

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated November 3, 2010, D. W. Fauke, Roadmaster, instructed L. L. Minges (“the Claimant”) to attend a formal Investigation to be held on November 17, 2010, in the Carrier’s office conference room in Cincinnati, Ohio, “to determine the facts and place your responsibility, if any, in connection with an incident that occurred on Wednesday, October 27, 2010 at approximately 1520 hours on the Illinois Subdivision between Milepost BC 329.3 and Milepost BC 338.8. It is alleged,” the letter continued, “that, while working Job 6L14 under employee in charge R. N. Hahn’s 707 authority, you failed to request permission to pass the signal at WAS Willows at A&S Connection from the NH Cabin operator to enter the main track interlocking.” The Roadmaster charged the Claimant “with failing to properly perform your duties, and possible violations of, but not limited to, CSXT Operating Rules – General Rule A, General Regulations GR-2, GR-3, and On-Track worker Rules 700 and 706a.” The letter stated that the Claimant was “being withheld from service pending investigation.”

By mutual agreement the Investigation was postponed to November 30, 2010.

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.

Claimant L. L. Minges has a service date with the Carrier of July 21, 1975. On October 27, 2010, he was assigned to operate a brush cutter in his position as Machine Operator. During his 35 years of service on the railroad he has also held positions as Switch Maintainer, Vehicle Operator, Crossing Watchman, Assistant Track Foreman, Assistant Track Inspector, and Track Inspector. The Employee History document for him introduced into evidence stated that there were no IDPAP incidents reported against employee, no OSEC decertifications, and no test failures reported against him. It also stated, "No absenteeisms reported against employee."

For his brush cutting assignment on October 27, 2010, Claimant Minges had Rule 707 authority under the name of Nick Hahn, the foreman and employee in charge. The authority ran from 0830 to 1700 hours from milepost BC 329.3 to milepost BC 333.8. Roadmaster Fauke testified that around 1530 hours on October 27th he was notified that the brush cutter operated by the Claimant had passed the signal at WAS Willows and was sitting inside the interlocking. The Willows Tower operator had reported the incident to his boss, the Trainmaster on the Kansas City Southern line. Eventually the report reached the NH Cabin Operator who reported it to Roadmaster Fauke. The signal at Willows, the Roadmaster stated, is an absolute signal, and you have to stop and get permission to go by an absolute signal. There are specific instructions pertaining to the location, the Roadmaster testified, that state, "Call Willows Tower on Channel 60-60 to get permission through the interlocker."

Roadmaster Fauke testified that the Claimant's 707 authority extended beyond (or west of) the Willows interlocking. Asked how far, he stated, "I don't know, 200 feet or so." Other testimony given at the hearing stated that it extended a tenth of a mile beyond the interlocking, or

528 feet. Foreman Hahn testified that it extended 100 or 150 feet.

The employee in charge is responsible for placing a red board in the ground next to the track to indicate where the 707 authority begins, and another red board, where the authority ends. The boards show the work limits of the 707 authority. In addition, the employee in charge must put in the ground an advance board not less than two miles from the first red board as an advance warning for approaching trains. Asked whether having 707 authority allowed the Claimant to pass the WAS signal at Willows, the Roadmaster stated that the Claimant was not permitted to do so without the permission of the Willows Tower operator. An employee qualified in the operating rules, such as the Claimant, the Roadmaster testified, should be able to recognize an absolute signal and his responsibilities with respect thereto no matter what territory he is on.

The Roadmaster explained how, in his opinion, the Claimant violated each of the rules listed in the charge letter that the Claimant was charged with possibly violating. With respect to Rule 700, Job Briefing Responsibilities, the Roadmaster testified, "Well in the job briefing evidently they weren't clear enough on where to stop, the WAS Signal, and they just, it just wasn't clarified to each; I don't think Larry [the Claimant] knew where to stop and he didn't ask and he didn't tell him." The Roadmaster acknowledged that the Claimant was not familiar with the area where the incident occurred, and that the employee in charge was. In order to be in charge of 707 authority an employee must be familiar with the physical characteristics of the area for which 707 authority is requested.

Referring to the present incident, the hearing officer asked the Roadmaster, "Whose responsibility is that to prevent something like that from happening." He stated, "The Operator has a responsibility and so does the employee in charge, they both have a responsibility to comply with all the rules." The employee in charge, Mr. Hahn, was also disciplined with regard to the incident, the Roadmaster stated.

Nick Hahn testified that he is Track Foreman on the Illinois subdivision and has been on the railroad with CSX for two years. He has also held the positions of Trackman, Vehicle

Operator, and Operator. His 707 order for October 27th, Mr. Hahn stated, did not cover the complete Willows interlocking, but his red board was inside the interlocking. The procedure for entering the interlocking, he testified, is to call the operator in the tower for permission, “and he gives me the time okayed and then we go from there.”

The hearing officer called to Mr. Hahn’s attention that in his written statement about the incident, he wrote, “At approximately 1330, operator Minges notified me that he was done cutting brush in my working limits.” He was asked if that was the correct time. He answered that it was actually probably later, that he thought that it was more like 1530.

Mr. Hahn’s written statement refers to “another job briefing “ after which Mr. Minges “set back on and went back to work.” The hearing officer asked him, “Do you remember what you discussed in that job briefing.” He stated, “I went over the limits again and like I said it’s been over a month now, a little hazy.” He was asked if he discussed the Willows interlocking. He testified, “I told him whenever he got up to Willows interlocker that I would have to get permission for him to go into that interlocker before he proceeded, that’s when he got down [sic “done”?] cutting brush.”

Questioned by the hearing officer if Mr. Minges contacted him when he reached the Willows interlocking, Mr. Hahn testified that Mr. Minges did so, and that he (Mr. Hahn) told him to “stay there I’ll call Willows Tower, call and get permission for you to go through.” He called Willows Tower, Mr. Hahn stated, “and that’s when he informed me that Mr. Minges was already on the other side of the WAS Willows.” Mr. Hahn, according to his testimony, then called Mr. Minges back and told him to go back east of the signal. He did not at any time receive permission for Mr. Minges to pass the WAS signal, Mr. Hahn testified. Nor, he stated, did he ever give Claimant Minges permission to pass the WAS signal.

On cross-examination the Organization representative asked Mr. Hahn if he was charged with anything as a result of the incident. He stated that he was. Asked what the charges were, he testified, “Well, I took partial responsibility for the incident and I admitted to my fault, which

was not having a thorough enough job briefing, but I did not take full responsibility for the incident.” He testified that he was disciplined for the incident. The Organization representative asked Mr. Hahn what the discipline was that he received. At that point the co-hearing officer intervened and stated, “I don’t think the discipline assessed to another employee is pertinent to the facts dealing with this case.”

The Organization expressed disagreement and stated, “[W]e want to see what happened as a result of all this and Mr. Hahn here is a witness and we want to know what his part was and what was the result of his actions . . . that he was charged with.” The co-hearing officer replied, “As a Conducting Officer, Mr. Hahn has answered the question and I would ask that you move on and deal with the facts in this case, before us today dealing with the charge letter in Exhibit #1.” The Organization representative again asked Mr. Hahn what the discipline was that he received. The co-hearing officer admonished the representative for asking the question and instructed him to “move on to another question.” The representative objected and declared, “[I]t’s our position that Mr. Hahn’s involvement and what happened as a result of all of this is relevant and germane to the issue at hand here with these charges. . . .”

Mr. Hahn testified that his red board, marking the end of his 707 authority, was placed at the 333.8 milepost approximately 100 or 150 feet west of the absolute WAS signal. Claimant Minges, Mr. Hahn testified, was allowed to go between the red boards marking the 707 authority, but, he added, a 707 does not give somebody authority to move into an interlocking. While Mr. Minges was working on his brush cutter, Mr. Hahn stated, he (Mr. Hahn) was in the pick up truck monitoring the radio. He was talking to Mr. Minges as needed, he explained, listening to any trains that might possibly be coming through, and “just monitoring the radio for activity on the track.”

Mr. Hahn was asked on cross-examination whether at any time during the day Mr. Minges asked him for permission to go by the absolute signal. He answered, “Yes sir, he said he was done cutting brush where he can cut and he then asked for permission to go through the

interlocker.” The Organization representative followed up, “Did you ever give him permission to go by the stop signal, to go by the absolute signal.” Mr. Hahn stated, “Never did I give him permission to go past the absolute signal.” The representative repeated, “Did he ask you for permission to go by it?” Mr. Hahn replied, “He told me he was ready to go by, at that time I called Willows Tower and tried to get permission for him to go through and that’s when Willows had informed me that he was already west of the absolute signal. . . .”

Larry Minges, the Claimant, testified that while operating the brush cutter on October 27, 2010, he encountered the WAS signal at Willows interlocking. When he came to the signal, he stated, “I informed Mr. Hahn that I was at the switch, and he said that I was good to the red board.” He did not have an updated job briefing at that time with Mr. Hahn, he stated. The Claimant identified a written statement that he gave concerning the incident the evening of the occurrence. He was asked by the hearing officer whether the act referred to in his written statement of sitting at milepost 331.1 occurred in the afternoon. He testified, “331.1 no that was in the morning.” When he finished cutting that day, the Claimant stated, he ended up within the Willows interlocking.

The hearing officer referred to the Claimant’s written statement and asked him when was his conversation with Mr. Hahn in which he asked for more protection. He answered, “That was after the Track Inspector had gone by, we had a job briefing and I told him [that] in the next couple hours I would be finished with the stretch that I was on and that I would need more protection to go to the 334.5.” According to the Claimant, “[O]nce again at that time he said I was up to the red boards.”

After his testimony in response to the hearing officer’s questions, the Claimant was questioned by his representative from the Organization. He was asked, “[W]hen you were east of the absolute signal, how did you contact Mr. Hahn and talk to him, how did you talk to him?” He testified:

I talked to him a couple times over the radio and once on the telephone when I was

nearing the switches down there, he called me to ask me how I was progressing, and I told him, I said I just finished this stretch between 333.0 and 333.7 and would need some time on the other side of the diamond and he told me I was good up to the red boards.

The Claimant testified that the red board was at milepost 333.8, and the absolute signal, at 333.7.

That was a distance of approximately one-tenth of a mile, he stated, or 528 feet.

The co-hearing officer asked Claimant Minges, "Did you ever specifically ask what the authority was past the absolute signal?" He answered, "No, I was aware of what it was." The co-hearing officer followed up, "What was the authority past the absolute signal?" The Claimant stated, "We had the 333.8 was our limits, western limits." The Claimant acknowledged that a 707 limit does not give him authority into an interlocking. The following colloquy then took place between the co-hearing officer and the Claimant:

Q. Did you ever ask specifically what authority you had to get by the red signal?

A. No not specifically.

Q. Did you ever write down any authority that you had to get by the red signal?

A. No.

Q. Are you required when you come to an absolute signal to write down your protection so that you have the known protection past that point?

A. Not that I am aware of.

Q. And did you ever specifically [ask] for authority into the interlocking from Mr. Hahn?

A. I told him that I was at the switch, which is at the signal and needed to finish up and he said I was good to the red board.

Q. So at what point was the conversation when he said you were good to the red board? I thought you said that was earlier when you put on the track and you had the job briefing?

A. It's it occurred twice, it occurred when the Track Inspector came through and I got off the track, let the Inspector through, and had another briefing with Mr. Hahn. And at that time he told me I was good to the red board and I told him in a couple hours I would be finish[ed] and needed to go across the diamond. And he said that it's, at that time he would get me across.

And then the second time he called me on the phone, as I was heading west toward 333.7 and at that time I said I'm approaching this switch down here and he

said you're good up to the red board.

Q. But when you got to the absolute signal did you stop at that point and re job brief with Mr. Hahn?

A. No I didn't.

The Claimant testified that the phone conversation between him and Mr. Hahn as he was heading west toward milepost 333.7 took place at about 1415 hours.

The hearing officer recalled Mr Hahn to testify. He asked Mr. Hahn if he had a follow-up job briefing with Mr. Minges after the Track Inspector went by and Mr. Minges got back on the track to cut brush. He stated, "It's in my statement isn't it, yes I did." The hearing officer asked Mr. Hahn if in the job briefing he at any time gave Mr. Minges permission or implied that he had permission into Willows interlocking up to the red board, or that he was good up to the red board. He testified, "No, I told him whenever he needed to get into Willow interlocker, he needed to talk to me so I could get permission from the tower to get him into the interlocker." The hearing officer then asked Mr. Hahn if he had a specific conversation with Mr. Minges to the effect that if Mr. Minges was to go by the WAS signal and enter the Willows interlocking, he was to get back in touch with Mr. Hahn to get further permission. Mr. Hahn stated, "Yes sir I told him he had to contact me, before entering the interlocker before he could proceed past that signal." Mr. Hahn denied stating to Mr. Minges, "You're good to the red board."

In response to a question from the co-hearing officer as to whether he contacted Mr. Minges after the Track Inspector went by and had a follow-up job briefing with Mr. Minges, Mr. Hahn stated as follows:

I can't remember if I contacted him, that was only, I do remember contacting him whenever, well he contacted me telling me that he was done within my limits and I said okay, wait and I'll get permission through the interlocker and that's when I remember contacting, or he contacted me.

The co-hearing officer asked Mr. Hahn if he remembered what his instructions were or how their conversation went when Mr. Minges told him that he was through cutting. He answered:

I don't remember his exact words, all I remember is he told me he was done. I said, wait,

I'm going to contact Willows to get through the interlocker. And that's whenever I called Willows and they said he had already been into the interlocker.

In a closing statement Claimant Minges said that he has been an operator on the railroad for 34 years and has never had an incident like this before. "I know the rules," he declared, "I know not to go past signals, I wouldn't go past the signal without permission and when Mr. Hahn told me I was good to the red board, I understood that he had got permission to go past it." The Claimant noted that Mr. Hahn talks to the tower and the dispatcher on channels which he (the Claimant) is not able to hear on his own radio. "[A]nd when I told him I was at the switch and he told me I was good to the red board," Claimant Minges asserted, "I understood that that meant that he had talked to somebody" who had given permission. "I don't violate the rules," Mr. Minges concluded. "I cherish my job."

The Organization representative also gave a closing statement in the Claimant's behalf. The Organization asserts that Mr. Minges has been on the railroad a long time and knows what signals are and that they are there to protect people's lives and railroad property. He is a responsible operator, according to the Organization, who was working with an employee in charge, Mr. Hahn, who made a mistake in carrying out his responsibilities. The Organization argues that Mr. Hahn told Mr. Minges that he was good to the red board, which was beyond the signal, and that Mr. Minges had the right to rely on what the employee in charge told him. It contends that the employee in charge was not forthcoming in his testimony, remarking that "it was pretty interesting" how Mr. Hahn could remember everything to cover himself but "was foggy on" everything else. Mr. Minges acted properly in taking the employee in charge at what he said, the Organization maintains. From a procedural standpoint the Organization argues that the hearing was not conducted in a fair and impartial manner because it was not allowed to question Mr. Hahn regarding the discipline he received for his role in the incident. The Organization's inability to question Mr. Hahn about his discipline, the Organization contends, prevented it from presenting all of the evidence that it wished to in this case.

Following the close of the hearing, by letter dated December 10, 2010, the Division Engineer notified the Claimant of the Carrier's determination that he and his representative "were allowed to cross-examine all Carrier witnesses and present any witnesses, documents and testimony" on his behalf and that "[a]ll objections were properly addressed by the conducting officer during the course of the hearing." The letter further stated, "Based on my support of the Conducting Officer's finding of guilt, it is my decision that the discipline to be assessed is forty-five (45) days actual suspension, beginning October 29, 2010 until December 12, 2010. You will return to work on Monday, December 13, 2010."

Contrary to the statement in the decision letter dated December 10, 2010, the Claimant's representative was not allowed to cross-examine all Carrier witnesses, at least not fully cross-examine. The Claimant's representative was not permitted to question Mr. Hahn, the employee in charge during the incident in question, regarding the discipline that he received for his role in the incident. The degree of Mr. Hahn's discipline was a material fact in the case because he and the Claimant worked together on the same assignment, Mr. Hahn as the employee in charge and the Claimant as the operator of the brush cutting machine.

The Carrier itself has imposed different levels of discipline on employees involved in the same incident, depending on their degree of responsibility for the accident. See, for example, Awards Nos. 7 and 16 of Public Law Board No. 7120, where the Carrier assessed greater discipline against two members of a four-man team whose vehicle was involved in an accident with property damage. All four employees, a driver and three passengers, were in a truck that struck and damaged a crossing gate while backing up. They all violated a rule that stated that where two or more persons are occupants of a motor vehicle, one person must be designated to guide backing movements from the ground. Nevertheless the Carrier assessed more severe discipline against the foreman and the driver because it determined that they had greater responsibility for the accident. The foreman and the driver were suspended, and the other two employees were given formal coaching and counseling.

The Claimant and the Organization were entitled to know the degree of discipline received by Mr. Hahn so that they could argue disparate treatment in the event the Claimant was found guilty of the charges and greater discipline was assessed against him than against Mr. Hahn. For example, the Organization could make the reasonable argument that as the employee in charge who was the only one of the two familiar with the territory where the incident occurred and who, by the express terms of Rule 700, had job briefing responsibilities for the assignment, it was improper for the Carrier to assess greater discipline against the Claimant than against Mr. Hahn. To make that argument, however, the Organization would have to know the level of discipline that Mr. Hahn received.

This Board does not here indicate how it would have ruled with respect to such an argument. Without evidence in the record of what discipline Mr. Hahn received and what offense(s) he was charged with, it would be injudicious of this Board to decide whether there was disparate treatment. It is sufficient, however, that such an argument be reasonable and not frivolous for the Board to find that it was error on the co-hearing officer's part to prevent the Claimant's representative from asking Mr. Hahn what discipline he received for the incident.

Contrary to the Division Engineer's finding, the representative's objection to the co-hearing officer's ruling denying him the right to question Mr. Hahn concerning his discipline for the incident was not properly addressed by the conducting officer during the course of the hearing. The Board concludes that foreclosing the Claimant's representative from questioning Mr. Hahn about his discipline was error. The error was also prejudicial because keeping out such evidence limited the Organization's ability to challenge the degree of discipline assessed against the Claimant on the ground of disparate treatment in the event that the Claimant was found guilty. Thus without knowing what discipline Mr. Hahn received, the Organization could not very well argue that the Claimant was improperly assessed greater discipline than Mr. Hahn.

The Board now turns to the merits of the charges against the Claimant. Where both the Claimant's and Foreman Hahn's accounts of the facts are in agreement, it is likely that they

accurately reflect what actually happened. The written statements of both witnesses, which were prepared on the evening of the incident, are in agreement that the Claimant told Foreman Hahn that he would reach the end of his 707 limits by mid-afternoon and that later, in the afternoon, he called the foreman to tell him that he was at the end of his limits.

Following is Mr. Hahn's written account of the incident:

My order on October 27, 2010 went from MP BC 329.3 to MP BC 333.8. It went into effect at 0830 and expired at 1700. Operator Minges sat on with the brush cutter at MP BC 333.1 at 8:45 am and went to work after we had a job briefing. He notified me that he would be done working within my limits by mid afternoon. I told him that I would get additional protection through Willows if needed. At about 12:30 R J Crouse came through my limits. Operator Minges set off at the 331.6 and let the track inspector through. After another job briefing, Operator Minges set back on and went to work. At approximately 1330, Operator Minges notified me that he was done cutting brush in my working limits. I told him to hold tight and I would get permission for him to proceed through Willows. When I talked to Willows, the operator notified me that Operator Minges was already west of his signal. I then told Operator Minges to back up east of the signal. . . .

Mr. Minges's written statement in pertinent part was as follows:

. . . I told him I would be to the end of our limits by mid afternoon. He told me to call him when I reached that point. About 3:30 I called Mr. Hahn and reported I was ready for more protection. At that point he asked [if] I was west of a signal. I told him I was. He told me move back east. I did and let him know. . . .

The written statement of Willows Tower Operator Cole explains how Foreman Hahn would have been aware that Mr. Minges was west of the signal before Mr. Minges called him:

At approximately 2:20 p.m. on Wednesday, October 27th, a brush cutter job working on the B & O main went past the number 2 Willows signal displaying stop. The foreman of the job was notified of the violation and job got behind the signal.

Roadmaster Fauke explained that Operator Cole was on Central standard time while CSX is on Eastern standard time. The 2:20 p.m. time in Operator Cole's statement was therefore the equivalent of 3:20 p.m. at the place where the incident occurred.

At the hearing, in response to a question by the hearing officer as to whether he contacted Mr. Minges after his follow-up job briefing with him, Foreman Hahn gave similar testimony to his written statement: "[W]ell he contacted me telling me that he was done within my limits and I said okay, wait and I'll get permission through the interlocker and that's when I remember

contacting, or he contacted me.” (Tr. 51-52).

It is not disputed that Foreman Hahn’s (and the Claimant’s) 707 work limits on October 27th extended beyond the absolute signal at the entrance of the Willows interlocking and into the interlocking. If Mr. Minges told Foreman Hahn that he “was done” within the 707 work limits, it should have been obvious to Mr. Hahn that Mr. Minges had already passed the absolute signal at the entrance to the interlocking. The question which arises is why Foreman Hahn thought that he would have had to get permission for Mr. Minges to go through the interlocking if Mr. Hinges was already in the interlocking. The most reasonable explanation, the Board thinks, is that Foreman Hahn was not aware on the date of the incident that his 707 authority extended beyond the absolute signal at the beginning of the Willows interlocking. He apparently believed that the absolute signal was outside of his and the Claimant’s 707 authority limits.

Supporting the foregoing inference is the fact that there is no mention of the Willows interlocking in the Job Briefing Form prepared by Foreman Hahn on the morning of October 27th. There is a section on the Job Briefing Form headed “Type Of Track Protection.” The first line of that section lists N. R. Hahn as the Employee in Charge of On-Track Safety. The second line asks, “What Type of On-Track Safety do I have on the Track I am Working.” Foreman Hahn entered “707” on that line. However, 707, as Foreman Hahn himself testified, did not cover the absolute signal at the entrance to the Willows interlocking. (Tr. 29). The Willows Tower operator had to give permission to continue on the track past the absolute signal. Foreman Hahn should have indicated on the Job Briefing Form that permission was required from the Willows Tower operator to safely enter the track beyond the signal. The fact that no such information appears on the Job Briefing Form supports the inference that Foreman Hahn was not aware that the absolute signal was within his 707 authority for October 27th.

Foreman Hahn also gave testimony that was basically inconsistent with his testimony recorded at pages 51-52 of the transcript. According to Foreman Hahn’s testimony at pages 51-52 of the transcript and his written statement, the purpose of Mr. Minges’s calling him was

to report that he had finished his work within his 707 limits. As Foreman Hahn noted in his written statement, earlier Mr. Minges notified him "that he would be done working within my limits by mid afternoon." The subsequent call in mid-afternoon was an updated report that Mr. Minges had now, in fact, completed his work within the authorized limits.

At pages 30-31 of the transcript, however, Foreman Hahn testified that the reason that Mr. Minges called him later in the afternoon was because he had told Mr. Minges that whenever he got up to the Willows interlocking, Foreman Hahn would have to get permission for him to go into the interlocking. The hearing officer asked Foreman Hahn if Mr. Minges contacted him when he reached the Willows interlocking. Foreman Hahn answered, "Yes, sir." The hearing officer asked, "And what was your conversation at that time?" Foreman Hahn testified, "He said he was up to Willows interlocker and I told him stay there I'll call Willows Tower, call and get permission for you to go through." According to Foreman Hahn, he then called the Willows Tower and was told that Mr. Minges was already on the other side of the WAS signal.

It is to be noted first that this version of the events is different from Foreman Hahn's written statement made on the evening of the incident. In that statement there was no mention that Mr. Minges had called to state that he was at the Willows interlocking or because Foreman Hahn had instructed him to call when he reached the interlocking. From the written statement it appears that the call was a follow-up to their earlier conversation in which the Claimant told Foreman Hahn that he would be done working within their limits in mid-afternoon. Second, it is simply not believable that an employee with 34 or 35 years of service on the railroad with an impeccable service record would not know that he had passed an absolute signal at the entrance to an interlocking and, after passing the signal, would then call his foreman and employee in charge to get permission to go through the signal. Stated another way, it is not credible that Mr. Minges would have called Foreman Hahn for permission to go through a nonexistent absolute signal. In the direction that Mr. Minges was traveling, there was no absolute signal since he had already passed that signal.

The Board is aware of the general principle in railroad arbitration that deference is generally given to credibility determinations by the conducting officer because he (or she) has the opportunity to observe the demeanor of the witnesses. However, the “substantial evidence” standard, which applies in railroad arbitration proceedings, permits a reviewing tribunal to disregard a credibility finding that “oversteps the bounds of reason” or is “inherently incredible or patently unreasonable.” NLRB v. Mt. Vernon Telephone Co., 352 F. 2d 977, 979 (6th Cir. 1965), NLRB v. Anthony Co., 557 F.2d 692, 695 (9th Cir. 1977). In this Board’s opinion it is inherently incredible and clearly unreasonable that the Claimant, with 35 years of service on the railroad and no record of prior discipline, would have called his foreman for permission to pass an absolute signal and enter an interlocking after he had already gone by the signal and was inside the interlocking.

The testimony is incredible not only because a veteran railroad man with no prior discipline is not likely to do such a thing. It is further unbelievable because Foreman Hahn also gave a written statement on the date of the incident that the very same conversation, rather than being for the purpose of obtaining permission to go by the signal, was to report that the Claimant was finished cutting in the foreman’s and the Claimant’s work limits.

In addition, as pointed out above, Foreman Hahn provided no explanation of why he would have called the Willows operator to obtain permission for the Claimant to go by the signal and enter the interlocking after the Claimant informed him that he was done working within his work limits, where the work limits ended past the signal and inside the interlocking. From the Claimant’s report to him that he had finished working within the 707 work limits, Foreman Hahn should have realized that the Claimant had already passed the signal and was inside the interlocking. His failure to be aware of that fact raises the question of whether Foreman Hahn was aware of the fact that the 707 authority he had been granted that day extended past the absolute signal and inside the interlocking.

The Board finds no reasonable basis for failing to credit the Claimant’s testimony that he

was told by Foreman Hahn that he was good to the red board. As noted, from the evidence it appears that Mr. Hahn was not aware that the absolute signal and beginning of the interlocking were within his 707 authority for October 27. That would explain his failure to make mention in the "Type of Track Protection" portion of his Job Briefing Form dated 10/27/10 of the absolute signal and the need to obtain permission from the Willows Tower operator to clear the signal and enter the interlocking. It would also explain why he wrote in his statement about the incident and testified that he called the Willows Tower for permission for the Claimant to pass through Willows interlocking after the Claimant had notified him that he was done working within his limits.

Apparently unaware that the absolute signal was within their 707 authority for that day, Foreman Hahn gave permission for the Claimant to go to the red board that was on the other side of the absolute signal. The Job Briefing Form lists N. R. Hahn as "the Employee in Charge of On-Track Safety." The Claimant took the word of Foreman Hahn that he was good to the red board and proceeded through the absolute signal, which was within his 707 limits. Rule 706-A is clear that "the on-track equipment operator or employee-in-charge must: b. Secure permission to make the desired movements over the railroad crossing." (emphasis added). The Claimant had the right to rely on what Foreman Hahn told him since Mr. Hahn was the employee in charge and the person in charge of on-track safety. Neither Rule 706-A or any other rule introduced into evidence states that the equipment operator must first stop before going through the crossing. What is necessary according to Rule 706-A is to secure permission to make the desired movements.

Nevertheless the Board believes that Claimant Minges can be faulted to some extent. The fact that the Job Briefing Form made no mention of the absolute signal and the necessity to call the Willows Tower operator should have sounded a note of caution in Mr. Minges's mind. By his own testimony his phone conversation with Foreman Hahn when he told him that he was approaching the switch was at about 1415 hours (Tr. 47). At that time he did not specifically

discuss with Foreman Hahn the kind of authority that Mr. Hahn had received for the Claimant to enter the interlocking (Tr. 46). Apparently the Claimant only received general permission from Mr. Hahn to go to the red board. The Board believes that under the circumstances when, an hour or so later, at about 1515 or 1530 hours, the Claimant arrived at the absolute signal at the entrance to the interlocking, safe practice would have dictated that the Claimant call his foreman and make sure that there was no problem in going past the stop light on the absolute signal. The fact that the absolute signal and the Willows interlocking were not mentioned in the "Type of Track Protection" portion of the Job Briefing Form should have caused the Claimant to communicate with his foreman before going past the signal where, by his own testimony, he had not specifically discussed the matter of authority to go through the signal with the foreman (Tr. 46).

The Board is of the opinion, however, that the Claimant's failure to call his foreman specifically regarding the absolute signal cannot properly be characterized as a major offense because the Claimant did receive permission to go to the red board, which was past the signal in the direction that the Claimant was traveling. It therefore cannot fairly be said that he occupied track without authority. What happened here was a failure of communication between the foreman in charge and the Claimant – or, in railroad terms, a violation with regard to job briefing. The foreman was no less at fault for that failure than the Claimant since the foreman was the employee in charge of the assignment and, specifically, of track safety. It was he who gave the Claimant permission to go to the red board. If the foreman was not charged and found guilty of a major offense in this matter (and there is no evidence that he was), then there is no proper basis for finding the Claimant guilty of a major offense. As already noted, the Claimant's representative was improperly prevented at the hearing by the co-conducting officer from inquiring regarding the discipline incurred by the foreman for his part in this incident.

The Claimant is a 35 year employee with no record of prior discipline in his personnel file. Under the Carrier's Individual Development & Personal Accountability Policy the most severe

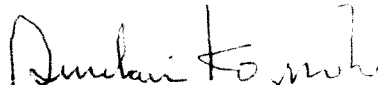
discipline that would have been appropriate on the facts of this case was a Time Out with up to five days' overhead record suspension. The Board determines that such penalty shall be assessed in the present case. The overhead record suspension shall be in effect for a one-year period from the date of the incident. The Board hereby determines that the Carrier shall designate someone at the level of Roadmaster or higher to meet with the Claimant as provided in the IDPAP "to develop the key factors and corrective solution" for the purpose of preventing the kind of incident that occurred here from happening in the future. The Claimant shall be made whole for all losses suffered as the result of imposition of greater discipline than was found appropriate in this proceeding.

A W A R D

Claim sustained in accordance with the 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

Chicago, Illinois
March 2, 2011