

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 23, 2010, the Manager of Bridges, MW Albany Division, notified J. E. Strock (“the Claimant”) to attend a formal Investigation to be held on December 8, 2010, at the Division Engineer office in Selkirk, New York, “to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 1130 hours, on November 11, 2010 at or near QB 172.85, on the Berkshire Subdivision, in the vicinity of East Chatham, New York.” The alleged incident was described in the letter as follows:

It is alleged that while working Job 6QP1 at this location, you failed to follow the directions given to you on November 10, 2010 by the Manager of Bridges. . . . On this date, [the Manager] instructed you not to access the scaffolding from the north side of the bridge, but to instead use the entranceway between the two tracks. On November 11, 2010 [the Manager] observed you working on the scaffolding while the entrance between the tracks was closed. At this time, [the Manager] asked you how you gained access to the scaffolding and you told [the Manager] that you entered from the north side of the bridge. It is further noted, that by gaining access from the north side of the bridge, you were not able to comply with the FRA Fall Protection requirements on which you have been trained.

The letter continued that the Claimant was “charged with failure to follow instructions and failure to properly and safely perform the responsibilities of your position in possible violation of, but not limited to, CSXT Operating Rules – General Regulations GR-2 items 4, 5 & 6, and General Rules S & A, CSX Safe Way-General safety Rule GS-1.” At the request of the Organization the hearing was rescheduled first to January 5, 2011, and then to January 24, 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, Jason Eli Strock, has a service date of May 14, 2007, and was employed as a Bridge Mechanic at the time of the incident. He had worked in the Bridge department since August, 2008. He has no prior discipline on his record. The charging officer had been Manager of Bridges for about eight months on the date of the occurrence and been employed on the railroad for a year and a half.

The first witness called by the conducting officer to testify at the Investigation was the Claimant. Claimant Strock testified that on November 11, 2010, at about 1130 hours, after the other members of his team had gone back to the truck, he was sweeping up the scaffold, and the Manager came onto the bridge. The first thing he said, according to Mr. Strock, was, "Whose going to fail my O-test?" The Manager asked Mr. Strock, "How did you get down there?" "I said," Mr. Strock testified, "I went over to the north side of the bridge." The Manager, Mr. Strock stated, said that he told the employees not to go that way unless they were hooked up.

The conducting officer asked the Claimant if the Manager had instructed him not to access the scaffolding from the north side of the bridge but to use the entranceway and access it between the two tracks. He answered that the Manager told them not to access it by the north side of the bridge unless they were using the proper fall protection, that the Manager thought that

it was safer to use the hole at the entranceway. The team, including the foreman, Bruce Coyle, Mr. Strock testified, agreed that it was safer to go over the side of the bridge because the entrance hole measured 15½" by 17" and "we're taught not to put our feet where our eyes have not yet been. And that hole," Mr. Strock continued, "once you get your legs and your hips in there you can't see where you're going."

The Claimant described how he was hooked up. He attached a carabiner (a kind of coupling) to the post of the handrail, and hooked one end of employee Mark Leifer's lanyard to the carabiner and the other end to the D-ring with attached shock absorber on the back of Mr. Strock's harness. While so secured Mr. Strock went over the wing wall and stepped onto the head wall of the bridge. He then hooked his own lanyard, one end to his D-ring with attached shock absorber, and the other end "to the red cable that we frequently use to hook our lanyards to." Mark Leifer unhooked the top lanyard, and Strock entered the bridge seat or scaffolding to do his work. Mr. Strock estimated that it was about another three feet down to get to the scaffolding.

The conducting officer asked Mr. Strock, "Now Mr. Strock you had previously testified that [the Manager] had given you an instruction not to access this bridge seat in the manner that you described, is that correct?" He answered, "That is incorrect. He had told all of us on Monday the 8th when he was at the job site, he told us that he didn't, he didn't feel it was safe to go around that side, he wanted us to access by the center and we shouldn't go over the north side unless we were hooked up is what he said." The way that he accessed the bridge seat area, Mr. Strock testified, was in compliance with the FRA fall protection requirements.

The second witness called by the conducting officer was the Manager of Bridges. On November 10, 2010, the Manager testified, he and his bridge crew were working on a bridge at QB 172.85 on the bridge seat. "When we were all down under the bridge that day," he stated, "Jason Strock and another employee entered the bridge over the Wing

Wall to enter the scaffolding. This was not the first time I've seen it happen," he continued. "I instructed him not to access those scaffolding from that direction," the Manager testified, "but to use the opening between the two tracks, siding and the main track." No fall protection was used on that date, he stated. The entranceway between the two tracks was the "preferred method of entrance to the bridge" for the duration of the project, the Manager stated.

The next morning, November 11, the Manager testified, he showed up at the site around 11:15 a.m. and received a job briefing from the foreman. All team members but Mr. Strock, he stated, were on the right of way road. He went to the bridge and saw that the hole at the entranceway between the two tracks was covered with its grate. He said, "Who will have an O-test failure?" He walked onto the bridge, looked down, and saw Mr. Strock on the scaffolding. "I asked Mr. Strock how he gained access to the scaffolding," the Manager testified, and "he pointed over to the Wing Wall and said the way I was told not to go.¹ I then informed Mr. Strock that he would be receiving an O-test failure," the Manager stated.

The conducting officer asked the Manager, "Did you make any statement at all to Mr. Strock concerning do not access the bridge seat on the north side unless you are hooked up?" He answered as follows:

No, I never said unless, the statement unless you're hooked up never came. The conversation between Mr. Strock, Mr. Coyle, and myself they felt that way was safer than going through the entranceway. The response was I prefer to go through the entranceway, they said they didn't feel it was as safe as going through, and I said possible if you were hooked up that might be an option. Nowhere in there was it allowed to be, to access the bridge scaffolding that way. There was a

¹The charge letter states that when the Manager asked the Claimant how he gained access to the scaffolding, the Claimant "told [the Manager] that you entered from the north side of the bridge." There is no mention that the Claimant said "the way I was told not to go."

conversation but nothing was said as far as doing it that way.

The conducting officer asked the Manager if it is possible to use the fall protection by hooking to the angle iron on the handrail on the north side of the bridge to gain access to the bridge seat. He answered:

No, it's not. The required handrails only have a designed force laterally or vertically of 200 pounds. The FRA bridge specifications . . . ask for a 5,000 anchorage point for all fall protection. Aside from that, when you're on top . . . and you hook off to actually have access down, a normal five foot lanyard is not long enough to reach far enough down to gain access to the bridge seat; and then the bridge is more that 12 foot in height to the water.

The manager testified that he has a bachelor's degree in Civil Engineering and that he had four years of structural design experience before he came to the railroad. Tying a lanyard off to the handrail, the Manager stated, would not be in compliance with FRA fall protection requirements.

The Manager noted that CSX document No. MWI 2003-02 entitled FRA Bridge Worker Safety Standards provides as follows: "The personal fall arrest system shall be arranged so that a bridge worker cannot free fall more than six feet and cannot contact the ground or any lower horizontal surface of the bridge." It would not be in compliance with FRA fall protection requirements, the Manager stated, for someone to hook a lanyard without a shock absorber to the handrail of the bridge and directly into the D-ring on the back of their harness. You must use a shock absorber, he clarified. The purpose of a fall arrest system, he explained, is to slow the impact of the stopping and to prevent contact with any portion of the bridge or the ground. The Manager estimated the distance from the lower portion of the angle iron on the bridge handrail to the top of the bridge seat as five and a half or six feet.

Mr. Strock has been trained on FRA fall protection requirements, the Manager stated. The Manager identified an answer sheet completed by Mr. Strock for a test he took on July 27, 2010, for the CSX fall protection training program on which he received a score of 93%. He also identified the Employee History record for Mr. Strock, which showed that he had classroom training in fall protection on July 27, 2010, and received a score of 93. One of the questions on the test was, "How close can I get to the edge of an opening or a wing wall without fall protection?" The correct answer, the Manager testified, is "No closer than six feet." Fall protection would be required, the Manager stated, if access was gained over the wing wall on the north side of the bridge. Fall protection would not be required to gain access through the opening between the two tracks, the Manager asserted, because you don't have the possibility to fall greater than 12 feet.

The Manager testified that on the day of the incident Mr. Coyle, who was Mr. Strock's foreman, told him that Mr. Strock hooked two lanyards together to gain access to the bridge seat. One lanyard, he stated, isn't quite long enough to reach the safest point to climb over the wing wall. Two lanyards, five feet each, hooked together, would be necessary. That is how Mr. Coyle demonstrated to him, the Manager testified, that Mr. Strock hooked off to reach the seat of the bridge.

Mr. Strock failed to properly and safely perform the responsibilities of his position, the Manager testified, because he did not follow the fall protection guidelines in which he was trained. He failed to use proper fall protection, the Manager stated, in that he hooked off of a handrail that does not carry the required 5,000 pound support factor. In addition, according to the Manager, he hooked two lanyards together, which increased the height of a fall from six feet to over six feet. Further, the Manager testified, Mr. Strock was insubordinate and failed to follow instructions in that he was instructed not to access the bridge seat going over the wing wall but, instead, to use the entrance between the tracks. His actions, the Manager asserted, also constituted willful neglect of the duties of his job and endangerment of life or property.

Moreover, the Manager testified, the fall protection requirements are issued by the Federal Railroad Administration, so his failure to comply with those requirements was a violation of federal law.

On cross-examination the Manager was reminded of his testimony that the railing on the bridge was not a proper anchorage because it was not capable of supporting at least 5,000 pounds per bridge worker. He was then asked, "What would meet that 5,000 pounds?" He answered, "A bridge tie, strapped around the bridge tie, hooked off to the bridge tie."

The Manager further testified on cross-examination that in order to climb over the wing wall at the safest place to do so, which would have been near the head wall, "you would have to practically lay on your stomach to put your foot down and you're putting your foot down blindly." The Manager was then asked on cross-examination, referring to the small opening at the entrance to the bridge where he wanted the bridge team to enter the seat of the bridge, "In accessing that hole, would Mr. Strock be able to see his feet and the contact if he accessed and he could fit through that hole?" He answered, "I'd say no." The Organization representative came back, "So it's the same situation as you just stated about not being able to see the placement of his feet on the Wing Wall then?" The Manager replied, "You don't have the opportunity to fall 12 foot or greater, therefore it's not as a severe case."

Bruce Michael Coyle, Jr., Claimant Strock's foreman on the date of the incident, testified as follows. He has worked about seven and a half years for the railroad, and is going on his fourth year in the bridge department. Mr. Strock worked under his area of responsibility on November 11, 2010. On that date Mr. Strock accessed the bridge seat on the north side of the bridge by going down the side of the bridge hooked up with a lanyard to the railing. The lanyard used was a little bit longer than the standard size lanyard. Once he got below the bridge he hooked another lanyard onto a different point of anchorage. Mr. Coyle did not know for sure how he was hooked up.

Two or three workdays prior to the incident [Mr. Coyle's testimony continued] the Manager instructed Mr. Strock and the rest of the team not to access the bridge seat via the wing wall on the north end of the bridge. Mr. Strock accessed the bridge seat on the north end of the bridge via the wing wall under Foreman Coyle's instruction. They had a group meeting and felt that it was safer to do it that way. He (Foreman Coyle) had track 1 out of service by means of an EC-1. The speed limit on the siding track, which was not out of service, was 50 mph. With an advance watchman or not, it was not the safest way to go down the six-foot hole with a train coming down at them at 50 mph. They could not stop the train. He (Foreman Coyle) therefore "deemed it safer to go down the north side of the bridge where [the Manager] told us not to."

The conducting officer asked Mr. Coyle if he knew the requirement for the number of pounds of load to tie off for fall protection. Mr. Coyle stated that he did not recall the specific weight the point was supposed to hold. He stated, in reply to another question, that he did not know if the pipe that Mr. Strock's lanyard was hooked onto was capable of supporting 5,000 pounds. The hearing officer then asked Foreman Coyle, "So could you please tell us how you . . . could have instructed Mr. Strock to use that as an anchorage point if you weren't sure it was going to support the 5,000 pound loading required by the Federal Railroad Administration?" Mr. Coyle answered:

Well at the time I felt it was safer being that . . . when we climbed over that wing wall on the north side of the bridge, we could step over the wall and on to the concrete embankment and stand there so and as opposed to go down the six foot, we weren't hooked up to anything going down the six foot, except steal in our way [in] a 15 inch, 16 inch hole we get down into, we just felt, I felt it was, I'll take the, I felt it was safer and that what I, that's what I had them do. (Tr. 38)

The conducting officer asked Mr. Coyle, "Was it in compliance with the FRA regulations?" He answered, "No, I guess not." The Organization representative then asked Mr. Coyle whether entering through the hole and the entranceway would have complied with the Carrier's safety rule that "you be able to see where your feet were going to land." He answered, "No absolutely not." Mr. Coyle elaborated that "you're pretty much going off a feel of your boot

to know where your feet are placed as far as what part of the steel you're on when you're going down that hole."

The Organization representative next asked Mr. Coyle whether it would be a violation of the safety procedures of the Carrier to attempt to obtain access through a hole located between two tracks, one of which was live. He answered that he believed that it would because "if we got caught on a part of a steel going down that hole then we wouldn't be able to clear the track within the 10 to 15 second rule that they want us to clear the track with their proper sight distance." Mr. Coyle added that "we talked about that that day and after that day. . . ."

Mr. Coyle testified that he and the other members of the team "determined that the safest way to access that bridge to get to the scaffold down below was the north side of the bridge, where we could hook up to the . . . railing and step over the wing wall and be onto the cement below and then step down to the scaffolding, hooked up. . . ." (Tr. 40). They "were just afraid" to go through the entranceway, he stated, and they discussed that they "had an advanced watchman in place, but an advance watchman," he asserted, "can't stop a 50 mile an hour train within . . . 500 yards. So the safest way to get down to the bridge was, I believe, in fact, the north side." (Tr. 40). Foreman Coyle testified that there were conversations regarding how to enter the bridge seat between the Manager and him privately, between the Manager and the whole team, and then another conversation on the subject "one on one" between the Manager and Foreman Coyle. Mr. Coyle stated that he explained to the Manager why he thought that it was safer to gain access over the wing wall.

The Conducting Officer questioned Foreman Coyle about whether he could have gotten protection for both tracks. He answered that as far as he recalled in talking with the dispatcher they were going to be able to get protection on one of the two tracks and that they got the protection on track 1 because their work was on the track 1 side. "As far as I recall that day," Foreman Coyle testified, "I could get one of the two tracks in the time period we need to get the track, so I opted to get Track 1, so we would be able to do our work." (Tr. 42). Mr. Coyle

expressed the opinion that the dispatcher would not have given him protection on both tracks at the same time, even for 15 minutes so that the team could enter the hole and reach the bridge seat safely. He testified:

Yeah, 15 minutes would be a safe time for people to get down, but once we got down, we're going to be stuck down under the bridge now until we get another EC-1 to get out so, it, it falls into that really fine line category of getting your work done or don't get your work done, so, but, it's just not, it's just not reality out there to do that, it's not going to, they're not going to do it. (Tr. 44).

Marc Aaron Leifer testified as follows. On the date of the occurrence he was a Bridge Mechanic and had just under four years of service. He was present at the bridge at milepost QB 172.85 on November 11, 2010. Prior to November 11, 2010, the Manager gave instructions to the group he was working with on how to access the bridge seat or scaffolding underneath the bridge at milepost 172.85. He said that "he'd like to have us use the hole, the opening in between the two tracks and if we went the other way that we had to do it safely, if we went, I believe it's the north side of the bridge, over the side that we had to do it safely." (Tr. 45).

The conducting officer asked Mr. Leifer, "Did you understand that instruction from [the Manager] that you were not to use the north end of the bridge as an access point?" He answered, "No, the way he said it was to access it, if you can access it that way safely." (Tr. 45). Mr. Leifer pointed out on a photo where Mr. Strock hooked onto a pipe on the railing. He stated that he gave Mr. Strock a lanyard that CSX had issued to him (Mr. Leifer). Mr. Leifer testified that on November 11, 2010, he gained access to the scaffold underneath the bridge the same way that Mr. Strock did.

Mr. Strock was recalled as a witness and testified that according to the training he was given at CSX he always has "the ability to choose the safe way when it comes down to it and that's what I did. And that's what we all did." He stated that the whole bridge gang agreed that was the safest course of action.

In a closing statement on behalf of the Claimant, the Organization representative argued that all charges against the Claimant should be dropped because the accused was charged with

failure to follow instructions given to him on November 10th by the Manager of Bridges at milepost 172.85 on the Berkshire subdivision, and the testimony at the hearing showed that neither the Manager or the Claimant was at that location on November 10th since they were working at another location.

The Claimant read a prepared statement in his own behalf. In the statement he asserted that on November 10, 2010, he did not receive any instructions from the Manager of Bridges and did not even see the Manager that day. On November 10th, Mr. Strock stated, he was working on the Castleton bridge, which is at a different location. In any event, the Claimant declared, "I did not disobey his instructions in any way because he specifically told us not to access the scaffolding from the north side of the bridge unless we were using the proper fall protection. He told all this in person when he was at the job site on November 8th, 2010," the Claimant asserted.

Some of the other arguments made in the Claimant's closing statement were as follows:

In addition the charge letter states that by gaining access from the north side of the bridge I was not able to comply with the FRA fall protection requirements. This is false because a carabiner, lanyard, harness, and method I used met all fall protection requirements in which I have been trained. Furthermore by not accessing the scaffolding through the hole between the tracks, I was not disobeying [the Manager's] instructions. I was choosing a safer way to go. This access hole in between the tracks is not safe at all. It is very narrow. It only measures 15½ by 17 inches. It is a very tight squeeze when ascending or descending through it. We are all also taught not to place our feet where our eyes have not yet been, and when descending into this hole you cannot see where you need to place your feet.

In addition when accessing this hole, even with complete protection on both tracks, it is unsafe. The south side of the hole measures only 32 inches from the north rail of the siding track, and the north side of the hole measures 47 inches from the south rail of the main track. What if your clothing or harness gets caught on the edges of the hole or caught on anything for that matter; and what if a runaway car rolls down the hill? It is obvious that the possible outcome would not be positive in any way.

Following the close of the hearing, by letter dated February 8, 2011, the Division Engineer of the Carrier's MW Albany Division notified the Claimant of the Carrier's determination that the hearing was conducted in accordance with the Claimant's contractual due process rights and that all objections were properly dealt with by the conducting officer during the course of the hearing. The Division Engineer concluded his letter with the statement: "Based

on my support of the Conducting Officer's finding of guilt, it is my decision that the discipline to be assessed is ten (10) days actual suspension beginning on February 14, 2011 and ending on February 23, 2011."

Before discussing the merits of this case, there is a procedural matter that warrants mention. The conducting officer called the Claimant as the first witness in the case. That is not the normal procedure. The usual procedure in a discipline case is to call the Carrier's witnesses first to present whatever evidence the Carrier has in support of the charges against the Claimant. Only after the Claimant has been fully apprised of the evidence against him is the Claimant called to present evidence in his own defense. This Board does not recall a prior discipline case where the claimant was called as the first witness in the formal Investigation. It is certainly not the normal practice followed.

The Board notes that in Award No. 91 of this same Public Law Board the same conducting officer did not call the claimant as a witness until all of the Carrier's witnesses testified and presented evidence in support of the charges. The hearing in Award No. 91, however, was held on February 10, 2011, whereas the hearing in this case was held on January 24, 2011. Perhaps in the interim it was explained to the conducting officer that the normal procedure in a discipline case is for the Carrier's witnesses to testify in support of the charges before the claimant is called upon to defend himself. In that way the claimant and his representative will be fully informed of what the claimant is alleged to have done wrong and will have a fair opportunity to answer the charges. That will not be the case where the claimant is called as the first witness in the proceeding.

A procedural argument made by the Organization in this case is that the charges should be dismissed because the charge letter states that the Claimant failed to follow instructions given to him on November 10, 2010, whereas the evidence showed that the alleged instructions were actually given on November 8, 2010. In Award No. No. 85, PLB No. 7120, this Board held that the test as to whether proper notice of charges has been given to a claimant is "whether the

accused was given sufficient information to prepare a defense to the charges.” There is little doubt in the present case that the Claimant had sufficient information to prepare his defense. He knew exactly which conversation with the Manager was referenced in the charge letter, and the precise date of the conversation was not material to the case. See also Award No. 58 of this Public Law Board No. 7120.

The most serious charge against the Claimant is insubordination. The Board does not believe that there is substantial evidence to support that charge. Claimant Strock testified that what the Manager of Bridges told the team at the job site was that he did not feel it was safe to go over the wing wall “unless we were hooked up.” (Tr. 8-9). The Claimant’s testimony was supported by witness and fellow team member Marc Leifer who testified that the Manager told them that he would like them to use the opening between the two tracks “and if we went the other way that we had to do it safely, if we went . . . over the side that we had to do it safely.” (Tr. 45). Both employees understood the Manager to voice his preference for the hole at the entranceway but not to exclude going over the side of the bridge if safety procedures were followed. Claimant Strock specifically recalled the Manager’s mention of using a hookup, and what stuck in Mr. Leifer’s mind is that safe procedure must be followed.

The Manager’s own testimony supports the understanding of Mr. Strock and Mr. Leifer. He testified that what he said to Mr. Strock and Mr. Coyle was that “I prefer to go through the entranceway. They said they didn’t feel it was as safe . . . , and I said possible if you were hooked up that might be an option. . . .” (Tr. 12). (emphasis added). The Manager thus admitted that he said that being hooked up might be an option.

Mr. Strock apparently seized on the Manager’s statement that being hooked up could be a possible option as giving approval for the use of that method. The Manager testified that he did not outright give permission to use a hookup, but there is no evidence that he told Mr. Strock that it was prohibited to use a hookup. Moreover, according to his own testimony he said that he preferred that the entranceway be used. In addition to his quoted testimony above from page 12

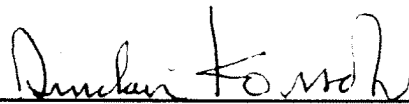
of the transcript, at page 11 of the transcript the Manager testified, "He was instructed to use the entranceway between the two tracks, this was the preferred method of entrance to the bridge during the duration of the project. . . ." (emphasis added). The term "prefer" indicates that there may be another option even though it may not be the first choice. The use of "prefer" together with the reference to being hooked up as a possible option was a reasonable basis for Mr. Strock to infer that it was permissible for him to enter the bridge seat by going over the side of the bridge with fall protection in a situation where admittedly it would have been a violation of the Carrier's safety regulations to go under the bridge through the hole at the entranceway. The Board so finds.²

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
June 20, 2011

²It is true that Foreman Coyle testified that the Manager gave instructions for him and the team not to access the bridge seat by means of the wing wall at the north end of the bridge. (Tr. 36). However, Foreman Coyle testified that he had two private conversations with the Manager regarding access to the bridge seat, including a "one on one" conversation after the Manager spoke to the whole team. (Tr. 40). It is therefore very possible that things were said to Mr. Coyle by the Manager that were not said to the other members of the team and that Mr. Coyle based his understanding of the Manager's instructions on what was said to him in private.