

PUBLIC LAW BOARD NO. 7529

Case No. 26
Award No. 26

Brotherhood of Maintenance of Way Employee Division
IBT Rail Conference

vs.

CSX Transportation, Inc.

Statement of Claim:

1. "The Carrier's decision to impose discipline in the form of a thirty (30) day suspension [fifteen (15) calendar day actual suspension and the remaining fifteen (15) calendar day suspension held overhead for a period of one (1) year] upon employee N. Johnson for the alleged violations of CSXT Operating Rules – General Rule A, General Regulations GR-2 and On-Track Worker Rules and Qualifications – Rule 727, CSX Safeway Rule GS-8 for allegedly failing to move into the clear of the red zone of the tie inserter machine (TRW 200807) when the machine was being moved in a reverse move on June 30, 2012 was on the basis of unproven charges, arbitrary, capricious and disparate and in violation of the Agreement (System File D21900113/2013-137780).
2. "As a consequence of the violation referred to in Part 1 above, Claimant N. Johnson shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement."

Findings and Opinion:

The Carrier and Employee involved herein are Carrier and Employee as defined in the Railway Labor Act, as amended. This Board has jurisdiction over this matter.

Before addressing the merits of this case, this Board must rule on a procedural objection raised by the Organization. There were some minor discrepancies between Carrier letter of July 20, 2012 setting forth the charge and its subsequent letters of July 25, August 30, and October 9, 2012 granting postponement of the investigation. These discrepancies did not cause material differences in Carrier's description of the involved incident and the rules alleged to have been violated remained the same in each letter. Under these circumstances, Claimant received adequate notice of the conduct in question, and the minor differences in the letters did not compromise his ability to prepare a defense to the charge. Accordingly, the Organization's objection is found to be lacking in merit.

On June 30, 2012, Claimant N. L. Johnson (ID No. 248603) was performing trackman duties in the "hole" behind the tie inserter (tie machine) near Shelby, North Carolina. The tie machine has an arm that extends up to seven or eight feet from its side. When retracted, this arm extends less than one foot. The arm pulls ties from beneath the rails.

On the date in question, Joseph Pulver was operating the plate magnet machine, which picked up the plates from the end of ties pulled out by the tie machine. Pulver called T. J. Beck who was operating the tie machine to check if it had some paint to put on the magnet. Beck responded affirmatively and advised Pulver that he would back up to deliver the paint to him. The distance between the two machines was between 50 and 70 feet.

A cart was attached to the back of the tie machine by a draw bar. The cart was about 20 feet from the machine and it was used to store equipment, as well as employee coolers. Normally, Claimant would have been working 15 to 20 feet behind the cart. At about 0815 hours, Claimant was getting water from out of his cooler on the cart, when Beck blew his horn and pointed back indicating that he intended to back up. Claimant nodded his head affirmatively, indicating that he understood and began retreating to the right, while another employee who was also working in the "hole" retreated to the left.

Claimant testified that within 30 seconds after he acknowledged that Beck intended to back up, he did so at an unusually high rate of speed, leaving him with insufficient time to get clear. Claimant maintained that he could not get clear because within his walking red zone were pulled ties, loose ties, new ties and ballast. Claimant began walking over ties looking for a safe place to clear when the tie machine's extended arm struck him and knocked him to the ground. Claimant denied standing on an old tie at any time while the tie machine was backing up.

Neither Beck nor Pulver observed Claimant when he was struck. Beck testified that as he backed up, he was initially looking over his shoulder, then looked to the side, out the door, down the boom to make sure that it was not hitting old ties or anything already pulled out, when he saw Claimant trying to catch his balance. Beck's written statement adds that contrary to Claimant, as the tie machine backed up, he saw Claimant standing on an old tie that had been extracted.

Pulver's written statement indicates that he saw Claimant standing on an old tie that had been pulled out when the tie machine began backing up. After the machine struck Claimant, Pulver saw Claimant sitting on an old tie, but could not say it was the same tie upon which he previously saw him standing.

Carrier charged Claimant with violating Rule 727 – Spacing of Equipment, GS-8 – Slip, Trip and Fall Prevention, and GR-2. Each is discussed below.

Rule 727 defines the Red Zone for track equipment as 15 feet in front or ten feet beyond the maximum reach of any extended portion of the machine in any direction, whichever is applicable. Roadway works must not enter a machine's Red Zone without first communicating with an operator to establish safe work procedures and the operator must communicate with a track worker before coming closer than 15 feet.

Beck estimated that when he began backing up, Claimant was 5 or 10 feet or 3 cross ties behind the door of the tie machine, between it and the cart. (Transcript 32 at lines 11-21). Beck acknowledged that he did not do a job briefing before backing up, but blew his horn to get Claimant's attention. (Transcript 32 at lines 25-29).

Rule 727 placed equal responsibility on the machine operator and the road worker. Smith testified that he believed that Beck and Claimant were equally responsible for the accident. However, only Claimant was disciplined. Even assuming Carrier had established by substantial evidence that Claimant had violated Rule 727, the discipline imposed for this violation cannot stand because of the disparate treatment given Beck, who was equally responsible for the event.

Rule GS-8 requires that an employee choose routes that afford the safest working conditions. Carrier maintains that Claimant failed to do so because he was observed standing on an old tie. Beck and Pulver each testified that they had glimpsed Claimant standing on an old tie, which Claimant denied. Even assuming their testimony is credited, neither testified as to the amount of time Claimant remained on this tie or whether he was standing on this tie when struck. Neither contradicted Claimant's testimony that his path was impeded by ties or indicated that there was a safer path than the one chosen by Claimant. Accordingly, their testimony fails to establish Claimant's violation of this rule.

GR-2 requires that employees not be dishonest, make false statements, or conceal facts concerning matters under investigation. Claimant's written statement maintains that he was struck by the arm of the tie machine. Beck and Pulver's statements indicate the arm was not extended when the machine backed up. The arm was well greased and if it had struck Claimant, as he asserts, it would have left grease marks on his shirt. Manager Smith, however, testified that when he observed Claimant shortly after the incident, his shirt contained no grease marks. During the investigation, Claimant produced a grease stained shirt, which he maintained he was wearing on the date of the incident. However, his production of this shirt months after the event has limited probative value.


Claimant's statement that the arm was extended even though supported by the belatedly produced shirt is insufficient to overcome the consistent statements of Beck, Pulver and Smith. The Carrier has met its burden to establish by substantial evidence that Claimant violated Rule 2.

The disparate treatment given Beck regarding his equal responsibility for the accident has no bearing on the question of the appropriate penalty for Claimant's conduct in violation of Rule 2, occurring after the accident. Dishonesty may be treated as an offense warranting dismissal. The penalty of 15 days actual and 15 days overhead suspension is neither harsh nor excessive for this offense.

Award:

Claim denied.

July 2, 2013
Date



Mitchell M. Kraus
Referee