Award No. 25
Case No. 25

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated July 15, 2008, E. Marrero, Engineer Track, directed G. E. Shipley ("the Claimant") to attend an Investigation in the Carrier's Headquarter Office Building in Hialeah, Florida, on July 31, 2008, "to develop the facts and place your responsibility, if any, in connection with an incident that occurred on Monday, July 7, 2008 at approximately 1315 hours at or near mile post SXH 38.95 on the Homestead Subdivision, when the hi-rail vehicle that you were operating while assigned to assist in marking ties, struck and severely injured Mr. J. D. Mallett, Roadmaster." The letter stated that the Claimant was "charged with failure to safely perform the responsibilities of your position, carelessness, endangering life and property, failure to devote full attention to controlling the movement of a vehicle, and possible violations of" a number of Rules, Regulations, and Instructions. The hearing was held on July 31, as originally scheduled, but the location was changed to the Amtrak station in Ft. Lauderdale, Florida.

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 July 7, 2008, the Claimant, who was a foreman, and Roadmaster J. D. Mallett were working together using a hi-rail truck to mark ties that the Claimant's crew was to replace the following week. The Claimant was operating the hi-rail while the Roadmaster would walk ahead and mark the ties with paint. They were working under 704 authority obtained by the Claimant.

Their method of working was for the Roadmaster to walk ahead on the track while the Claimant sat in the hi-rail truck waiting for the Roadmaster to signal him to bring the truck forward. The truck contained cans of paint and drinking water. The Claimant had obtained 704 authority until 1330 hours. The Roadmaster ran out of paint periodically and, when that happened, he would step outside of the track and motion for the Claimant to bring the truck up to him.

At approximately 1250 hours the Roadmaster again ran out of paint and motioned for the Claimant. When the Claimant came up to him with the hi-rail truck, they discussed the amount of time remaining under the 704 authority and agreed that they had enough time for the Roadmaster to mark additional ties. The Roadmaster put the empty can of paint in the truck and got another full can of paint.

The Roadmaster got in the center of the track and began walking away from the truck and marking ties. About 20 or 25 minutes later he heard a noise behind him and was struck from behind by the hi-rail truck. He was knocked down between the rails, landing underneath the truck. The Roadmaster yelled the Claimant's name a couple of times. The Claimant felt a thud and heard his name called. He stopped the truck and, when he could not see the Roadmaster over the hood, backed it up. He jumped out of the

truck and saw the Roadmaster lying on the track.

The Claimant attended to his injured supervisor and, despite initial resistance by the Roadmaster, insisted that the Roadmaster had to go to a hospital to be checked out. The Claimant removed the truck from the track, released the 704 authority, helped the Roadmaster into the truck, and drove him to the hospital. A Narrative of the incident prepared and edited by Engineering Division management on July 7, and 8, 2008, stated, " * * * Final diagnosis was torn ligament across top of shoulder, will be required to wear a nylon sling for his shoulder and several broken vertebra in his back that will require a brace. * * * " According to the Narrative, the Roadmaster was expected to be released from the hospital on July 9, 2008, and "to be off for at least 6 weeks with therapy to follow for shoulder and 4 months for his back."

The Claimant testified that shortly after the accident, while he was assisting the Roadmaster, the Roadmaster asked him what happened. According to the Claimant he told the Roadmaster that from the time the Roadmaster walked away from the truck until the time he heard the thud and the Roadmaster call his name, he honestly did not know what happened. "I don't know if I blacked out or zoned out," the Claimant said to the Roadmaster. In a statement that he wrote at the request of the Carrier on the day of the incident, the Claimant stated, "I don't know if I doze [sic] off while moving, but the next thing I remember, I felt a thud and heard J.D. [the Roadmaster] yell, 'Ship!' That's when I realized what had happen." [sic] The Claimant was required to submit to drug/alcohol testing following the accident, and the results were negative.

The Claimant began his employment with the railroad in October, 1997. His record was without blemish until April, 2007, when he signed a waiver and accepted a

15-day suspension and 15 days of on-the-job training for a Rule 704/706 violation.[1] The details of the incident do not appear in the record. He received coaching and counseling regarding the proper procedures for securing Roadway and Carrier vehicles in December, 2007, after he improperly secured equipment and vehicles that were later stolen. The coaching and counseling were considered Informal Corrective Action ("ICI"), the first step of discipline under the Carrier's Individual Development & Personal Accountability Policy. He received a 15-day actual and a 15-day overhead suspension in April, 2008, for a vehicle accident where he was a passenger. As the foreman he was found to be at fault for not seeing to it that someone in the vehicle got out and directed the driver in backing up the truck so that it would not hit and damage the gate equipment at a railroad crossing. The discipline was reduced to a 10-day suspension in a Public Law Board proceeding.

Following the hearing in the present case, the Division Engineer, by letter dated August 19, 2008, notified the Claimant that the evidence substantiated that he violated the cited Rules, Regulations, and Instructions; that he admitted driving the vehicle that struck the Roadmaster; that he admitted several times in his testimony that he was "not focused on the job task when the vehicle struck" the Roadmaster; that it was proven that he was careless, neglected his duty and endangered the life of the Roadmaster; and that he "also failed to devote [his] full attention to the company's service while on duty and . . . failed to perform [his] duties safely." The letter concluded, "Based on the above and due to the seriousness of the charges that were placed against you, coupled with the fact that these

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[1] The Narrative prepared by the Engineering Division regarding the July 7, 2008, incident refers to an incident wherein the Claimant "rolled a backhoe over and was coached in October of 2006. . . ." However there is no reference to such an incident in the Employee Information System Document Search Report, which was admitted into evidence as Carrier Exhibit E. Since no reference to such an incident was found in the System Document Search, that would indicate to the Board that no official discipline was administered to the Claimant for the occurrence.

charges have been proven; it is my decision that you are to be immediately terminated from the service of CSXT."

The Carrier contends that the discipline of dismissal was fully justified because the Claimant was provided a fair and impartial investigation; the Carrier produced substantial evidence of his guilt; and that the discipline was not excessive. The Claimant's due process rights were fully protected, the Carrier asserts, and the hearing was conducted in a fair and impartial manner. Certain procedural arguments raised by the Organization at the hearing were without merit, the Carrier contends.

Regarding evidence of guilt, the Carrier asserts that the Claimant admitted his guilt when questioned during the Investigation and that in this industry, "an employee's admission of guilt satisfies the Carrier's burden of producing substantial evidence thereof." Concerning the degree of discipline, the Carrier notes that the Claimant "was found guilty of failure to safely perform the responsibility of his position, carelessness, endangering life and property, and failure to devote full attention to controlling the movement of a vehicle when he struck Roadmaster Mallet from behind and causing bodily harm while Claimant Shipley was operating the hi-rail vehicle and they were marking ties at milepost SXH 38.95." The Carrier contends that "[t]he level of discipline of dismissal cannot be viewed as arbitrary or capricious given the severity of the offense." Citing prior awards between the parties, the Carrier argues that "employees who engage in negligent behavior, such as that exhibited by Claimant Shipley can be subjected to severe disciplinary measures."

In his own defense at the Investigation, the Claimant stated that he started working with the company on October 20, 1997. He has held numerous positions, he asserted, and has had the benefit of working with some very experienced project managers and

roadmasters that some of the newer workers did not have the benefit of. For three years, he stated, he worked on a particular double segment of track almost seven days a week, traveling 210 miles a day. He never fell asleep, he said, and always had everything he was supposed to have. According to the Claimant, he always did what he was supposed to do and usually got assigned some of the most difficult and challenging jobs that were out there. "I have been a loyal employee," the Claimant declared. The payroll records, he stated, show how many hours he is out there on the railroad for the company. "My phone is always on if they call out," the Claimant continued, and "whatever I need to do, I do."

Referring to incidents that had occurred in the "last year and a half," the Claimant stated, "I had had these problems and these incidents and I can't explain it, . . . I just want it to be known that I don't want my character or my workmanship or my dedication to this Company presented, I don't know what word I am looking for, but I don't want it to be determined on just what happened the last year and a half." The Claimant proceeded, "I think I am still a salvageable employee and could still be a great employee and contribute a lot to this Company in the years to come if given the chance."

Regarding the accident, the Claimant averred that "there is nobody that feels worse about what happened to JD than me. If I could trade places with him," he declared, "I would do it." The accident was unfortunate for both the Roadmaster and for him, the Claimant stated, "and I just hope I got a chance to continue when this is all said and done and I still have a chance to be employed with this Company."

The Board agrees with the Carrier's position that the Claimant was afforded all of the due process rights to which he was entitled and that there was no procedural violation in the Investigation of the incident. The Board has also established by substantial evidence that the Claimant was guilty of negligently operating the hi-rail and thereby

causing serious injury and endangering the life of his supervisor, the Roadmaster.

In the course of his testimony the Claimant suggested that perhaps some medical condition caused him to doze off, black out, become disoriented, or otherwise be unaware of his surroundings. However, no evidence was presented that a medical condition caused the lapse on the Claimant's part. A medical cause for the Claimant's conduct would be an affirmative defense for which the burden of proof is properly placed on the Claimant. In the absence of evidence of a medical condition causing the Claimant to become unaware that the hi-rail truck that he was operating was moving toward the Roadmaster, about to run into him, and then actually ran him over, until after the event, the Board must find that the Claimant was negligent and the charges against him, proved. The Board so finds.

Nevertheless the Board believes that dismissal was an excessive penalty under all of the circumstances of this case. The Board believes that there are significant elements of mitigation present. First, the record reflects that the Claimant was a hard-working, competent, and loyal employee of the Carrier and was so recognized by his immediate supervisor, Roadmaster Mallett, despite the Roadmaster's knowledge of the Claimant's responsibility for his (the Roadmaster's) injuries. This is evident in the following questioning of Roadmaster Mallett regarding Claimant Shipley at the hearing:

Q. Okay. Mr. Mallett on the second page under Rule GR-2, Mr. Marrero has charged Mr. Shipley with GR-2. He obviously has emphasized the careless part, but he did point out #4 of that rule. In your opinion as a Supervisor, Mr. Shipley, has he ever been disloyal to you?

A. Never once.

Q. Has he ever been dishonest?

A. Never once.

Q. Ever insubordinate?

A. Never once.

Q. Immoral?

A. Never.

Q. Quarrelsome?

A. No.

Q. Vicious?

A. No.

Q. Has he ever been careless in his work performance?

A. At the time he has worked with me, never once.

Q. Has he ever shown any incompetence?

A. No, he has never been incompetent. I mean, if you ever had something and wasn't going right, he would always call me and we would [work] our way through it.

Q. Has he ever willfully neglected his duties?

A. Not that I am aware of, no.

Q. Under Rule GR-5, Mr. Marrero has charged Mr. Shipley, with GR-5, when the incident occurred, did Mr. Shipley rendered [sic] every assistance in assisting you after the incident occurred?

A. Mr. Shipley was very cooperative and way beyond.

* * *

What comes across from Roadmaster Mallett's answers is a true liking and appreciation of Claimant Shipley as a person and an employee. The record reflects that overall in his

almost 11 years of employment with the Carrier, the Claimant has been an asset to the company.

A second element of mitigation is the lack of any evidence that in the job briefing the Claimant was instructed to keep the hi-rail truck in park until motioned by the Roadmaster to move the truck forward. There is testimony by both the Roadmaster and the Claimant about repeated job briefings during the marking of the ties, including a job briefing the last time both men conversed together shortly before the accident. The Narrative prepared by the Engineering Division also refers to job briefings. But nowhere is there any mention of a specific instruction from the Roadmaster to the Claimant that the truck must be kept in park gear while the Claimant waited for the Roadmaster to motion him ahead. The circumstances of the accident make it likely, in the Board's opinion, that the truck was not in park at the time of the last conversation between the Claimant and the Roadmaster immediately prior to the accident.

The Claimant testified that Assistant Roadmaster Usher questioned him at the hospital whether he had the truck in park. "I told him," the Claimant testified, "I couldn't recall if I had it in park or if I had it in drive and my foot on the brake. That was the last time JD was at window talking to me." (Tr. 89). In the Board's opinion it is not likely that the Claimant would not have put the truck in park if he had been told in the job briefing immediately prior to the accident that the truck had to be in park. He likely also would have remembered that it was in park. Roadmaster Mallett specifically testified that he and the Claimant had a job briefing at approximately 1250 hours, their last meeting prior to the accident. (Tr. 65). As the supervisor, it was the Roadmaster's responsibility to have a proper job briefing.

In the Board's opinion the foregoing elements of mitigation require a finding that,

under all of the circumstances, dismissal was an excessive penalty in this case. See Third Division Award No. 30121 (Simmelkjaer) involving these same parties (dismissal of employee who sustained personal injury due to negligence reduced to suspension based on mitigating circumstances). The Board has read the three Public Law Board No. 6564 cases cited by the Carrier. Two of the cases involved a suspension rather than dismissal. Award No. 40, which did involve dismissal, lacked elements of mitigation. In addition, the claimant in that case, according to the award, had "other recent incidents in which [he] put at risk not only his own safety, but the well-being and safety of co-workers and the general public." That was not true of the Claimant in this case.

The Board finds that mitigating circumstances warrant reduction of the dismissal penalty assessed in this case but that, because of the serious nature of the violation, the Claimant is not entitled to back pay. The record, however, raises serious concerns about the medical condition of the Claimant.

The fact that the Claimant may have dozed off or blacked out raises the concern that he has a sleep disorder or that he perhaps suffered some kind of seizure. The Board finds therefore that the appropriate remedy in this case is for the Claimant to be reinstated immediately to medical leave status with insurance coverage. He shall then be required to submit to an examination at a sleep clinic, preferably one associated with an accredited hospital. In addition, he shall submit himself to a neurological examination by a Board-certified neurologist experienced in detecting seizure disorders and other medical conditions that could cause someone to lose touch with his surroundings.

The Claimant's return to active employment shall be conditioned on his obtaining a release to return to work each from the sleep clinic and the neurologist. Should treatment be required, the Claimant shall continue on medical leave status for a

reasonable period of time necessary to complete the treatment. The particular sleep clinic and neurologist to conduct the aforementioned examinations shall be selected jointly and on a prompt basis by the Carrier and the Organization.

AWARD

Claim sustained in accordance with the findings.

ORDER

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
February 25, 2009