

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
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(CSX TRANSPORTATION, INC.
PUBLIC LAW BOARD NO. 7120

STATEMENT OF CHARGE:

By letter dated April 1, 2011, J. E. Saladin, Roadmaster MW Jacksonville Division, notified R. L. Harris (“the Claimant”) to attend a formal Investigation on April 12, 2011, at the Carrier’s facility in Tampa, Florida, “to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 1130 hours, on March 16, 2011 at or near mile post AZA 886.7, on the Palmetto Subdivision, in the vicinity of Tampa, FL, wherein it is alleged while you were operating the tailgate of Welding Truck No. 240094 you crushed your ring finer on your right hand.” The Claimant, the letter stated, was “charged with failure to properly and safely perform the responsibilities of your position, careless operation of your assigned equipment, and possible violations of, but not limited to, CSX Safeway Rules GS-7, GS-12 and ES-15.” The hearing, after several postponements, was held on August 2, 2011.

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.

The Claimant, R. L. Harris, began his employment with the Carrier on August 25, 2008, and, at the time of the incident here involved, on March 16, 2011, was a Welder. He had been in that position since about October or November, 2010. On March 16, 2011, Mr. Harris was part of a welding team that had been assigned to remove and replace a broken rail at or near milepost AZA 886.7 on the Palmetto Subdivision in the vicinity of Tampa, Florida.

The primary source in the record of what happened during the incident is a written statement given by Mr. Harris after the injury to his finger when he returned to the Carrier's office after being treated in the hospital. As this Board understands from the written statement, the welding team was at the job site, had received a job briefing from the job foreman, and Mr. Harris began to unload tools and equipment from the back of the welding truck "onto the tailgate of the truck when [he] noticed the welding truck liftgate wasn't all the way up."

It was not explained during the hearing whether the terms "tailgate" and "liftgate" are synonymous. For purposes of this hearing, however, the Board will assume that they are one and the same because the charge letter states that the Claimant's finger was crushed while he was allegedly "operating the tailgate" of the welding truck. According to Mr. Harris's written statement, however, he "activated the lift gate," which eventually caused the injury to his finger. The Board therefore understands that tailgate and liftgate [also spelled "lift gate" in the record] are used interchangeably in this case.

Mr. Harris's statement described what happened after he noticed that the tailgate or liftgate was not all the way up (that is, the tailgate was not even with the bed of the

truck):

I had one foot on the bed of the welding truck and another foot on the highest step.

I reached back with my left hand and rested my right hand on top of the channel-way of the lift. I activated the lift-gate with my left hand. As the gate rose I felt tightness on my ring finger and immediately snatched my finger out of the channel-way. I looked at my gloves and noticed a hole with some of my finger sticking out. I removed the glove to find the skin from the top of my finger to the first joint of my ring finger and found that it was stripped and some of my tip of my finger was gone while on the bed of the truck.

I walked towards 5A75 welding truck and showed it to Mike Self who told me to wrap it [in] paper napkins and instructed [me] to elevate my hand. He also informed EIC Townsend. Mike Self and I walked off the truck where he informed Engineer of Track Pete Marrero, Roadmaster Ed Felton, and proceeded to Tampa General Hospital in CSX Boom Truck where I was treated and released about 1600 hours.

Claimant Harris testified that he was never instructed in the operation of the tailgate but that he learned how to do so from manuals and from another welder named Joe Givens. He described the process as follows:

Basically . . . after turning . . . the electrical on I believe tap the on button twice until the green light comes on. Now pull the lever to release the lock. Let the tailgate up, and it will go up, fall back, then proceed to let it down. As far as turning, letting it up, just make sure that you press the button twice till the green light comes on. Let it up and turn the lever back into the undercarriage of the back of the truck so it will follow up. As it goes up, you take it up past the lever, push the tailgate in, let it down into the latch. (Tr. 31).

The Carrier assigned Roadmaster Ed Felton to investigate the March 16, 2011, incident, and he was called by the Carrier as a witness at the hearing. He did not see the

accident happen, and he based his conclusions regarding the Claimant's alleged rules' violations from his viewing of the welding truck and his interview of the Claimant regarding the accident. He testified that the Claimant violated the rules listed in the charge letter because "He (Mr. Harris) had his finger in a pinch point area which is strictly, everybody is well aware of sticking stuff in pinch point areas, stay away from pinch points and red zones." Roadmaster Felton testified that Mr. Harris violated General Safety Rules GS-7 and GS-12 and Engineering Department Safety Rules ES-15. These rules provide in pertinent part as follows:

GS-7. Operating Tools, Equipment, Doors, and Windows by Hand

When operating tools, equipment, doors and windows by hand:

* * *

- Avoid placing any part of your hand or body where it can be pinched.

* * *

GS-12. Getting On or Off Equipment

A. Getting on or off equipment:

- Before getting on equipment, scan the area of the equipment you will get on to make certain that it is free of hazards.

* * *

ES-15. Mechanized Equipment

Operator must:

* * *

- e. Stop equipment when the operator's attention cannot be directed exclusively to controlling the movement.

Mr. Harris violated Rule GS-7, Roadmaster Felton testified, because he put his hand in the slot where the tailgate slides up like a track. He had his finger inside the slot, Roadmaster Felton stated, and when the tailgate raised, it caught his finger. He should have stayed on the ground, Roadmaster Felton testified, and raised the tailgate before he went into the back of the truck. Mr. Harris violated Rule ES-15, Mr. Felton testified, because he was standing on his truck with his hand on the slot, hit the switch to raise the tailgate, but did not stop the tailgate in time to keep from getting his finger caught in the red zone area, the pinch point.

With respect to Rule GS-12, Mr. Harris violated the rule, Roadmaster Felton testified, because there was a hazard when he got onto the truck and placed his hand in the pinch point area to operate the gate. Roadmaster Felton testified that there is no written instruction as to where an employee is to stand when operating the liftgate, but, when the new truck arrived, the Welding Supervisor instructed everybody to be on the ground when they operated the tailgate.

The conducting officer asked Roadmaster Felton whether his investigation revealed that Mr. Harris did in fact place his hand or finger in a track that became a pinch point as he operated from a position on the vehicle when he should have been standing on the ground. He answered, "Yes sir."

On cross-examination Roadmaster Felton was asked whether the Carrier has a specific way of identifying pinch points. He answered, "Usually most of the pinch points are marked." He was asked, "Was this particular pinch point marked?" He answered, "I think they was, I wouldn't swear to it." Asked how pinch points are marked, he stated, "We usually got little stickers or got them marked in red pinch point areas." This would have been a red pinch point area, he testified.

Questioned whether Rule ES-15 pertains to a lift gate, Roadmaster Felton stated, "It pertains to any type of mechanized equipment." The lift gate, he testified, did not have any safety stops on it. Mr. Harris was charged with violation of Rule GS-12, Mr. Felton testified, "because he didn't completely get on the equipment when he stopped part way up getting on the equipment to energize the gate." The hazard existed, according to Roadmaster Felton, because Mr. Harris put his finger in the pinch point area and then energized the gate. The lift gate itself was not a hazard, Mr. Felton clarified, just the pinch point area on the gate.

Roadmaster Felton was asked by Claimant Harris if CSX received vehicles or equipment on which pinch points were not identified. He answered, "To my knowledge everything that comes out, all the new vehicles they do have stickers on them with pinch point areas designated." Mr. Harris asked the Roadmaster if he would believe it if Mr. Harris told him that the welding truck in question did not have the pinch point area designated. He answered, "Yes sir." In response to questions by Mr. Harris, Roadmaster Felton testified that since Mr. Harris's accident the Carrier has put a cover on top of the pinch point of the vehicle in question where Mr. Harris got his finger caught in the slot. The Roadmaster explained that the cover is there so that "if you do put your hand on top of it, your hand won't have the tendency to drop down in the slot." The safeguard was put in, the Roadmaster stated, after Mr. Harris hurt his finger on the tail lift. Roadmaster Felton acknowledged that from the position in the truck where Mr. Harris was standing, "you can't see that you've got you hand in a pinch point."

On redirect examination the following colloquy occurred between the conducting officer and witness Roadmaster Felton:

Q. In reference to the pinch points Mr. Felton, typically are all pinch points

recognized by some kind of red paint or additional advertisement indicating of a pinch point area?

A. We try to identify all pinch point areas by either stickers, with red paint, or make everybody aware of the pinch points.

Q. Okay is it your, is it your testimony, you just indicated that you try, would it be possible to identify and put reference markers on all pinch points?

A. Yes all pinch points should be identified.

Claimant Harris testified that he is a qualified operator of the welding truck involved in the present case. He gave the name of the Welding Supervisor who qualified him and stated that, in addition, he was qualified by Welding Foreman George Cook. He was tested and qualified on the rules he was charged with violating, he stated. He used the particular truck here involved several times in the past, he testified.

Mr. Harris testified that the Welding Supervisor who qualified him did not at any time indicate to him or his coworkers that the lift gate on the welding truck was supposed to be operated while standing on the ground. He was never instructed in the operation of the tailgate of the welding truck, Mr. Harris stated, and learned to operate it from the manuals and a Mr. Joe Givens, who was a welder at that time. The conducting officer asked the Claimant, "Mr. Harris was there any information ever given to you in any kind of educational experiences that you had prior to this day regarding the position of where you are expected to be while operating this tailgate?" He answered, "No."

The conducting officer asked Mr. Harris if his right ring finger was, in fact, in a pinch point area on the tailgate prior to getting pinched or crushed. He answered, "No." The conducting officer followed up, "For the record Mr. Harris can you explain how your finger got pinched or crushed?" He answered, "Yes, my finger . . . was over the channel

but it wasn't inside of the channel as it came up, the little piece that comes up when it hit my finger pushed my finger into the channel and that's how it got crushed and I was never, I never knew that was a pinch point it was never identified to me as a pinch point."

In response to questioning by the Organization representative, Claimant Harris testified that he never had any training on the lift gate of the particular welding truck involved in this case. The Organization representative asked the Claimant whether the Welding Supervisor who trained him or any other supervisor ever brought to his attention that he had to operate the particular lift gate from the ground only. He answered, "No." The pinch point on the lift gate, Mr. Harris testified, was not identified as a pinch point or a red zone. The way that CSX identifies pinch points and red zones, Mr. Harris stated, is with red paint or stickers as a rule.

The Organization representative asked the Claimant whether in the four to six months that he has been in the welder job he himself had ever brought it to anyone's attention that the area in question could possibly be a pinch point. He testified that he did bring this to the attention of the Welding Supervisor who qualified him. Asked what the Welding Supervisor's response was, Mr. Harris stated, "Maybe it could be, it wasn't really addressed as something that was important." The Welding Supervisor, Mr. Harris testified, did not tell him to cover the spot or mark it as a pinch point. According to Mr. Harris, a superior would have to authorize the covering of the area or the marking of it as a pinch point.

The Organization representative asked Mr. Harris if he violated the part of Rule GS-7 that stated, "Avoid placing any part of your hand or body where it can be pinched." He testified, "I'd say I didn't violate that because it was never identified as a pinch point and when I did mention it was a pinch point it was never put out as a pinch point. I

wasn't aware that it was until my finger was crushed, until the incident occurred."

He did not violate Rule GS-12, dealing with getting on or off equipment, Mr. Harris testified, because "I did everything that rule said to do, that's why I was letting the tail gate up before I got on it." Mr. Harris stated that he scanned the lift gate, saw that it was about two inches lower than the back of the truck, and wanted to make sure that the lift gate was in a safe position before he got on the lift gate. The hazard that existed on the welding truck, Mr. Harris testified, was that the tailgate was down lower than the back of the truck approximately two inches. There was no hazard on the back of the truck itself, Mr. Harris stated.

He did not violate Rule E-15, Mr. Harris testified, because his attention was focused directly on getting the tailgate of the lift to level off with the bed of the truck so that he could take and load equipment on it safely. His attention was directed on the lift gate coming up and on nothing else, Mr. Harris stated.

After questioning of the Claimant by the Organization representative, the conducting officer picked up on the Claimant's testimony regarding his conversation with the Welding Supervisor about the possibility of there being a pinch point in the channel in which the lift gate mechanism traveled. The following testimony then took place with an objection being registered by the Organization representative and additional questioning on his part:

Q. (By Conducting Officer) Mr. Harris did you not just testify to the fact that during your training period with [the Welding Supervisor] that you indicated to him at that time that you felt that the same location in which your finger got crushed was in fact a pinch point?

A. I had indicated that it might have been a pinch point that's what I said.

- Q. Okay then, then the, the direct question for you Mr. Harris is you previously by your own accord defined this location, or channel, or area where your finger was actually crushed, you defined that previous to the injury as being a pinch point, is that correct?

Objection by Organization Representative:

I object . . . Mr. Harris did not give a statement that defined it as a pinch point, he asked a question to [the Welding Supervisor] did he define it as a pinch point.

Conducting Officer:

Yes sir . . . your objection is noted for the record, but, however, it will be overruled based on the previous testimony, we'll let the record stand as it is but according to what I heard . . ., the principal Mr. Harris just testified that by his own accord he thought that it was a pinch point at a time prior to the date of March 16, 2011. So just as a referencing question Mr. Harris by your own, by virtue of your own understanding of what a pinch point is, you made this aware to a supervisor is that correct?

A. Yes.

- Q. And you made that aware to your, to this particular supervisor . . . prior to the incident on March 16, 2011?

A. Yes.

- Q. Thank you Mr. Harris. Mr. [Organization Representative] do you have any additional questions of Mr. Harris before we close this investigation sir?

- Q. (By Organization Representative of Claimant) Yes I do. Mr. Harris again when you asked [the Welding Supervisor] was this particular was a pinch

point, was you asking him a question or was you directing him or telling him that this was a pinch point?

A. I was asking him a question if it was a pinch point.

Q. And again for the record what did he, what was his answer?

A. Really, it wasn't any answer, he just like, it was shaken off like well maybe.

At the close of the hearing the Claimant was permitted to make a closing statement on his own behalf and stated as follows:

I'd like to make the statement that, I what I thought was a pinch point I learned later that really was a pinch point, that I wasn't as, I can say inexperienced in, I wasn't so inexperienced that I didn't understand that it was when I asked someone that was more apt in working around this equipment. Since this incident has occurred I have taken more initiative now upon myself to stick by my guns no matter who's there to anything that occurs to me. And I came here to make a difference and I shall continue to make a difference in a good way on the railroad. But this was a learning process that I wish I hadn't never had to go through, but since I've been through there I think that I should walk away here, with whichever this way forward with a positive attitude and to better this railroad as an employee of this railroad.

Following the close of the hearing, by letter dated August 15, 2011, the Division Engineer, MW Jacksonville Division, notified the Claimant of the Carrier's determination, after review of the transcript, that the hearing was conducted in accordance with his contractual due process rights. "All objections were properly addressed by the conducting officer during the course of the hearing," the letter stated. The letter concluded, "Based on the evidence presented at the investigation, it is my decision that the discipline to be assessed is five (5) days actual suspension, beginning August 22, 2011 up to and including August 26, 2011, returning to work Monday, August 29, 2011."

The Carrier filed a post-hearing submission in the case. Procedurally, the Carrier argues that the Claimant was afforded a fair and impartial investigation in accordance

with the controlling agreement. On the merits, the Carrier contends that it met its burden of producing substantial evidence of the Claimant's guilt. Specifically, the Carrier asserts, "Substantial, probative evidence brought forth in the investigation, established the Claimant's violation of CSX Safeway Rules GS-7 and GS-12." The Claimant violated Rule GS-7, the Carrier contends, by placing his hand in a pinch point while operating equipment; and, GS-12 by not scanning the area for hazards (pinch points) prior to getting on the equipment. The Carrier argues that the Claimant testified that he knew how to operate the lift gate and that he was aware that the area where he placed his hand was a pinch point. "This demonstrates," the Carrier contends, "the Claimant did not scan the area for hazards, and placed his hand in a pinch point."

The Carrier rejects the argument that because the channel area was not painted or otherwise identified as a pinch point, there was no rule violation. "The Claimant knew this area was a potential pinch point, and he had allegedly raised the issue with his supervisor (Tr. pp. 33, 35-36). Because of this," the Carrier contends, "it is reasonable to expect the Claimant to know he was not supposed to place his hand in the area when raising the lift gate." To accept a contrary position, the Carrier argues, "employees could place their hands in door jams, car doors, and windows; and not accept any personal responsibility simply because those areas are not painted and specifically identified." Common sense and good judgment must prevail, the Carrier insists. The "Carrier should not be required to mark every single potential hazard in order for employees to work safely," the Carrier declares.

With regard to the degree of discipline, the Carrier asserts that the Claimant's suspension was fully justified by the terms of the IDPAP for the rule violations here in issue, which constituted a Serious Offense. It argues that a five-day actual suspension

was appropriate discipline because this was the Claimant's first Serious Offense.

The Board notes that in this case (as it has done in the past few cases) the Carrier has departed from its usual practice of making a specific finding as to whether the claimant was guilty and, if so, of which particular rule violations. The Division Engineer did not state whether he found that the Claimant was guilty of all of the alleged charges or of any of them. He merely stated that the Claimant's contractual due process rights were observed, all objections were properly addressed in the course of the hearing, and that based on the evidence presented in the investigation, he was assessing five days of actual suspension.

This is not merely an academic observation. Thus the Board notes that the Carrier in its post-hearing submission does not argue that the Claimant violated Engineering Department Safety Rules ES-15, although the charge letter charged the Claimant with a violation of Rule ES-15. The Board agrees that substantial evidence was not presented at the hearing to support a finding of a violation of ES-15. There was no evidence presented that the Claimant's attention was not at all times directed exclusively to controlling the movement of the tailgate (also referred to as the lift gate) that he was attempting to bring up even to the level of the bed of the truck. But the decision letter does not say so, and, if the Carrier agrees that the record does not contain substantial evidence of a violation of Rule ES-15, that should be clear from a reading of the decision letter in the case. Neither the Claimant, the Organization, or the Board should be put in the position of having to guess what exactly the decision of the Carrier was in a particular case with regard to the charges against the Claimant.

The Board does not agree with the statement in the decision letter that all objections were properly addressed by the conducting officer in the course of the hearing.

Near the end of the hearing the conducting officer asked the Claimant whether it was not correct that the Claimant had previously of his own accord defined the channel area here involved where his finger was crushed “as being a pinch point.” The Organization representative objected, asserting, “Mr. Harris did not give a statement that he defined it as a pinch point, he asked a question to [the Welding Supervisor] did he define it as a pinch point.” The conducting officer informed the Organization representative that his “objection is noted for the record, but however it will be overruled based on the previous testimony” (Tr. 36).

The Board believes that the Organization’s objection was well taken. In his prior testimony the Claimant had not “defined that [channel area] previous to the injury as being a pinch point” as stated by the conducting officer. The Claimant’s prior testimony never went beyond stating that he brought to the Welding Supervisor’s attention “that this could be a pinch point or this might have been a possible pinch point.” (Tr. 33).

According to the Claimant’s testimony, basically the Welding Supervisor did not confirm that the spot was a pinch point. Thus the Claimant’s understanding of what the Welding Supervisor said was , “Maybe it could be, it wasn’t really addressed as something that was important.” (Tr. 33).

The Claimant testified that the Welding Supervisor never told him to cover the spot in question or mark it as a pinch point. The Carrier argues that “[t]he Claimant knew this area was a potential pinch point, and he had allegedly raised the issue with his supervisor.” The Carrier’s argument ignores, however, that the supervisor took no action to confirm that the spot was a pinch point and that normally a subordinate is expected to defer to his superior. In the present case the superior was also far more experienced than the subordinate.

The Carrier further argues that it “should not be required to mark every single potential hazard in order for employees to work safely.” That argument, however, ignores the testimony of its only witness in the case besides the Claimant. Roadmaster Felton testified, “We try to identify all pinch points areas by either stickers, with red paint, or make everybody aware of the pinch points.” The conducting officer then raised with the Roadmaster the very point addressed in the Carrier’s argument. The conducting officer asked Roadmaster Felton, “[W]ould it be possible to identify and put reference markers on all pinch points?” The Roadmaster answered, “Yes all pinch points should be identified.” (Tr. 28).

The Carrier argues, “In this case, the Claimant violated Rule GS-7 by placing his hand in a pinch point while operating equipment, and violated Rule GS-12 by not scanning the area for hazards (pinch points) prior to getting on the equipment.” The answer to the Carrier’s argument is, “Why was the channel area not marked if it was a pinch point? Why did the Welding Supervisor, when asked by the Claimant if the area was a pinch point, not say that it was a pinch point? Is it fair or just to hold a relatively inexperienced welder to a higher standard than the Welding Supervisor?”

In the present case you have a relatively inexperienced welder with four to six months of experience on the job who asks the Welding Supervisor, presumably a highly experienced welder, if a particular area is a pinch point. The supervisor does not say that it is a pinch point, does not treat the matter as something of importance, and takes no action to mark the area as a pinch point. Under these circumstances, in a work environment where every pinch point is marked, the Board is of the opinion that the particular welder involved cannot be considered careless if he later puts his hand on the spot in question from a position on the welding truck where the individual cannot see that

he has his hand in a pinch point, and where the employee is performing a task that he had never been informed should not be performed while on the welding truck.

This is not a situation where there was an obvious hazard that an employee ignored and thereby sustained an injury. This was a situation where the Claimant, a relatively inexperienced welder, raised with the Welding Supervisor the question of whether a certain spot on a tailgate channel of a welding truck was a pinch point. The supervisor did not say that it was a pinch point and did not do anything to mark the spot as a pinch point, although the practice was to identify all pinch points. Subsequently while standing on the truck and operating the truck's tailgate controls, the Claimant put his hand on the spot on the tailgate channel. Shortly thereafter he was injured when his finger was pinched by a piece of metal that traveled through the channel.

From where the Claimant was standing on the truck it was not possible for him to see that he put his hand in a pinch point. (Tr. 25, lines 9-18). He had never been instructed or otherwise told that it was not permissible to operate the tailgate controls from where he was standing on the truck. After the injury the Welding Supervisor in question covered the spot on the channel with a metal cover so that if someone standing where the Claimant stood were to put his hand on the spot, it would not get pinched. The supervisor also, for the first time, issued an order that one must stand on the ground when operating the tailgate controls and may not operate the controls while standing on the truck. It is the Board's opinion that on the foregoing facts it would be unfair and unjust to subject the Claimant to discipline for the injury he incurred. The Board so finds. The claim will be sustained.

Since the claim has been sustained, the Claimant is entitled to be made whole for all wages lost as a result of the discipline and to have his record cleared with regard to the

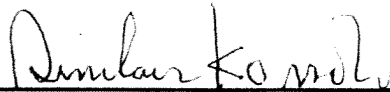
discipline. One other point should be noted. In its post-hearing submission the Carrier asserts that "because this was the Claimant's first Serious Offense, the Carrier acted in accordance with its IDPAP when it issued the Claimant a 5-day suspension." The Progression listed in the IDPAP table summarizing the handling of Serious Offenses is "Time Out with up to 5 days overhead record suspension" for a first offense. It is not clear from the record, even had the claim not been sustained, why the facts of this case warranted departure from the normal progression for Serious Offenses and the assessment of an actual rather than a record suspension.

A W A R D

Claim sustained.

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
December 9, 2011