

PUBLIC LAW BOARD NO. 7529

Award No. 100
Carrier File: 2015-191148
System File: D13908015

PARTIES

TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees
Division of the International Brotherhood of Teamsters
(the Organization)

and

CSX Transportation, Inc.
(the Carrier)

Arbitrator: Sherwood Malamud

Claimant: Scott G. Damson

Decision: Claim Sustained in Part

Statement of Claim:

“It is my desire to process the discipline assessed to me and to obtain a decision as quickly as possible. Therefore, I hereby elect to have said discipline submitted to Special Board of Adjustment No. 7529. In so electing, I understand that the Neutral Member of Special Board of Adjustment 7529 will base his decision on the transcript of my hearing, my prior service record, the notice of my hearing, the notice of discipline and Rule 25 of the Maintenance of Way Agreement.”

Findings of the Board:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

On July 7, 2015, the Carrier assessed a 30-day suspension to Claimant Track Foreman S. G. Damson for his conduct on February 13, 2015 at approximately 14:48 hours. The Carrier charged that Claimant on that date:

“ . . . in the vicinity of ANJ 809.8 and 804.5 where you released your track authority before placing a 10 mph speed restrictions on the TDD defects found by the Sperry car. You placed a 30 mph slow order at the ANJ 809.8 which was a 35% TDD requiring a 10 mph slow order and no slow order at the ANJ 804.5 which was a 20% TDD and required a 10 mph slow order as well.”

The Carrier charged that Claimant violated CSXT Operating Rules 100.1 and MWI 501.

Upon due notice, the Carrier conducted an on the property hearing on April 7 which hearing was recessed by the Carrier's Hearing Officer over the objection of the Organization's Representative eventually to June 17, 2015. Claimant Damson attended the hearing on both dates. Other than the recess of the hearing, the Organization acknowledges that Claimant received a fair and impartial hearing.

At the conclusion of the first day of hearing on April 7, 2015, the Organization did not agree to the recess. On April 13, 2015, the Organization Representative Russell Farmer stated the Organization's objection in writing. The Organization viewed the recess as a violation of Rule 25; it interfered with Claimant's receipt of a fair and impartial investigation. In this regard, Representative Farmer states in his letter that:

“The Agreement—and the arbitrators that review disciplinary disputes—recognize that Rule 25 creates an adversarial process, with quasi-traditional safeguards and procedural protections. In this regard, Rule 25 obligates CSX to ensure charged employees receive a fair and impartial investigation before any discipline is imposed. This means that while CSX may have some latitude to effectuate a hearing, it still must make sure it does not abuse its authority in investigating an employee. Yet, that is exactly what happened in this matter. CSX closed the hearing and offered me the opportunity to make closing comments in conformance with the customary conduct of the hearing. Giving me the opportunity to make a closing statement makes sense since, as the representative of the charged employee, my role is to assist in effectuating his defense and a closing statement allows me to state my position regarding the state of the evidentiary record. And this is exactly what I did during my closing remarks—I pointed out that CSX had not met its burden of proof. However, you then apparently took my closing comments to heart and decided that more was needed to establish CSX's case; ordering the hearing postponed until such time as you could attain (sic) evidence to rebut my closing comments. This was clearly neither fair nor impartial; if CSX needed additional evidence in the formal record, then it should have been introduced earlier and not after baiting me into believing that the formal record was closed.”

The Board reviewed the transcripts of the hearings of April 7 and June 17, 2015. The Board concludes that Rule 25 affords a Claimant a fair and impartial investigation of the facts underlying the charges which are the subject of the hearing. The parties had not agreed upon procedural rules. The Carrier Hearing Officer ascertains the facts underlying the charges brought by the Carrier's supervisor(s) through extensive questioning of the supervisor(s).

Here, the Hearing Officer carefully examined Roadmaster Metts who authored the charges against Claimant. The issue over a recess arose out of testimony elicited by Organization Representative Farmer from Claimant towards the end of a long day of hearing. The Representative asked Claimant if the track location at issue was a designated crude oil train route. Claimant answered it was not. On cross-examination his testimony wavered. When asked by the Hearing Officer for proof that it was not a designated crude oil train route, Claimant indicated he had no independent proof with him. Nonetheless, the Hearing Officer closed the evidentiary portion of the hearing. At the very beginning of Representative Farmer's closing summary remarks, the Hearing Officer interrupted and suggested the recess. The Organization did not agree to a recess. Subsequently, in the letter quoted above, it stated its clear objection and reasoning to its objection to the recess.

When the hearing reconvened on June 17, 2015, the Carrier recalled Roadmaster Metts to testify. The Organization objected. The Roadmaster testified that the Lineville subdivision on which the track in question was located was not a crude oil train route. The import of this testimony is to establish that Exhibit 3 at the investigatory hearing, the commit letter from CSX to the Federal Railroad Administration (FRA), had no bearing in this case. The Board finds it should not have been received in evidence, and the record was burdened with extended testimony concerning this letter. Thus, the facts established at the reconvened hearing over the objection of the Organization provided strong support to the Organization's case.

The Board addresses this evidence, because the Organization's objection is grounded on its assertion that the recess of an investigatory hearing over the Organization's objection substantially impacts the fair and impartial nature of the hearing agreed to by the parties under Rule 25. In this instance, the Board concludes that the recess of the hearing, over the objection of the Organization, may be at worst an error. In this case the purpose of the recess was to clarify an assertion made concerning the nature of the track in question. The Board finds that if an error were committed in recessing the hearing, it was harmless error. Furthermore, if the error were prejudicial, the remedy would be to exclude all testimony obtained from the recessed hearing on June 17. In this case, that would exclude the important exculpatory evidence to Claimant's defense. The Board concludes that with the recess the investigatory hearing remained fair and impartial in accordance with Rule 25.

The Substantive Issue

The Carrier hired Claimant on May 7, 2007. In August 2014, Claimant transferred to LaGrange, Georgia. Prior to his transfer, on June 25, 2014 he was trained on the impact of the commitment letter that CSX provided to the FRA concerning key crude oil train routes. Neither location at issue in this case is a crude oil train route. Claimant was trained on MWI 501-13 as well on June 25. It was revised on June 27, 2014. Upon Claimant's transfer to LaGrange, Georgia in August, Roadmaster Metts issued a Field Manual to Claimant. The Field Manual contained instructions on addressing TDD detailed fractures in effect February 6, 2013. The Manual provided to Claimant did not contain the June 27, 2014 revisions that modified the speed responses to TDD defects in the track. The revisions required that 10 mph slow orders issue for fissures of 5-24% and 25-79% to protect the track until the defects were repaired.

When Roadmaster Metts assigned Claimant to the Sperry car inspection of the track on February 13, 2015, two defects were detected. A 35% TDD at ANJ 809.8 required the issuance of a 10 mph slow order. Claimant placed a 30 mph slow order on that segment of track. At ANJ 804.5, a 20% TDD was detected. Under the revised MWI bulletin, a 10 mph slow order was required. Claimant put no slow order on this segment of track which trains may traverse up to 50 mph, in accordance with the 2013 Field Manual.

Claimant testified that he did not recall the training he had received concerning the modified MWI 501-13 speed restrictions. He referred, instead, to the Field Manual issued to him by Roadmaster Metts in August 2014. Claimant also indicated his lack of familiarity with the Carrier mainframe computer system and employee access to that system through Gateway. He did not access the updated bulletin concerning revisions to MWI 501-13. When Metts assigned Claimant to the Sperry car that day he made no reference to the bulletin updates.

The Carrier argues that ignorance of the rules should not serve as an excuse or a defense. The Board agrees. Claimant failed to ascertain and consequently comply with the updated specified speed limitations in the slow orders he placed on the track. Claimant contacted his supervisor, Roadmaster Metts. He notified the Roadmaster of the defects. Claimant did not receive an immediate call back from the supervisor. As a result, Claimant released his EC-1 authority over the track with improper slow orders governing the track. The slow orders were in effect for approximately one hour. Claimant testified that he contacted the one train that passed over the area at an extremely slow speed below 10 mph.

The Board concludes that Claimant violated the Operating Rules 100.1 and MWI 501-13 as revised on 6/27/14. It is Claimant's second serious offense. However, the above record sets out a number of mitigating factors. First, the Roadmaster issued to Claimant a Field Manual with an outdated chart concerning the remedial actions necessary upon the detection of track defects. Second, the introduction of the commit letter by the Roadmaster, the issuing supervisor of this

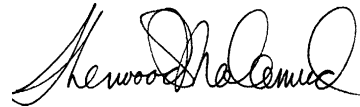
discipline, underscores the confusion that may result from the application of two documents to the circumstances of this case. Third, Claimant acknowledged his failure by requesting training on accessing the Carrier's computers to obtain bulletin updates. Fourth, the Board recognizes the importance of the protection of track at all times. Nonetheless, the Board concludes that the imposition of a 30-day suspension is harsh under these circumstances. A 15-day suspension is more appropriate to the circumstances of this case.

The Board notes that Claimant should receive additional training on obtaining Carrier updates and operation bulletins. The Carrier is ordered to reimburse Claimant for the difference in pay and benefits that Claimant received during the period of suspension as contrasted to the amount he should have earned had he been suspended for 15 days. Furthermore, his employee history should be amended to reflect a 15 rather than a 30 day suspension.

AWARD

The claim is sustained, in part. The Carrier established that Claimant violated Operating Rules 100.1 and MWI 501. Under the circumstances of the case, the discipline imposed should be reduced from the 30 to a 15 day suspension. The Carrier shall reimburse Claimant for the difference in pay and benefits as a result of the reduction in the length of the suspension.

Date: October 13, 2016

A handwritten signature in black ink, appearing to read "Sherwood Malamud". The signature is fluid and cursive, with the first name "Sherwood" written in a larger, more prominent script than the last name "Malamud".

Sherwood Malamud
Neutral Member