

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated June 4, 2009, M. Koelsch, Manager SPT Teams, instructed A. Lewis ("the Claimant") to attend, as principal, a formal Investigation on June 16, 2009, in Pittsburgh, Pennsylvania, "to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 1230 hours on Wednesday, May 20, 2009 near MP QI - 166.0, on the Indianapolis Line subdivision while you were working as Trackman on the T4 System Tie Team in the capacity of feeding spikes on SD 9903." With regard thereto, the letter stated, the Claimant was "charged with failure to properly and safely perform the responsibilities of your position, making false statements regarding matters under investigation, failure to perform a proper job briefing, carelessness, incompetence, endangerment, and possible violations of, but not limited to, CSX Transportation Operating Rules - General Rule A, General Regulations GR-2, GR-8, GR-14 and GR-16; CSX Safe Way Rules – General Safety Rules GS-1, GS-3, and GS-7, Engineering Safety Rule ES-15 as well as CSX Transportation MWI Safe Job Procedure G 023A." By mutual agreement of the Carrier and the Organization the Investigation was postponed to July 14, 2009, and the hearing site changed to Holland, Michigan. The Claimant was withheld from service from May 21, through June 11, 2009.

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 May 20, 2009, the Claimant was part of a three-man team assigned to a spiker, a machine used to drive spikes into the ties on rail tracks in order to fasten the rails or tie plates to the ties. The Claimant's assignment was that of spike feeder. He would take spikes from a tray and load them into a tube that directed the spikes into a device called a gun which was used by the operator to drive the spikes into the ties. The team consisted of two operators—one for each rail—and the spike feeder. The operators operated controls that moved the spiker machine forward and backward and drove the spikes into the ties. The spike feeder did not operate any of the controls.

While operating the spiker machine on May 20, 2009, the operators came to an insulated joint. An insulated joint is a joint that has an arm around it to stop electric current going through the rail, such as for flashers or signals for train crews. When driving in a spike near an insulated joint, the operator must turn the spike around so that it does not hit and short the joint out. Instead of the head of the spike facing the rail, it must face the other way. This requires stopping the spiker machine, taking the spike out of the feeder, and turning it around and reinserting it so that the lip of the spike is facing the opposite direction in the spiker.

Safe procedure requires the operator to bring the guns all the way up and set the locking pin in place so that the heads will not come down. The operator must then

push the yellow disengagement button to make sure that no electric current is flowing to any of the controls of the machine. Hitting the disengagement button is supposed to disable the machine and prevent the heads from moving even if the control for the heads were accidentally moved to the on position. When the operators encounter an insulated joint, they are not allowed to proceed with the spiking activity until a job briefing is held. In order to turn the spike around the operator must get off of the machine.

Manager Koelsch testified that in the job briefing the employees “talk about the energizing the machine and locking the heads up, and then get into . . . turning the spike . . . to face the outside away from the rail.” They also discuss the hazard of the guns coming down, he stated.

Manager Koelsch was in court for the railroad in another city on May 20, 2009, when he was notified that Thadeus Williams, one of the operators of the spiker machine, had just been injured when the gun on his machine came down on his hand while he was in the process of turning the spike before driving it into a tie by an insulated joint. He requested Steve Duncan, the lead mechanic, to check out the machine and obtain statements from Mr. Johnnie Wilson, the second operator on the machine, and the Claimant, the third member of the gang. The injured operator had been taken to a hospital where he was treated with sutures and a tetanus shot. Mr. Duncan obtained the following statement, which was signed by both employees:

Before Thad [operator Thadeus Williams] stepped off operators had job briefing about ins. joint. Thad pushed yellow button. Johnnie Wilson stepped off spiker to use bathroom. He heard Thadeus yell the gun was on his hand. Johnnie then instructed Al Lewis to reengage electrical and put the machine in travel to raise gun. Al then did this. And the guns raised up. Johnnie, Al, and Mechanic Parnell Richardson then applied first aid.

The hearing officer asked Mr. Duncan, with regard to the statement, if in his opinion it made “any sense that the machine head had come down after the electric interlock button was pressed.” Mr. Duncan answered as follows:

Does it make any sense that it come down? You’re asking a pretty blanked [sic] question, and I’m not being blunt about it or anything, but we’ve seen Rail Lifters run away on their own without somebody. We’ve seen several pieces of equipment do that without somebody being there, yes, but this particular machine. I’m not sure and that’s an honest question to answer.

Mr. Wilson testified that the job briefing the gang had prior to driving a spike at the insulated joint consisted of Mr. Williams “telling me that he was going to get off and turn the spike for the insulated joint and kill the power source.” Asked by the hearing officer if he thought that they had a thorough job briefing, Mr. Wilson stated, “No, no I wouldn’t say it was thorough; a thorough job brief we should have pinned the machine up, it should have been pinned up, should have at least been pinned up.” Pinning the machine, he testified, would have avoided the accident.

Mr. Wilson testified that he was also charged with respect to the May 20 incident and has agreed to waiver of a hearing. “I was as guilty as the person that got hurt,” he stated, “cause I didn’t do the job briefing. I should have told them I would lock the head up.” All three members of the gang—himself, Mr. Williams, and the Claimant—were responsible for taking part in the job briefing, Mr. Wilson stated.

Thadeus Williams testified that he stopped the machine by applying the brake, pushed in the interlock button to disable the spiking pump to the machine, and then sat down and had a job briefing with himself, Mr. Wilson, and Claimant Lewis. He conveyed to them that he was at an insulated joint and that he would have to get off of the machine. He got off on the left side, Mr. Williams stated, and Mr. Wilson got off on the right. He proceeded to the outside gun, he testified, and turned the spike around in the

jaws. “And then I came to the inside,” Mr. Williams testified, “and all of a sudden the gun came down on my hand. . . .” He was traumatized and in shock, Mr. Williams stated. Mr. Wilson, who was already off the machine on the other side, heard Williams holler and came up to the machine. He told the Claimant to pull the interlock button out and put the machine in travel mode to bring the gun up, Mr. Williams testified. The Claimant did so, and the gun came off Mr. Williams’s hand.

The hearing officer asked Mr. Williams if his gang discussed locking the head or the lockout/tagout procedure as part of the job briefing. “I can’t say that I did—I did not,” Mr. Williams testified. When the gun came down on his hand, Mr. Williams stated, he could not see Mr. Lewis. Asked by the hearing officer if he thought that a thorough job briefing was done prior to the incident, Mr. Williams stated, “No.” The most important thing, the hazard of not pinning the guns up, was not covered, he said.

Manager Koelsch testified that since the accident of May 20, 2009, the Carrier has come out with a new rule that when turning a spike for an insulated joint, employees must lock out/tag out the machine and pin it up (Tr. 75). Alternatively, employees may use a spike mall to hammer in the spike and thereby avoid putting their hands in harm’s way. The Claimant testified that the lockout/tagout procedure was revised on October 24, 2008, to require the pinning procedure when turning a spike. He was not informed of the revised procedure, the Claimant stated, until after the May 20 incident. He acknowledged, however, that he was aware that in order to turn the spike safely it was necessary to lock the pin so that the head would not come down.

The Claimant, in his testimony, described the May 20 incident similarly to Mr. Williams. Asked by the hearing officer if he had a job briefing, the Claimant testified as follows:

Prior to Thadeus stopping the machine. Thadeus briefed and told Johnny, "I am getting off the machine to turn a spike." At that point he stopped the machine; I assumed he stopped the machine. He stopped the machine and like I said Johnny exited from the right side. I was preparing to exit from the right side and the next thing I know, Thadeus is saying that "My hand is underneath the machine."

The hearing officer asked the Claimant if he felt that he had a thorough briefing. The Claimant answered, "I do." His answer surprised the hearing officer who asked the Claimant to state again what was discussed at the job briefing. "The job briefing," the Claimant testified, "entailed Thadeus getting off the machine and turning the spike and the fact that he had ran into an insulated joint."

In response to further questioning by the hearing officer, the Claimant acknowledged that the sequence of events, the hazards of the task, the equipment involved, personal protective equipment, and whether everyone had a thorough understanding of what had to be done were not discussed. Nor, the Claimant testified, was securing the pin discussed in the job briefing. Asked by the hearing officer whether he still felt that the job briefing was thorough, the Claimant stated, "Yes, I am assuming that Mr. Williams is going to protect himself; he is the one putting himself in harm's way. I am going to always assume that you are not going to deliberately harm yourself that you are going to take the necessary precautions to protect yourself."

The Claimant was also questioned by his Organization representative regarding the job briefing and testified as follows. Thadeus Williams gave the job briefing. The Claimant understood what he was talking about, but, since he (the Claimant) was the feeder and had no control over the machine, Mr. Williams was basically talking to Mr. Wilson. The Claimant heard the job briefing and understood what was going on. But he did not know that Mr. Williams was going to get off the machine, get up underneath the machine, and not lock up the heads. There is no way in the world that the incident could

have happened had Mr. Williams locked the heads up.

After the incident, the Claimant testified, he was given instructions that he was to use the locking pin when spiking in the area of an insulated joint. According to the Claimant's testimony, until his assignment to his current gang two weeks prior to the incident, he had not operated a spiker machine for a period of seven years. The Claimant further testified that he was not informed of the new lockout/tagout rules requiring the lock-pinning of the gun mechanism until June 15, 2009. The training records for the Claimant introduced into evidence bear out his testimony in that they show that he had not had any lockout/tagout training since 2007.

The Claimant added, however, that he knew that there were locking pins on the spiker machine and that if he had run into an insulated joint while he was operating the machine, he would have put the locking pins in. "I know better than to stick my hands in harm's way," he stated, "or what those guns will do; so I never once put myself in that position."

At the conclusion of the presentation of evidence, the Organization made a closing argument in behalf of the Claimant. The Organization notes that the Claimant was charged with making false statements and argues that no testimony was elicited about the Claimant making any false statement.

With regard to the allegation that he failed to perform a proper job briefing, the Organization asserts that Mr. Williams gave the job briefing that day. The Claimant was doing his job, the Organization contends, and was not incompetent. He did not endanger anybody, the Organization asserts. Contrary to the allegation that the Claimant was incompetent and endangered Mr. Williams, the Organization maintains, he came to the aid of Mr. Williams and helped make his injury less severe than it otherwise would have

been. The Claimant, the Organization argues, was the feeder and not the operator, and it was not his responsibility to lock the pin to make sure that the guns did not come down.

The Organization notes that Mr. Williams and not the Claimant gave the job briefing. Any failure to give a good job briefing, the Organization contends, lies with the person who gave the job briefing. The Claimant, the Organization asserts, has been on the railroad for a long time, knows how to work safely, and has a good record with the Carrier. The Organization points out that the Claimant was not near Mr. Williams when the accident happened and was therefore not in a position to warn him of the danger in which he was placing himself. There was no contributory negligence on the Claimant's part, the Organization asserts. The charges against the Claimant should be dropped, the Organization argues.

In a closing statement in his own behalf, Mr. Lewis asserted that he did his job and was not guilty of any of the 13 violations with which he was charged. He had no control over the person who gave the job briefing, Mr. Lewis stated. He had no time to react to prevent the situation, Mr. Lewis asserted. "I didn't contribute to this incident at all," Mr. Lewis declared, "and I think it was very, very unfair of the party that charged me with thirteen violations, to call me incompetent, careless, and virtually a liar."

By letter dated July 31, 2009, the Assistant Chief Engineer System Production notified the Claimant that "the testimony and evidence presented during this investigation . . . demonstrate that you are guilty of the infractions upon which you were charged and that your actions clearly violated applicable CSX Transportation Operating Rules and Regulations; CSX Safe Way Safety Rules; as well as, Engineering Department Rules and Instructions." Because the evidence demonstrated his guilt, the letter stated, "it is my determination that the 22 days you were removed from service, from May 21, 2009 thru

June 11, 2009, will be considered time served with 8 days of overhead suspension.” The overhead suspension was to remain in effect for 365 days from the date of the incident.

The decision letter found the Claimant guilty of all of the charges listed in the charge letter. The letter, however, fails to state what evidence was relied on for the guilty findings. There is manifestly no evidence in the record to support the serious charge that the Claimant made false statements regarding matters under investigation. The letter does not state what falsehoods the Claimant allegedly uttered, so this Board is placed in the position of having to guess what the deciding official had in mind.

Probably (although the Board is by no means certain) the deciding Carrier official found that the Claimant falsely stated that Mr. Williams pushed the yellow disengagement button before he dismounted the spiker machine. There is no substantial evidence to support such a finding, however.

According to the testimony, the machine was ten years old and performed erratically on a number of occasions both before and after the incident of May 20, 2009. In addition, the Carrier’s witness, lead mechanic Duncan, testified that he had seen examples where “Rail Lifters run away on their own” and “several pieces of equipment do that without somebody being there. . . .” (Tr. 48). As to the particular spiker machine here in question, he would not venture an opinion as to whether the machine heads came down on their own after the electrical disengagement button was pressed. The burden of proof is on the Carrier in a discipline case. Plainly, there is no basis on the evidence in the record to conclude that the Claimant made false statements regarding matters under investigation.

Nor is there any substantial evidence that the Claimant performed his job in a careless or incompetent manner, or that he endangered anyone else by the manner in

which he performed his work. On the contrary, he acted coolly and collectedly, with the assistance of fellow employee Mr. Wilson, to lift the spike gun from Mr. Williams's hand after it fell on his hand. To his credit the hearing officer rightly commended the Claimant for his action in rising to the occasion when his coworker was in serious danger.

There is, however, one area where the Claimant failed in his responsibility and which this Board may not overlook. Even though he did not conduct the job briefing, the Claimant participated in it. There were only three people who took part in the job briefing. The Claimant has more than 30 years of service with the railroad. He is well aware that a proper job briefing, as General Safety Rule GS-3 provides, must include identification of all potential hazards related to the job and the steps to be taken to eliminate or contain the danger. In fact, the Claimant's work record shows that he previously received Informal Corrective Instruction regarding the importance of job briefing. When no mention was made in the job briefing of the potential hazard of the guns striking the operator's hand when the operator performed the task of turning the spike in the gun apparatus, it was the Claimant's responsibility to speak up in the briefing about the danger and how to avoid it.

The Claimant relies on the fact that he was not the one who conducted the job briefing. However, Mr. Wilson also did not do the job briefing, but he acknowledged that he should have said to lock the head up (Tr. 61). A job briefing is a very important event that takes place at the job site. Its purpose is to assure that the work is done safely and correctly. It must be taken seriously by all who take part in it. As an experienced employee with many years of service, it was the Claimant's responsibility to speak up and call attention to the fact that the job briefing in which he was a participant did not identify the danger inherent in turning the spike without first setting the lock pin. For his failure

to do so he was properly subject to discipline.

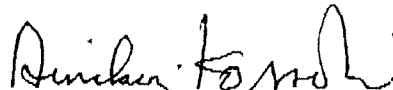
Because the rule violation here involved resulted in a personal injury, it must be considered a serious offense. A review of the Claimant's work record shows that this was his first serious offense. In accordance with the Individual Development & Personal Accountability Policy, the proper discipline should have been a Time Out with a 5 days' overhead record suspension. It is the Board's finding that the Claimant's discipline shall be reduced to a Time Out with a 5 days' overhead suspension and that he shall be made whole for any discipline imposed in excess thereof. The overhead suspension shall remain in effect for 365 days from the date of the incident. Any reference to an offense or rules violation other than General Safety Rule GS-3, Job Briefing, shall be removed from the grievant's personnel record as it relates to the May 20, 2009, incident.

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 date the signed Award is transmitted to the parties.



Sinclair Kossoff, Referee & Neutral Member