Award No. 36
Case No. 36

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 August 12, 2008, Dale Hanshew, Engineer Track, instructed J. Johnson ("the Claimant") to attend a formal Investigation on August 22, 2008, in the Carrier's offices in Atlanta, Georgia,"to determine the facts and place your responsibility, if any, in connection with an incident that occurred in Atlanta, GA on July 25, 2008. While making repairs to the track 29 lead at Tilford Yard," the letter continued, "you were part of a work group observed by the FRA as not complying with the On-Track Worker rules." The letter charged the Claimant with "failure to properly perform the responsibilities of your position in a safe and efficient manner, endangering life and/or property, and possible violations of but not limited to CSX Transportation Operating Rules: General Rule A; Section 7 On-Track Worker Rules and Qualifications 704C and CSX Safety Rule GS-10 and ES-23a." After three postponements the hearing in the matter was held on September 30, 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 has been employed by the Carrier and its predecessor since February 6, 1975. At the time of the incident in dispute he held the job of Basic Trackman in position 5A31-081 and was a Lubricator/Blue Hat.

On July 25, 2008, Claimant Johnson was part of a team of three employees assigned to perform a job of repairing a strip or switch joint on track 29/track 28 Bowl. The other two employees were Justin Bradfield, a Welder, and Steve Barfield, a Trackman.

Steve Barfield prepared the Job Briefing Safety Form for the job. Claimant Johnson was named on the form as the employee in charge of on-track authority. The form stated that the type of on-track safety to be utilized for the job was Watchman/Lookout.

After the job briefing form was filled out and initialed and they started out on their assignment, the Assistant Roadmaster called the team in their truck and asked them to perform a small job before proceeding on their main assignment. A Federal Railroad

Administration ("FRA") Inspector had just then found a loose wedge on track 29 lead and reported it to the Assistant Roadmaster. The Assistant Roadmaster figured that he would have the Claimant's team repair the wedge since they would be going near that location on their other assignment. He therefore called Claimant Johnson by cell phone and asked him if he could look at the wedge. The Assistant Roadmaster testified that Claimant Johnson is "normally my point of contact when he's out here working." He also referred to the Claimant as the "go to guy."

The Claimant and the other two employees proceeded in the truck to the track site with the defective wedge. Then, as testified by the Claimant, "I told the two guys to get out and perform the task." (Tr. 47). The Claimant's testimony continued:

> . . . I did not put my hand on one and say you get the helmet, or you do this, because people take offense to it and as far as I'm concerned those guys are professional railroaders. You don't have to call them names, you don't have to put a finger on them, you just give them the task and then they take over from there. That's my understanding of it, always have been. As far as calling names to do specific little things no I didn't. But it was understood between the two that the one that wasn't swing the hammer would have been the watchman lookout. That's been the understanding the understanding all the time; for years.

As directed by the Claimant, Justin Bradfield and Steven Barfield got out of the truck to fix the wedge. The Claimant remained in the truck and proceeded to get onto the radio in order to set up the work force's main assignment for that day.

Mr. Barfield had been employed by the Carrier for about 50 days as of the date of the incident. He took a hammer and walked to the track with Mr. Bradfield, who was not

holding any tool. Mr. Barfield knocked the wedge into the ground, but, according to Mr. Bradfield's testimony, "couldn't get the ears down on the wedge itself." Mr. Bradfield testified that therefore, "I proceeded back to the truck to get a deadhead punch so we could knock the ears down in a safe manner."

The Organization representative asked Mr. Bradfield at the hearing what he was doing at the time he was standing next to Mr. Barfield. He stated, "I was assisting him to try to get the wedge back in. Kind of watching over him, too, since he's a new hire." The Organization representative then asked, "So you were basically watching as a Watchman/Lookout?" Mr. Bradfield answered, "No, I was not under that impression at all, the same thing I told the FRA man."

Both under the regulations of the Federal Railroad Administration and the Carrier's rules it is a violation for an employee to perform work on or adjacent to a track unless that employee has protection, such as a Watchman/Lookout or other protective arrangement, while doing the work. An FRA Inspector happened to pass by just as Mr. Bradfield and Mr. Barfield were finishing the repair of the wedge, when each of them had a tool in his hand. A Watchman/Lookout is required to give his full attention to watching and looking out for approaching trains. He is not allowed to perform any other work.

The FRA Inspector asked Mr. Bradfield and Mr. Barfield who was in charge of the protection. They pointed to the Claimant as the person who was the Watchman/Lookout. The Inspector asked how the Claimant could provide Watchman/Lookout protection

sitting in the truck. As a result of the incident, the FRA Inspector served an Inspection Report on the Carrier which described the following violation found:

> Failure to maintain position to receive train approach warning signal. Watchman/Lookout was sitting in truck with door closed and diesel engine running. Truck was parked on the inside of a curve with limited visibility in both directions. Railroad employee could not effectively detect the approach of a train through sight or sound.

In the box on the Inspection Report for indicating whether there was a Violation Recommended the Inspector checked the "No" box. The Inspector also checked "Optional" rather than "Required" with regard to "Written Notification to FRA of Remedial Action."

Mr. Barfield testified that when they arrived at the job site for repairing the defective wedge he asked about the on-track protection, and Claimant Johnson said, "We'll do Watchman/Lookout." Mr. Barfield stated that he was knocking in the wedge; that Mr. Bradfield was behind him and that he did not know whether Bradfield did any work on the wedge. He acknowledged that when the FRA Inspector arrived on the scene, Mr. Bradfield had a tool in his hand. Asked by the Organization representative whether Mr. Bradfield could have been the Watchman/Lookout, Mr. Barfield stated, "Being new I don't know, I didn't know the rules at the time." He added, "So I didn't know what to look for."

Asked whether a job briefing was done at the work location for the added job, Mr. Barfield stated, "Not actually on paper. You know just a verbal, you know we kind of

protect the derails and watching the lookout." He testified that no Watchman/Lookout was designated in the verbal job briefing.

The Assistant Roadmaster was asked whether the Claimant has stated that he does not want to be a foreman or an employee-in-charge, that he is the Blue Hat Lubricator. The Assistant Roadmaster stated that the Claimant says that everyday. Asked whether the Claimant was nevertheless put in the position of Employee-in-Charge, the Assistant Roadmaster testified, "Yes, because he's the most experienced guy out there, the guy with the most years and time frame. And normally the people I have out there are the guys with less than sixty days that have no knowledge of the basic track rules and regulations out there." The Assistant Roadmaster stated that the Employee-in-Charge does not necessarily have to be the Watchman/Lookout and that someone else can be designated for that task.

In light of Mr. Barfield's testimony that Mr. Bradfield was behind him and that he did not know whether Mr. Bradfield was working on the wedge assignment, Mr. Bradfield was recalled as a witness and specifically questioned as to whether he was working at the time. He answered, "Yes sir. I was assisting him with the deadhead punch." He stated that he "absolutely" did not take on the responsibility of Watchman/Lookout. Asked whether his workforce had an updated job briefing when the job changed, he stated, "I don't believe we did. We basically said we were going to fix this wedge." He did not know of a Watchman/Lookout named for the new job task, he

testified.

The Claimant was asked by the hearing officer whether he designated someone else to be Watchman/Lookout for the wedge job that they were diverted to from their original assignment. He stated, "At the time per se I didn't put my finger on Steve, you be the Watchman/Lookout or Bradfield, you be the worker." His testimony continued:

> . . . It only takes one person to knock that wedge in. So it was without me saying you take the hammer, you be the Watchman/Lookout, because we've done this a time before. Whoever had, whoever was doing the work the other one is the Watchman/Lookout. That's how it operates out in the field. But as per se if I put my finger on which one to be, no I didn't. (Tr. 42).

The Claimant acknowledged that he did not know every move that Mr. Bradfield and Mr. Barfield made outside because he was on the radio performing another task. When Mr. Bradfield and Mr. Barfield got out of the truck, the Claimant stated, one had a hammer and the other stood on the west side of the track. "When I saw that," he testified, "I went on to doing what I was doing because they were in a position to do what they were out there to do." The job, the Claimant stressed, was a one-man task, with the other person as the Watchman/Lookout. He was not the Watchman/Lookout for the job, the Claimant stated.

The hearing officer showed the Claimant a page headed CSX ON-TRACK SAFETY JOB BRIEFING, which stated as follows:

> The following 10 questions must be able to be answered by all involved, before a job briefing is considered complete.

1) Who is the employee-in-charge of my on-track safety?

2) What type of on-track safety do I have on the tracks I am working on?

3) Is this type of protection appropriate for the type of work that I am performing?

4) Will other machines or personnel be involved in the work? If so how?

5) What type of on-track safety do I have, if any, on adjacent tracks?

6) When clearing the track where is my designated place of safety?

7) What are the track limits of my on-track safety?

8) What is the time limit of my on-track safety?

9) Where can I find a copy of the CSXT On-track safety rules?

10) Do I understand all aspects of my on-track safety and feel that I am adequately protected against trains and on-track equipment.

The Claimant acknowledged that the foregoing document was page 2 of the job briefing form. He is aware, the Claimant stated, that on-track worker protection comes under the jurisdiction of the FRA. He is also aware, the Claimant testified, that the ten questions on the document are those that everyone on the job needs to be able to answer if asked by the FRA.

After the close of the hearing, Michael A. Bossone, Division Engineer Atlanta Division, by letter dated October 20, 2008, notified the Claimant that he had reviewed the testimony and other evidence submitted during the Investigation and found that the Claimant was "guilty of a violation of CSX Transportation Operating Rules, General Rule

A; Section 7 On-Track Worker Rules and Qualifications 704C and CSX Safety Rule GS-10 and ES-23a as charged." The Division Engineer assessed discipline of a ten-day actual suspension from Monday, October 27, 2008, through Wednesday, November 5, 2008.

The Carrier contends that it provided the Claimant a fair and impartial Investigation in accordance with Rule 25 (Discipline) of the parties' June 1, 1999 System Agreement. At the hearing the Organization named two additional witnesses that it wished to call to testify. Neither individual was present at the hearing location. The hearing officer stated on the record that at 12:01 p.m. on the date of the hearing the Office of the Division Engineer, Atlanta Division, was notified that the Claimant was requesting that several named employees in the Atlanta area appear for the hearing. The hearing was scheduled to begin at 1:00 p.m. the same day.

The hearing officer stated that those employees had already been assigned work duties for the day and that no prior arrangements were made with their supervisor or the Carrier's office for them to participate in the hearing. The hearing officer stated that it was the Claimant's responsibility to arrange for his own witnesses to appear and that one hour's notice to the railroad was not sufficient notice.

The Carrier contends that there is no provision in the parties' Agreement that states that it must provide for the charged employee's witnesses. It is the employee's responsibility to make proper arrangements for his own witnesses, the Carrier argues, and

the Claimant's late request was not something that the Carrier was capable of complying with.

The Board agrees that one-hour's prior notice to provide a witness at an Investigation is not reasonable notice to the Carrier. In addition the Claimant and the Organization made no offer of proof of what evidence either of the two potential witnesses could contribute to the Investigation. Under these circumstances the Board finds that there is not substantial evidence in the record that the Claimant was prejudiced by the failure to the Carrier to produce the two witnesses on one-hour's notice or that he was thereby deprived of a fair and impartial hearing.

On the merits the Carrier contends that there was substantial evidence in the record to support its determination that the Claimant was guilty as charged. The discipline assessed, a ten-day actual suspension, the Carrier asserts, cannot be viewed as arbitrary or capricious given the severity of the offense. The Carrier requests the Board to uphold the discipline assessed.

The Organization contends that the charges should be dropped. The evidence, it argues, shows that the locations were totally different on the job briefing form and on the charge letter. Anyone familiar with on-track worker rules, the Organization asserts, knows that just because you are in charge of on-track safety does not mandate that you be the Watchman/Lookout. The Organization expresses its belief that "the charges are inaccurate and should not have been proceeded through" and requests that the charges be

dropped and the Claimant exonerated.

The Organization is correct that the Job Briefing Safety Form was prepared for an entirely different job on track 29/track 28 Bowl and not for the job of repairing the defective web on track 29 lead. The Assistant Roadmaster testified that track 29 lead and track 29 are two separate tracks about an eighth or a quarter of a mile apart. However, that does not end the inquiry. A job briefing was required to be done for the new job also. Any such job briefing had to comply with the 10 questions found on the CSX On-Track Safety Job Briefing document, which is the second page of the Job Briefing Safety Form. The fact that a second job briefing was not held did not excuse the Claimant and the other members of the team of which he was part from complying with the 10 questions with respect to the assigned work. Otherwise by the simple expedient of not performing a job briefing employees would be able to avoid having to comply with safety standards in doing on-track work. This, of course, cannot be.

As the document states, the 10 questions on the page "must be able to be answered by all involved, before a job briefing is considered complete." The questions that are particularly relevant in this case are Numbers 1, 2, and 10:

1) Who is the employee in-charge of my on-track safety?

2) What type of on-track safety do I have on the tracks I am working on?

10) Do I understand all aspects of my on-track safety and feel that I am adequately protected against trains and on-track equipment?

Here the Claimant was named the Employee-in-Charge on the written job briefing form for the track 29/track 28 Bowl job. In addition, according to the Assistant Roadmaster's unchallenged testimony, the Claimant was regularly designated the Employee-in-Charge on team assignments made by the Assistant Roadmaster because he was the longest service and most experienced employee that worked for the Assistant Roadmaster. In the absence of the designation of Mr. Bradfield or Mr. Barfield as the Employee-in-Charge on the wedge repair job, it must be assumed that the Claimant was also the Employee-in-Charge on that job.

In fact, there is affirmative evidence in the record that the Claimant and the others understood the Claimant to be the Employee-in-Charge on the wedge repair assignment. First, as the Assistant Roadmaster testified, he gave the assignment to the Claimant: "I called Mr. Johnson and told him to take a look at the FRA violations." (Tr. 28). Second, the Claimant testified, "I told the two guys to get out and perform the task." (Tr. 47). The fact that the Claimant directed the other two employees, Mr. Bradfield and Mr. Barfield, to get out and perform the task shows that he understood that he was in charge of the workers assigned to the wedge repair job the same as for the job covered by the job briefing form. Third, the fact that Mr. Bradfield and Mr. Barfield complied with the Claimant's instruction shows that they accepted him as the Employee-in-Charge on the job. The Board finds that the Claimant was the Employee-in-Charge of the employees assigned to perform the work of repairing the defective wedge on track 29 lead.

The first of the 10 questions must therefore be answered as follows: "The Claimant is the employee in charge of on-track safety for the wedge repair job." The answer to the second question is "Watchman/Lookout is the type of on-track safety to be used for the wedge repair job." Based on the evidence in this case, however, an affirmative answer could not be given to question No. 10. It is evident that none of the three members of the team would be able to truthfully state, "I understand all aspects of my on-track safety."

The Claimant could not truthfully state it because he believed that either Mr. Bradfield or Mr. Barfield was the Watchman/Lookout for the wedge repair job, and the evidence shows that this was not true. Mr. Bradfield clearly knew that Mr. Barfield, who performed the work, was not the Watchman/Lookout. He was also adamant that he himself did not serve in that role. That left only the Claimant, but he was sitting in his truck without a clear view of the track, and he could not have been the Watchman/Lookout. If Mr. Barfield thought that Mr. Bradfield was the Watchman/Lookout, clearly he was mistaken. He similarly would have been mistaken if he thought that the Claimant was the Watchman/Lookout.

It may be true that had Mr. Bradfield and Mr. Barfield both been experienced employees, it would have made sense for one to do the work and the other to serve as Watchman/Lookout. Mr. Barfield, however, had only 50 days' experience on the railroad. Mr. Bradfield wisely decided that he would assist Mr. Barfield in doing the assignment and make sure that it was done right. On-track safety is too critical a matter

on which to make assumptions. The Claimant should not have assumed that one of the other two men on the team would act as Watchman/Lookout. He should have specifically discussed that question with the other two team members. Had he done so, the FRA violation probably would not have occurred and he would have avoided being charged with a safety violation.

In the present case none of the members of the three-man workforce assigned to the wedge repair job was able to give an affirmative answer to the question, "Do I understand all aspects of my on-track safety?" The work assignment to repair the defective wedge should never have been begun because it was unsafe to do it given the state of knowledge of the three employees regarding who was in charge of on-track safety. The Claimant, as the Employee-in-Charge, must bear primary responsibility for permitting the work to go ahead without properly satisfying himself that all three members of the team were able to correctly answer all of the 10 cardinal questions that apply to all on-track assignments. The Board therefore finds that the Carrier properly charged the Claimant with "failure to perform the responsibilities of [his] position in a safe and efficient manner" and with "endangering life and/or property." It was not safe to proceed with the job assignment without everyone being on the same page regarding the identity of the Watchman/Lookout.

In assessing discipline in this case management was governed by the Individual Development & Personal Accountability Policy ("IDPAP"). The violation was a serious

one under the IDPAP because it involved permitting on-track work to be done without a Watchman/Lookout or other appropriate safety protection. At the time of the violation, however, the Claimant had 33 years of service with the Carrier and its predecessor. The Employee Summary Report introduced into evidence shows no prior discipline for his entire period of service and that he received a letter of commendation for "help in cleaning warehouse."

The IDPAP provides that the normal disciplinary progression for a first serious offense is "Time Out with up to 5 days overhead record suspension." No explanation was given why significantly more severe discipline was assessed in the present case. A Time Out would seem to be especially appropriate discipline in a case of this kind. The IDPAP describes the procedure as a "process conducted by the Engineering Department's designee" that "will include voluntary and full participation by the involved parties to develop the key factors and corrective solution." That would appear to be an ideal way to proceed with a 33-year cooperative[1] employee such as the Claimant who has committed his first rules violation. Such an employee would appear to be especially amenable to instruction regarding the key factors of his mistake and the corrective solution to make sure as much as humanly possible that it does not happen again.

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[1]As an indication of his work ethic, the Claimant was not sitting idly in his truck while the other two team members were repairing the defective wedge. Instead he was busily communicating over the radio with the yardmasters involved in his next job to set up the job. (Tr. 25).

The Board finds that the ten-day actual suspension administered to the Claimant was excessive discipline under the IDPAP. The discipline shall be reduced to a Time Out with 5 days' overhead record suspension, the overhead suspension to be effective for a one-year period commencing on the date of the violation found.[2] The Claimant shall be made whole for any lost wages or benefits as a result of discipline administered for the violation found in excess of that ordered in this proceeding.

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
July 27, 2009

[2]Although it is now a year after the event, for reasons of safety, the Board believes that after receipt of this award the Carrier should actually conduct a Time Out with the Claimant regarding proper on-track safety procedures including a review of the rules applicable to job briefings and on-track worker rules.