

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 December 4, 2009, the Carrier instructed L. A. Semler (hereinafter “the Claimant”) to attend a formal Investigation on December 16, 2009, in the Great Lakes Division Office in Strongsville, Ohio, “to determine the facts and place your responsibility, if any, in connection with an incident that occurred on Tuesday, November 17, 2009, at MP QE 87.0, on the Columbus Line Subdivision, when a surfacing team, with you as Foreman, failed to conduct a proper job briefing, resulting in the derailment of the front buggy of the Tamper, resulting in damages to the equipment.” The Claimant was charged “with willfully neglecting your duties as the Employee in Charge, failure to perform the responsibilities of your position in a safe and efficient manner, and with possible violation of, but not limited to, CSXT Operating Rules General Rules A and S, General Regulations GR-2 and GR-16, and CSXT Operating Rule 700, Job Briefing.” At the request of the Organization the hearing was rescheduled to January 27, 2010.

The charge letter gave the Claimant the option, in lieu of an Investigation, to participate in a “Time Out” process with an Engineer of Track “to develop the key factors and corrective solutions.” If that option were chosen, the letter stated, his local Chairman would be encouraged to attend and “[t]he only recorded information would be a note that you were referred to a ‘Time Out’ and a 5-day overhead recorded suspension for one (1) year.” The Claimant elected to proceed with the Investigation.

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds that:

1 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 November 17, 2009, Corey Tucker was the Tamper Operator on a surfacing team of which the Claimant was foreman and that was installing rail panels in a railroad crossing. Attached to the front of the tamper machine was another machine called a buggy that is used in the tamping operation. The buggy is made in such a way that its wheels can be retracted from the track as necessary and the body of the machine folded up on the tamper.

Tamper Operator Tucker testified that the Claimant, Foreman Semler, instructed him "to go into the clear" and that he (Tucker) "started to get out to put the buggy up, to forward it back up, and he (the Claimant) said to leave it down and go into the clear." (Tr. 18). Operator Tucker then backed up the tamper toward the switch at the siding while pulling the buggy that was attached to the front of the tamper machine. The buggy derailed while Operator Tucker was traveling toward the siding, but he was unaware of the derailment, causing some damage to the buggy. In his testimony, Mr. Tucker attributed the derailment to a mismatched joint. He was unable to say what caused the mismatched joint.

The hearing officer asked Operator Tucker if anybody was observing his

movement going into the clear. He stated, "There was people standing at the crossing so I would assume they were watching me. I don't know for sure about it." Questioned where Foreman Semler was, Mr. Tucker stated that he assumed that he was standing on the road or by a switch but that he did not know.

Operator Tucker testified that he took exception to the order given by Claimant Semler to go into the clear with the buggy on the tamper machine (Tr. 25) because he was "told previously by the mechanic not to go into the clear with the buggy. Not to go into a siding with the buggies up." (Tr. 26). The hearing officer asked Operator Tucker, "Not to go into the siding with the buggies up?" Operator Tucker then corrected himself, "With the buggies assembled, sorry." (Tr. 26). The hearing officer asked Operator Tucker, "Why would he tell you that?" Operator Tucker answered, "He said they tend to derail." The hearing officer asked, "Did you note that exception with Mr. Semler?" Operator Tucker stated, "No, I did not."

Mike Defibaugh, Roadway Mechanic, testified that on the day in question he was at the road crossing where Operator Tucker and a regulator operator were working. Mechanic Defibaugh then got a call to go repair a brush cutter that had gone down 10 or 15 miles down the track. "My last instruction to Corey [Operator Tucker] before I left," he testified, "was to make sure you pick up the buggies and everything before you tram." Twenty or 30 minutes later, Mechanic Defibaugh stated, he got a call from Operator Tucker that a buggy had derailed, and there was damage to it.

The hearing officer asked Mechanic Defibaugh why he instructed Operator Tucker to make sure he did not tram with the buggies down. He stated, "Because he was a newer operator and I was telling him . . . I always make sure to tell him to make sure he goes slow, keep an eye on everything. There's a lot of things that you've got to watch when

you're running that machine and I told him to make sure he don't tram with your buggy down." (Tr. 32). Mechanic Defibaugh added that the buggy weighs about 900 pounds, "so the reason I'm always instructing any operators I'm around not to tram into the siding or any siding, to pick that up because nobody goes through a checked gauge in siding and you've got a 900 pound buggy that can pop off at any time in a siding." (Tr. 33).

The following colloquy then ensued between the hearing officer and Mechanic Defibaugh:

Hearing Officer: So at the end of the day backing the equipment in, for the sake of argument, 200 feet, do you think it would be 100 percent necessary to pick the buggies up and that equipment in the back and then to clear it just for the night?

Mechanic: If you're going into a siding, yes.

Hearing Officer: In your opinion is that a rule or is that a hard and fast rule?

Mechanic: From past experience I would say I have never seen it in writing that you're supposed to do that.

Hearing Officer: On the occasion that you would happen, the equipment going into the clear with this buggy extended, is there any type of procedures set forth or any guidelines given by the Company in which that is to happen?

Mechanic: I haven't seen it in writing. I've been instructed by managers on the system production gang, and by representatives from Harsco that you ship the tram with the buggy down. The buggies always get put down when you're tamping, any time you're moving from job site to job site and it's clear enough

you're supposed to take up the buggy.

Mechanic Defibaugh testified that he repaired the derailed buggy the next day and that it took about four hours to repair.

After Mechanic Defibaugh completed his testimony, the Organization requested that Operator Tucker be recalled to testify. He gave the following testimony. Foreman Semler helped set up his (Mr. Tucker's) buggies. Foreman Semler does not operate Mr. Tucker's machine. Mr. Tucker does not believe that he knows anything about the operation of the machine. It is Mr. Tucker's responsibility to operate the machine. As a result of the buggy derailment he was coached/counseled. He finally realized that he had derailed the buggy when a welder got on the radio and told him to stop. He was pretty close to the switch, but he does not think that he was in the switch.

The Claimant asked Operator Tucker, "Do you in your mind believe it was my fault, the buggy derail?" Operator Tucker replied, "No, I don't think it was your fault that this buggy derailed – no."

Claimant Semler testified that on November 17, 2009, he was foreman of a surfacing gang and that as of July 8, 2010, he will have had 40 years of service with the Carrier. When it was getting dark, he stated, he instructed the regulator operator that the switches had been lined and to take his machines back and tie up for the evening. The regulator was already in the side track, the Claimant testified, and he (the Claimant) went down to Operator Tucker "and told him to leave the buggies down because we would probably have to raise that crossing again the next morning; ease, ease the machine back into the clear." (Tr. 45).

The Claimant further testified:

I told him to ease the machine back into the siding. There was seven people

standing at the crossing when he hit the first joint, which he did not take – there's a spring that holds the guide wheel over against the lined rail and I have told him myself on many occasions, if you do move take that spring, tension spring, off. It hit the joint, the buggy derailed, seven people were standing waiving their arms, yelling. One man was sitting in a truck on the radio telling him to stop. He was not paying attention, and that's what happened. We can talk about three hours but it's a pretty simple thing and that's what happened.

Asked by the hearing officer why he told Operator Tucker to ease into the clear, the Claimant testified, "Cause he's only been around three months. He has a habit of moving too fast which I've told him before don't go over switches fast, don't go with any irregularities; to go slow. Bigger the machine the slower you move it."

The hearing officer asked the Claimant what the position of the tension spring was when Operator Tucker was going into the clear. He stated, "I have no idea." The Claimant further testified, "I told him to take it off. I assumed it was on at the derail." Questioned by the hearing officer if it was his "responsibility as a foreman to supervise Mr. Tucker," the Claimant stated, "Yes, it is, but not in the safe operation of a machine. That's his responsibility." The hearing officer asked the Claimant, "Mr. Semler, where were you in relationship to the machine as it was backing into the clear." He stated, "No comment."

It was brought out at the hearing that Jason Hess, Engineer of Track, was the Carrier official who conducted the investigation of the buggy derailment incident, and, at the Organization's request, Jason Hess was called to testify at the hearing by telephone. He stated that Mr. Tucker did not inform him that he was at fault in the incident, but that he (Tucker) was charged with unsafe operation of the machine. He was given coaching and counseling. Coaching and counseling was not offered to Claimant Semler because of where he stood in the Carrier's Individual Development & Personal Accountability Policy (IDPAP). He was charged with an improper job briefing, Mr. Hess testified, "because the

foreman needs to be watching the tamper. That guy was making a reverse move and somebody should have been watching those buggies as the operator went to put them up and he told him not to.”

Engineer of Track Hess asserted, “The buggy should have been folded up on the tamper.” The Organization representative responded, “That’s not in the charge. That’s not in the charge.” Mr. Hess replied, “That’s part of the job briefing.”

The Claimant gave the following closing statement in his defense:

I believe this is a travesty of any justice system. This has been going on for three months trying to build some paper trail against me because of a couple of personalities that don’t like my personality has nothing to do with a cart derailing. As I said earlier every operator I’ve talked to has derailed that cart and nobody’s ever had charges filed against them. I believe that this is – I don’t know why you keep doing this but it’s a travesty of justice. Mr. Tucker admitted that it was his fault; it was not my fault, and you continually want to try to blame me and I do not, I can’t understand why the charges is determined if at any point I got responsibility. Well you’re the only one that thinks I have responsibility and you weren’t there either, so this line of questioning is out of line and I’m not guilty of this charge and I believe it should be throwed out.

In its closing argument the Organization asserted that the Carrier failed to practice due diligence in investigating the incident in that it did not interview all the witnesses and get an accurate account of what happened at the job site. The Carrier, the Organization argues, failed to interview Claimant Semler and ask him where he was at the time of the derailment. Mr. Tucker, the Organization asserts, has already taken responsibility for the operation of the machine and for the derailment. Mr. Tucker, the Organization contends, was given a proper job briefing by Claimant Semler, as Mr. Tucker himself testified. “When the machine derailed on a simple piece of straight line track which Mr. Tucker admits he had traversed several times that day,” the Organization argues, “he was derailed not because of Mr. Semler’s orders but at the hand of the operator who received only a coach and counsel for his actions.” The Carrier, the Organization contends, failed to meet

its burden of proof and should therefore dismiss the charges against the Claimant and remove any reference thereto from his personnel file.

After the close of the hearing, by letter dated February 12, 2010, the Division Engineer-Great Lakes Division notified the Claimant that after review of the transcript, "it has been determined that you are guilty as charged, thus placing you in the fourth (4) step of the I.D.P.A.P. policy." As a result, the letter stated, "a formal letter of reprimand will be placed on your file for failing to perform a proper job briefing. Consequently," the letter continued, "the 10 day overhead suspension assessed on November 13, 2009 will be enforced effective beginning Tuesday, February 16, 2010, up to and including Thursday, February 25, 2010." The Claimant was instructed to "meet with the Division Engineer or his designee to discuss Rule 700, Job Briefing," upon completion of his suspension.

The Claimant testified that it was his responsibility as a foreman to supervise Operator Tucker, "but not in the safe operation of a machine. That's his responsibility." (Tr. 48). Given that testimony, one would have expected the Claimant to defer to Operator Tucker when it came to the operation of the tamper. He did not do so. It is not disputed in the record that although Operator Tucker wanted to pick up the buggy before moving his tamper machine into the clear, as advised to do by Mechanic Defibaugh, the Claimant told him not to, but to move the tamper into the siding with the buggy down. Had the Claimant not overruled Operator Tucker in how to proceed to move the tamper into the siding the buggy would not have derailed.

One might argue that it was a matter of judgment on whether to go into the clear with the buggy up or down and that the fact that the Claimant chose to direct Operator Tucker to do so with the buggy down should not be an occasion to charge the Claimant.

According to Mechanic Defibaugh's testimony, however, it was "100 percent necessary" to pick up the buggy when clearing the tamper into a siding at the end of the day. (Tr. 33). The Claimant did not dispute that testimony. Rather his testimony was that the safe operation of the machine was Operator Tucker's responsibility. If, in fact, the Claimant was ignorant regarding the safe operation of the tamper and its buggy attachment, then he had no business overruling Operator Tucker's decision to raise the buggy. That the Claimant did overrule Mr. Tucker is evident from the latter's undisputed testimony that "I started to get out to put the buggy up, to forward it back up, and he (the Claimant) said to leave it down and go into the clear." (Tr. 18).

As the employee-in-charge the Claimant was responsible to provide a job briefing instructing all members of the roadway work group of the on-track safety methods to be followed in doing the work so that it could be performed safely and properly. In the Board's opinion safe operation would include the taking of reasonable measures to avoid a derailment of the equipment being used. It seems odd to this Board that the foreman of a surfacing team with almost 40 years on the railroad would not be aware of the danger of a buggy derailment in taking a tamper into the clear on a siding without bringing the buggy up.

If the Claimant was aware of the danger of a derailment, then the Carrier is correct in its position that the Claimant violated Operating Rule 700 by not providing a job briefing that avoided the derailment danger. The most obvious means of doing so would have been to instruct Operator Tucker in the job briefing to first pick up the buggy before taking the tamper into the clear to go into a siding. The Claimant failed to provide that means or any other means in his job briefing to avoid the danger of a buggy derailment.

The other possibility was that the Claimant was unaware of the danger of a buggy

derailment in taking the tamper into the siding with the buggy down. As indicated, the Board finds it difficult to believe that the foreman of a surface gang with 40 years on the railroad would be ignorant of the risk of derailment in the circumstances of this case. However, if, in fact, the Claimant was unaware of the hazard, it would have been because of his unfamiliarity with the operation of a tamper machine with an attached front buggy. In that case, the proper thing to do in the job briefing would have been to discuss with Operator Tucker what safety concerns were present concerning the bringing of the tamper machine into the siding. Had that been done, then Operator Tucker would have informed the Claimant of what the mechanic told him about the danger of a derailment if the buggy is not brought up before moving the tamper into a siding. Whether the Claimant was or was not aware of the likelihood of a derailment, he failed to conduct a proper job briefing in this case. The failure to do so resulted in the derailment of and damage to the front buggy of the tamper machine.

It is important to note that the Claimant and the Organization presented no evidence to challenge the testimony of Mechanic Defibaugh that good practice requires that the operator not clear a tamper machine into a siding with the buggy down because of the danger of a derailment. The Claimant gave no explanation of why he insisted that Operator Tucker leave the buggy down other than they would probably have to raise the crossing again the next morning. At no time did the Claimant or any other witness dispute Mechanic Defibaugh's testimony that the buggy "can pop off at any time in a siding." (Tr. 33). It is undenied in the record therefore that the instruction that the Claimant gave to Operator Tucker on how to take his tamper into the siding did not represent a safe way of performing that task.

The Organization suggested at the hearing that even at the point where the

derailment occurred, since the tamper had not yet entered the switch, Operator Tucker still could have put the buggy up. That, however, is not the issue. The issue is the job briefing that the Claimant gave to Operator Tucker. The Claimant admitted that he told Operator Tucker to ease the tamper into the siding and to leave the buggies down. (Tr. 45). For the reasons discussed above, that was not a proper job briefing.

It is true that the derailment did not occur in the siding but happened before the tamper entered the switch. Nevertheless the tamper operator had been ordered to take the machine into the siding and was heading for the siding when the derailment occurred. Had a proper job briefing been given, the buggy would not have been on the track, and it would not have derailed and received damage. The Carrier was therefore within its rights in administering discipline even though the derailment did not occur in the siding.

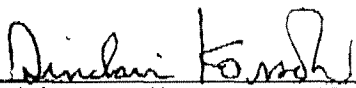
The Claimant argues that he was not at fault because Tamper Operator Tucker testified that he did not think that it was the Claimant's fault that the buggy derailed. First, it should be noted that, where fault is an issue, it is ultimately the Board's and not a witness's responsibility to determine fault. The Board has already noted that had the Claimant not ordered Operator Tucker to leave the buggy down, even though Mr. Tucker was already in the process of picking the buggy up, the derailment would not have occurred. More important, however, the issue in this case is not whether the derailment was the Claimant's fault but whether he failed to conduct a proper job briefing that resulted in the derailment of and damage to the front buggy of the tamper machine. For the reasons stated above there is substantial evidence in the record that the Claimant failed to conduct a proper job briefing with the resultant derailment. This Board cannot say that the discipline administered, a formal letter of reprimand, was excessive. The claim will be denied.

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.



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
May 25, 2010