personnel record, it has been determined that the appropriate measure of discipline should be a 30 day actual suspension. The discipline assessed shall run for 30 consecutive calendar days beginning on April 23, 2008 and continuing through May 23, 2008.

The Carrier found the Claimant guilty of violating General Safety Rule GS-3 and Operating Rules 700 and 727. GS-3 states the purpose of a job briefing (to “make us more aware of our surroundings and better prepared to recognize and avoid potential

hazards”), when to conduct a job briefing, and what the content of job briefing should consist of. It does not, however, state who is responsible for conducting a job briefing.

On-Track Worker Rule 700, however, covers the question of who is responsible for conducting a job briefing in a situation, such as in the present case, where work is being performed that will require an employee to foul a track. Rule 700 states:

Job Briefing Responsibilities

700. Job Briefing – Prior to starting a work period that will require an employee to foul a track, the employee-in-charge designated to provide on-track safety for all members of a group, or other designated employee, shall provide a job briefing. Such job briefing shall include information on the means by which on-track safety is to be provided and instruction on the on-track worker rules to be followed. If track to be fouled is in multiple track territory all participants must acknowledge designated track number. A job briefing for on-track safety shall be deemed complete only after the affected roadway worker has acknowledged understanding of track to be occupied, time limits, track limits, the roadway worker protection rules, procedures and instructions.

* * *

Roadway Work Group Communication - Every roadway work group working on a common task that involves fouling a track will have one roadway worker (the employee-in-charge) designated to provide on-track safety for all members of the group.

Before any member of a roadway work group fouls a track, the employee-in-charge shall arrange to inform each roadway worker of the on-track safety method to be used and followed during the performance of the work at that time and location as illustrated on the authority. Each roadway worker shall again be so informed at any time the on-track safety procedures change during the work period. Such information shall be given to all roadway workers affected before the change is effective, except in cases of emergency.

On-Track Equipment Note: On-Track Equipment (OTE) is defined as:

1. Vehicles equipped with hi-rail attachments or;
2. Rail detector cars or;
3. Motor cars or;
4. Other engineering equipment.

It includes mechanical department and contractor equipment equipped with flanged wheels.

On-track equipment operator refers to the operator of on-track equipment.

In the present case the work involved the fouling of the track, which the Board understands to mean placing personnel or equipment at or near the track. When the Claimant went onto or adjacent to the track in order to screw the clamp onto the saw and fasten it down to the rail, he was fouling the track. Rule 700 is explicit in requiring that “Before any member of a roadway work group fouls a track, the employee-in-charge shall arrange to inform each roadway worker of the on-track safety method to be used and followed during the performance of the work at that time and location as illustrated on the authority.” The employee-in-charge in this case was the Foreman since he did not assign anyone else that task, and he was in charge of the group. The Foreman did not inform the Claimant of the on-track safety method to be used and followed in performing the work of setting up the rail saw. That inference follows from the Claimant’s uncontradicted testimony that there was no job briefing between him and the Foreman regarding the cutting of the rail.¹

¹The Foreman testified that he held an initial job briefing, discussed the steps of the job with his men, and made assignments for the men. He gave no testimony, however, regarding what was said, if anything, in the job briefing regarding on-track safety methods. The Claimant’s

The Carrier charged and found the Claimant guilty of violating On-Track Worker Rule 700. The Board finds no support in the record for the Carrier's determination that the Claimant violated Rule 700. The responsibility under Rule 700 for conducting a job briefing with regard to the set up and operation of the rail saw was that of the employee-in-charge, not the Claimant's. The evidence in the record reveals a serious shortcoming in the content of the job briefing. But the blame for that must be placed on the individual that Rule 700 placed the responsibility on for conducting the job briefing. Plainly that individual was the Foreman and not the Claimant.

The Carrier also found the Claimant guilty of violating General Safety Rule GS-3. The only evidence in the record explaining on what basis the Claimant allegedly violated GS-3 is the testimony of Roadmaster Fauke. The Hearing Officer had Roadmaster Fauke read into the record GS-3 and the other rules cited in the charge letter. The Hearing Officer then said to the Roadmaster, "Mr. Fauke, you've entered the rules that apply here and you testified as to what happened. Can you give me in your own words . . . as a result of your investigation that day, what did you feel Mr. Maroney did wrong and how did he violate the rules that you entered?"

The Roadmaster replied, "I feel Mr. Maroney – what he done wrong was walk back behind Mr. Gabel without letting him know he was going to be behind him and

testimony stands uncontradicted that there was no job briefing between him and the Foreman regarding the cutting of the rail.

violated his Red Zone while operating the rail saw.” In no way did the Roadmaster explain how the Claimant violated General Safety Rule GS-3. Nor is the Board able to discern from the content of Rule GS-3 how the Claimant violated that rule. As previously noted the rule deals with job briefing, but there is nothing in that rule or any other rule or regulation cited by the Carrier that would place the responsibility for conducting a job briefing on the Claimant in the circumstances of this case. The Board finds that there is no substantial evidence in the record to establish that the Claimant violated General Safety Rule GS-3.

The Claimant was at fault for reentering the Red Zone in violation of Rule 727 without first communicating with the Foreman to make sure that he would not engage the saw while the Claimant was nearby. The Foreman, however, was equally at fault. On-Track Rule 700 is very clear as to his responsibility, and he failed to comply with the rule. He was required to provide a job briefing that “include[d] information on the means by which on-track safety [was] to be provided and instruction on the on-track worker rules to be followed.” One of the rules to be followed was On-Track Rule 727, but, since the Foreman did not conduct a job briefing pertaining to the cutting of the rail, it must be assumed that he did not provide instruction regarding compliance with Rule 727 in connection with the cutting.

Moreover, it should be noted, that Rule 727 places responsibility not only on roadway workers with regard to a machine’s Red Zone but also on the operator of the

machine. Paragraph 1 d requires an operator of machinery approaching on-track workers to “communicate with the workers before coming closer than 15 feet.” Such a rule evinces an intention to require the same due care on the part of an operator of on-track equipment not to injure on-track workers as is required of such workers to avoid being injured by on-track equipment. The Foreman’s action in bringing the rail saw into operation without first checking to make sure that nobody was in the vicinity of the machine was not the due care that one would expect of an experienced operator. Also one would think that a proper job briefing would make provision for such a precautionary measure on the part of the operator for on-track safety.

In sum there is no substantial evidence to support the Carrier’s determination that the Claimant violated General Safety Rule GS-3 or On-Track Worker Rule 700. In addition, under the plain language of Rule 700, as the person with the responsibility for the safety of his gang, it was the Foreman’s and not the Claimant’s responsibility to conduct a job briefing in connection with the fouling of the track on March 31, 2008, in order to install a new crossing panel. The evidence shows that the Foreman neglected to conduct a job briefing with the Claimant, who assisted him in setting up the rail saw, pertaining to the cutting of the rail. The Claimant violated Rule 727, paragraph 1 c by entering the rail saw’s Red Zone without first communicating with the Foreman, who was the operator of the machine. The Foreman, however, was equally at fault in failing to conduct a job briefing regarding the cutting of the rail, which should have included

instructions to the Claimant not to enter the Red Zone while the machine was operating or about to be operated. The Foreman also did not exercise due care in starting to operate the saw without first checking to make sure that nobody was in the vicinity of his machine.

Had a proper job briefing been conducted in this case and the Claimant nevertheless entered the Red Zone in violation of Rule 727, then the Claimant's discipline of a 30-day actual suspension would have been within the range of appropriate discipline provided for in the Individual Development & Personal Accountability Policy, in view of the seriousness of the violation and the fact that this would have been his second serious violation within a three-year period. On the other hand, it is equally plausible that with a proper job briefing that included information on the means by which on-track safety was to be provided and instruction on the on-track worker rules to be followed in relation to the cutting of the rail, no violation would have occurred.

The Board is aware of and agrees with the principle that, in general, one cannot avoid responsibility for his own negligence by pleading the negligence of others. See, for example, Third Division Award No. 39511. On the other hand, where two employees bear significant responsibility for a violation and only one receives discipline, that fact may properly be taken into consideration in reviewing the properness of the other employee's discipline.

In the present case, for the reasons discussed above, the Board believes that had

the Foreman conducted a proper job briefing with the Claimant before commencing the setup and operation of the rail saw, as he was required by On-Track Rule 700 to do, it is reasonable to believe that the accident in which sparks were thrown in the Claimant's face never would have occurred. Second, had the Foreman checked to make sure that nobody was in the immediate area before engaging the saw, as exercise of ordinary care would require, then he would have seen the Claimant, who was a few feet away from him attempting to give more slack to the hydraulic hose, and not started the saw.

Under these circumstances, where the Claimant and the Foreman were engaged in the same activity at the same time, and both displayed lack of due care in significant ways, the Board is of the opinion that the Carrier cannot justify imposing a 30 day actual suspension on one and no discipline whatsoever on the other. It is for that reason that the Board finds that the discipline imposed on the Claimant was excessive and must be reduced. The Board believes that a fair reduction in the present case would be to the level of discipline permissible under the first step of the progression for serious offenses. The ID&PAP provides "Time Out with up to 5 days overhead record suspension" as the first step of the progression. It is the Board's determination that the appropriate discipline to be assessed against the Claimant in this case is Time Out and five days' overhead suspension, with the overhead amount to remain in effect for one year from the date of the incident. The Claimant shall be made whole for the difference in lost wages pursuant to the discipline assessed by the Carrier and what was ordered to be assessed in this

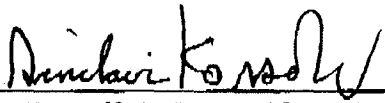
proceeding.

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.



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
June 12, 2009