

Parties Brotherhood of Maintenance of Way
To Employees' Division
and
Dispute CSX Transportation, Inc.

Statement of Claim:

1. *Carrier's decision to impose discipline in the form of a thirty (30) day actual calendar suspension beginning Wednesday, January 16, 2013 and ending Thursday, February 14, 2013 upon Claimant G. Fikes for the alleged violations of CSXT Operating Rule A, General Regulations GR-2, CSX Safe Way General Safety Rule GS01, On-Track Worker Rules and Qualifications – Rules 720 and 727 in connection with an incident that occurred at approximately 1150 hours on January 15, 2013 at or near Mile Post SA 57.7 was on the basis of unproven charges, arbitrary, capricious and in violation of the Agreement (System File D21904313/2013-143233).*
2. *As a consequence of Carrier's violation referred to in Part 1 above, Claimant shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement."*

Findings and Decision:

Public Law Board No. 7529 finds and holds that employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute.

G.E. Fikes (Claimant), ID No. 223279, a machine operator was charged with an incident that occurred at approximately 1150 hours, January 15, 2013, at or near milepost SA 57.7, while he was assigned to a machine operator position on the System Production Team 6XC5, and operating a spike puller (SP 200103). He was charged with allowing his spike puller to strike another spike puller (SP9615) being operated by Mr. Campbell. After a hearing held on February 12, 2013, and based on testimony and evidence presented, it was determined that Claimant violated CSXT Operating Rules, General Rule A, General Regulations GR-2, CSX Safe Way General Safety Rule GS-1, On-Track Worker Rules and Qualifications – Rules – 720 and 727. The discipline assessed was thirty (30) days suspension.

The undisputed facts are that on January 15, 2013, Claimant was operating spike puller #200103; a spike puller is a machine that pulls spikes from the track in order to permit removal of the rails. Claimant and another spike puller were part of a team doing the same job. At one point Claimant's machine suddenly

traveled forward, striking the rear of the other spike puller. Both machines derailed and were damaged because of the impact.

Following the incident, Michael Little, the Director of Rails System Production Teams, led an investigation of the matter. He and other personnel performed several reenactments. Also employees' statements were reviewed. Mr. Little concluded that Claimant's machine had not malfunctioned, that Claimant had operated his spike puller while walking alongside it, that Claimant was unable to stop his machine and this led to it striking the other spike puller. The Claimant denied this version of the incident. Claimant asserted that the spike puller malfunctioned due to the operating lever becoming stuck, causing the machine to accelerate forward, although Claimant was able to place the machine in neutral and activate an emergency shutdown, the machine collided with the other spike puller.

In order to prevail in the charge against Claimant the Carrier must show Claimant caused the incident based on an intentional act or that he acted with negligence. Claimant did not act with the specific intent to cause the spike puller to impact the other spike puller. The record is void of any evidence showing that Claimant intentionally abused the equipment or used it contrary to its intended purpose. Therefore, the Carrier did not show Claimant intentionally caused this accident.

Whether the Carrier showed Claimant acting negligently is another issue. Here, the Carrier through its witnesses claimed Claimant operated the spike puller while he was walking alongside it. If proved, this would provide evidence that Claimant acted negligently. However, the record and testimony does not support this conclusion. There was no direct evidence presented by the Carrier to show Claimant was walking alongside the machine shortly before the accident. At best, a witness testified that Claimant was seen walking and operating his machine at an earlier time period, nonetheless this was not close in time with the incident. Importantly, the record does not show Claimant was walking alongside the machine shortly before the incident.

The conclusion that the incident must have occurred with Claimant walking alongside his machine was not supported by evidence. Claimant denied this stating he had to jump from his machine because it was not stopping fast enough.

The reenactment evidence cannot be accepted as substantial evidence against Claimant for several reasons. First, the testimony indicates mechanics had performed maintenance on the control lever system of the machine before conducting the reenactment. This was likely prejudicial to the Claimant who claimed that the machine had malfunctioned. Secondly, because the reenactments were the main evidence in this case against Claimant, the Carrier has the burden of showing the details of the reenactments were similar to the incident as it occurred. Details such as visual observations, calculations of speed, braking distance and weather conditions were not shown to be similar. Third, the Carrier was subject to questions of reliability and accuracy when it performed the reenactments without affording Claimant a chance to share how the reenactments should be conducted. Finally, the reenactment evidence left too many unanswered questions.

An inference that something happened is not the same as proving by direct or circumstantial evidence that a fact occurred. Here, the record does not show substantial evidence that Claimant lacked sufficient care in fulfilling his duties. In other words, the Carrier lacked proof that Claimant acted negligently. Therefore

the Carrier has failed to meet its burden of proving by substantial evidence that Claimant violated the rules. Because the burden of proof was not met, the charges against Claimant must be denied.

Award:

The claim and appeal is sustained, in accordance with the Findings and Decision.

12/18/13

Award Date

Lamont M. Walton

Lamont M. Walton, Referee