

PUBLIC LAW BOARD NO. 7529

Case No. 10
Award No. 10

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 upon employee M. Stortz in the form of a ten (10) day overhead suspension for a period of one (1) year for the alleged violations of CSXT Operating Rules – General Regulations GR-16, Rule 600 Part 1 and General Rule A in connection with his alleged failure to properly grind a defective field weld on March 5, 2012, thereby allegedly not allowing the joint bars to correctly fit the rail at CP DRAW and allegedly resulting in a broken rail derailment of Q00405 causing approximately \$115,000 worth of damage was on the basis of unproven charges, arbitrary, capricious and in violation of the Agreement (Carrier's File 2012-127521).
2. "As a consequence of the Carrier's violation described in Part 1 above, Claimant M. Stortz 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 reaching the merits of this dispute, this Board must resolve the Organization's objections to the conduct of the hearing officers. The Organization maintains that the hearing officer did not act in a fair and impartial manner. The specifics are considered below:

1. The Examination of Roadmaster Pavetto

The hearing officer declined to permit the employee's representative's questions about Carrier exceeding FRA rules setting time limits for the repair of defective track. He stated that the non-compliance with an FRA rule was not referenced in the charge, which stated "simply that the work was performed improperly." The hearing officer then directed that the representative limit his questioning to the charge. (Transcript at p. 44, lines 38-45).

In fact, the charge was not limited to work performance. Rather, the charge alleged that this work caused a broken rail derailment.

When the representative attempted to explain that the question was relevant to the cause of the accident, about which the hearing officer had allowed Pavetto to testify, the hearing officer repeatedly interrupted him, noting that Pavetto did not merely give his opinion, but rather gave "his professional opinion." (Transcript at p. 45, lines 2-38). The hearing officer then read a portion of the Department Report concluding that it stated the cause of the derailment. (Transcript at p. 45, lines 36-45 to p. 46, line 31).

Though the hearing officer eventually permitted the representative to question Roadmaster Pavetto about the relevant rule, he only did so after attempting to prevent this line of questioning and persistent efforts by the representative. By attempting to limit the questioning of Roadmaster Pavetto through the misrepresentation of the charge and maintaining that the Carrier's derailment report definitively established its cause, the hearing officer demonstrated that he had prejudged the case and was acting as an advocate for the Carrier.

2. Examination of Timothy Hull

Timothy Hull, Welding Foreman was asked by the hearing officer whether a photograph previously introduced into evidence as Exhibit 5, showed excessive metal on a weld. (Transcript at p. 94, lines 1-2). When Hull responded negatively (Transcript at p. 94, line 5), the hearing officer repeated the question twice more and got the same negative response both times. (Transcript at p. 94, lines 16-24).

Palleschi: Okay. That photograph – is there excessive metal left on that weld?

Hull: Well, if you're comparing it to the typical weld, I would say no.

Palleschi: You would say that that's not excessive rail material under the ball of that rail?

Hull: How do you define excessive?

Palleschi: Well I'm asking the questions.

Hull: Okay.

Palleschi: Would you or would you not?

Hull: No.

Palleschi: Would joint bars fit properly on that section under the ball of the rail with that much metal left on?

Hull: You asked me if I thought there was a lot of metal on there, and I said no.

Palleschi: I asked you a question, and I expect an answer, Mr. Hull. Do you understand?

Hull: No, could you rephrase the question?

Palleschi: I'm going to repeat the question. But I am not -- you're not here to ask me questions.

Hull: Okay, I'm not asking you.

Palleschi: Pardon?

Hull: Okay.

Palleschi: You're here to answer questions, do you understand that?

Hull: Yes, I do.

When the hearing officer again asked whether the joint bar could fit into the rail given the metal shown in the photo, Claimant then responded he really didn't know. (Transcript at p. 95, lines 1-4). The hearing officer persisted, asking twice more whether Hull could see the excess metal in the photo, to which Hull responded that he really didn't know. (Transcript at p. 95, lines 7-12). After overruling an objection that he was badgering the witness, the hearing officer again asked Hull if the bar would fit properly and correctly on the weld as shown. (Transcript at p. 97, lines 16-19). Hull answered affirmatively (Transcript at p. 97, line 22). The hearing officer again asked whether the photo showed excess metal, and Hull again answered negatively. (Transcript at p. 97, lines 24-25).

After two (2) more questions concerning the exhibit, the hearing officer once again asked if it showed excess metal in the area of the weld, and Hull responded that, "It appears that way." (Transcript at p. 98, lines 14-16).

The hearing officer then began another line of questioning on another photograph previously introduced as Exhibit 9. When Hull testified that the exhibit did not accurately show what he saw in the field, because the photo failed to show bolts in the joint (Transcript at p. 100, lines 7-9); the hearing officer then described what he saw in the photo. (Transcript at p. 100, lines 15-24). When Hull stated why he believed the exhibit was not accurate (Transcript at p. 105, line 39-45), the hearing officer summarized Roadmaster Pavetto's previous testimony (Transcript at p. 106 at lines 10-12). When Hull attempted to state what he saw in the exhibit, the hearing officer interrupted, saying, "That's what it shows" (Transcript at p. 106, line 16) referring to the description previously given by Pavetto.

While the Carrier argues that the hearing officer was required to repeat questions because witness Hull was being evasive, the record reflects that Hull was simply not agreeing with the hearing officer's characterization of photographic exhibits. By repeatedly asking the same question, the hearing officer ceased being an impartial fact finder and became an advocate.

While hearing officers are entitled to latitude in the manner they conduct the hearing, the hearing officer herein, as set forth in detail above, exceeded any reasonable deference to which he might have been entitled, and compromised Claimant's contractual right to a fair and impartial hearing. Under these circumstances, the discipline assessed in this matter may not stand.

Award:

Claim sustained.

January 7, 2013
Date


Mitchell M. Kraus
Referee.