

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:

By letter dated April 22, 2008, Ed Wilhoit, Manager Program Construction, notified L. E. Graham (“the Claimant”) to attend a formal Investigation on May 6, 2008, in the Roadmaster’s Office in Huntington, West Virginia, “to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 1130 hours on Monday, April 14, 2008, at or near mile post CAB-229.3, on the James River Subdivision, near Clifton Forge, Virginia, when, while you were operating TJT # 9607 (Junior Tamper) you ran into Ballast Regulator (BR# 200505) being operated by B.S. Whanger. . . .” The letter stated that the Claimant was “charged with failure to properly and safely perform the responsibilities of your position, failure to control the equipment that you were operating, failure to stop within one-half the range of vision, carelessness, and possible violations of, but not necessarily limited to, CSX Transportation Operating Rules – General Rule A, General Regulations GR-2, and GR-16; Operating Rules 700, 720, and 727; as well as, CSX Safeway - General Safety Rules GS-3, and Engineering Department Safety Rules ES-14, and ES-15.” The letter further stated that the Claimant was “being withheld from service pending the outcome of this

investigation.” The hearing was postponed by agreement of the parties until September 4, 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.

The Claimant began his employment with the Carrier on November 1, 1976, and at the times relevant hereto was assigned to Central East Service Lane Work Team Gang 5GCT-067 as a Machine Operator A. On April 14, 2008, around 1130 hours, the Junior Tamper that he was operating collided with a Ballast Regulator that had stopped on the track and was being operated by W. S. Whanger. Manager Program Instruction Wilhoit interviewed the Claimant and Mr. Whanger by telephone on the date of the accident and prepared the following Equipment Incident Report & Narrative:

. . . TJT operator Mr. Graham stated that the Cat Operator Mr. Brougham [sic]¹ who was getting 704 was on channel 14 clearing the limits behind the team on the Allegheny Subdivision. Mr. Graham stated he went to channel 14 also and when he came around a curve he did not see ballast regulator stopped. Mr. Whanger stated that he announced that he was stopped at Milepost CAB-229.3 on road channel #8. Mr. Graham was on channel 14 and did not hear Mr. Whanger on channel 8. The TJT has no operational damage and the ballast regulator required minor repairs. There were no injuries.

George Broughman testified as follows about the incident. He was an Equipment Operator and ran the Cat Tamper on the 5GCT servicing unit. He was Employee-in-Charge so far as on-track safety and securing 704 authorities. He was asked to acquire the track time to move the equipment from somewhere in West Virginia to the James River Subdivision. He got the track time and did a thorough job briefing. He was leading the machinery being moved. They went through the Clifton Forge yard and stopped in Eagle Rock. He was told in Eagle Rock that there had been an incident with the Tamper and the Regulator around milepost 229.2 or so. Milepost 229.3 is the end of the James River Subdivision and the beginning of the Allegheny Subdivision, and 229.3 is in straight sight.

¹The Incident Report prepared by Manager Ed Wilhoit has the spelling "Brougham" for the name of the lead Operator and Employee-in-Charge. In the transcript the same individual's name is spelled "Broughman." Both spellings are used in this award.

Mr. Broughman testified that he did not see the accident. Later [Mr. Broughman's testimony continued] he viewed the equipment involved in the incident. The Ballast Regulator had a bent water pipe on the back of it – very minor damage, and it is still like that today. As for the Junior Tamper, the mechanic got stuff out of the scrap pile and cut a piece of metal out of the back of it and welded it back in, in a matter of hours. The damage to the Tamper was cosmetic, very minimal damage to the center of the back end, and he remembers that the dents and bangs in the metal were there before. There was very, very minimal damage to both pieces of equipment. Based on the damage he does not see how they could have been going very fast at all.

Shane Whanger, Equipment Operator, testified as follows. They were tramping equipment eastbound through Clifton Forge, and out of Clifton Forge. George Brougham [sic] said he was stopping to clear the track behind him. He stopped, and Whanger, who was operating the Ballast Regulator, pulled up behind him. The next piece of equipment was the Tamper, and he didn't stop. Larry Graham was operating the Tamper. The hit that Whanger received from the Tamper "wasn't that bad." The Tamper was not going very fast, possibly five miles per hour. Whanger's machine sustained very little damage, some paint scratched on it, a couple of very small dents, and a piece of tubing for the water sprayer on the back. He thinks that the only damage to the Tamper was sheet metal damage to the front of it. The collision occurred on tangent track. Whanger does not think that there was a signal where he stopped. They stopped pretty close to the milepost.

Claimant Graham gave testimony as follows. At the time of the incident he was a Junior Tamper Operator. He had been in the position for two months. He has almost 32 years of service with the Carrier. His prior positions with the Carrier included truck driver, different machines, such as burr cranes, gallions, petty bones, speed swings, spikers, tampers, regulators, tie handlers – just general equipment. He has received a copy of the Operating Rules and the Safe Way Rules.

Regarding the incident in question [the Claimant's testimony continued], they were moving from a siding at Covington to Eagle Rock on the James River. They got through the Allegheny Subdivision and were proceeding on the James River when George Broughman, the employee who had 704 authority, said that he was going to contact the Dispatcher and give up the track behind them. Graham had slowed down because he could not see very well and was just barely moving, maybe at most three miles per hour, walking speed, when he saw the Tamper [sic Regulator?]. He hit the brakes, but it was too late, and they made contact.

The Claimant was asked by the hearing officer why he stated that he could not see very well. He stated, "I was in a curve and the only vision I had was rear view mirror in the center and the stack and my head took up most of the vision behind me, the exhaust stack." The Claimant's representative asked him, "As far as the maintaining half the range of vision, being prepared to stop, did you feel that based on the observation and the speed you were going, you . . . could stop?" He answered, "Yes." Both machines were

operational after contact was made, the Claimant testified, and the damage was very minimal.

The hearing officer asked the Claimant how he could account for the discrepancy between the testimony of Mr. Whanger and Mr. Broughman that they were on tangent track and his testimony that he was on a curve. He stated, "They were stopped in tangent track and I was coming through the curve. When I got into the tangent track that is when the collision occurred." The hearing officer called the Claimant's attention to Operating Rule 720, which states, "Do not exceed the speed that will permit stopping within one-half the range of vision, the speed authorized for trains on the same track, or the speed listed below, whichever is less." He was asked, "Did you stop within one-half range of vision on the day in question?" He answered, "No, I did not."

Following the close of the hearing, by letter dated September 23, 2009, D. L Moss Jr., Director of Program Instruction, notified the Claimant that a review of the transcript demonstrated that the facts supported and confirmed that the charges placed against him "were valid and proven," that he was "guilty of the infractions" of which he was charged, and that his "actions clearly violated applicable CSX Transportation Operating Rules and Regulations, CSX Safe Way Safety Rules, as well as Engineering Department Rules as described in the April 22, 2008, charge letter." Regarding the penalty assessed, the letter stated as follows:

Review of your personnel record (copy attached) indicates that you have other

recent incidents related to failing to control your equipment and failure to properly and safely perform the responsibilities of your position.

Through this review, and because all charges assessed were properly proven, it is my decision that the discipline to be assessed is your immediate dismissal in all capacities from CSX Transportation.

It is the position of the Carrier that the Claimant was provided a fair and impartial Investigation, that it produced substantial evidence of the Claimant's guilt, and that the discipline assessed was fully justified. The Claimant's own testimony, the Carrier argues, in which he admitted that he did not stop within one-half of his range of vision on the date in question, established his guilt. The discipline assessed was proper and not excessive, the Carrier contends, in light of his personnel record. The Carrier notes that the Claimant, by waiver, received a 30-day actual suspension for an incident that occurred in June, 2005; and that he was given a 60-day actual suspension, by waiver, for two additional incidents that occurred in August, 2007.

It is true that the damage that occurred in this case was minimal. However, according to the Carrier's Individual Development & Personal Accountability Policy an equipment collision is considered a major offense. Moreover, the circumstances of the collision raise serious questions about the care with which the Claimant was operating his machine and his attentiveness to his duties.

Equipment Operator Whanger testified that Employee-in-Charge George

Broughman said that he was stopping to clear the track behind him. Mr. Broughman stopped, and Mr. Whanger, who was operating the Ballast Regulator, pulled up behind him. Claimant Graham testified that he heard Mr. Broughman say that he was going to contact the Dispatcher and give up the track behind them. It is clear therefore that both Mr. Broughman and the Claimant were on the same radio channel.

If Mr. Whanger heard Mr. Broughman say that he was going to stop, then the Claimant also should have heard what Mr. Broughman said and been prepared to stop the same as Mr. Whanger did. His failure to stop on time indicates that he was not operating his equipment with the attentiveness and care required. In addition, independent of the foregoing, the fact that the Claimant did not stop in time to avoid a collision with the Ballast Regulator in front of him, which he was following, and that had stopped on tangent track, would indicate that he was traveling too fast for the conditions.

This Board is not unmindful of the long service of the Claimant. However, he has been involved in four serious (or greater) offenses within a three-year period, the last three of which occurred within an eight-month period. The pertinent part of the Individual Development & Personal Accountability Policy states:

If an employee commits three serious offenses within a period of three years, the employee may be subject to dismissal. The employee's entire record will be taken into consideration when assessing discipline.

Considering the dangers inherent in railroad work, the Board cannot say that the Carrier

did not have a proper basis for imposing dismissal in the circumstances of this case. The Claimant has been a machine operator for many years. He was familiar with the rules, regulations, and responsibilities governing the operation of on-track equipment. He was on notice by the terms of the Individual Development & Personal Accountability Policy that he could be dismissed for his next serious offense. Despite this awareness he did not perform his job on the date in question with due care and caused the equipment he was operating to collide with another on-track machine. The Carrier has applied progressive discipline in response to the Claimant's operational offenses. No mitigating circumstances were shown to have been present with regard to the latest incident. Under these circumstances, and in light of his disciplinary record, the Carrier was entitled to conclude that continued employment of the Claimant as a Machine Operator posed too great a risk to the Claimant's own safety and that of the other employees with whom he worked. See Case No. 40, Public Law Board No. 6564. The Board has no valid basis for disturbing the discipline meted out by the Carrier.

In his closing statement the Claimant stated that if he could save his job by surrendering his Operator rights, he would be more than glad to do so because he would love to finish his career as a CSX employee. Likewise the Claimant's Organization representative declared that Claimant Graham was willing to do whatever it takes to retain his job. Such appeal must be made to the Carrier, which has the power to grant such relief on a leniency basis.

A W A R D

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that
an award favorable to the Claimant not be made.

A handwritten signature in dark ink, appearing to read "Sinclair Kossoff", written over a horizontal line.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
June 1, 2009