

PUBLIC LAW BOARD NO. 7529

Case No. 163

PARTIES
TO THE DISPUTE

Brotherhood of Maintenance of Way Employees
Division of the International Brotherhood of Teamsters

VS.

CSX Transportation, Inc.
Carrier File: 2017-220603

Referee: Sherwood Malamud

FINDINGS

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employee 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.

By a request form dated April 24, 2017, Claimant, Track Inspector W. L. Marshall asked that the disciplinary matter be processed by Public Law Board 7529 (Special Board of Adjustment) for expedited handling.

FACTS

The Carrier hired Claimant W. L. Marshall on March 2, 2015. By letter dated January 31, 2017 Assistant Division Engineer (ADE) A.M. Kurec directed Claimant to report to an investigatory hearing which was held on March 28, 2017 concerning an incident that occurred at 1112 hours on January 26, 2017. ADE Kurec charged that Claimant "failed to protect trains and on track equipment against any known conditions that would interfere with safe operations. . ." in the vicinity of the Dewitt Yard. The Carrier offered, but Claimant rejected, the opportunity to waive the investigation and agree to the assessment of a formal reprimand for this incident.

Claimant was the last Track Inspector to inspect a segment of track known as the South Van Yard #7 switch in the Dewitt yard on December 27, 2016. On January 26, 2017 there was a derailment at this location. After investigation, the TAPS committee comprised of representatives of the Carrier's transportation Mechanical and Engineering departments agreed on the cause of the derailment, wide gauge due to defective or missing fasteners. In a different accident report, Exhibit G, the cause of the derailment is noted as wide gauge due to missing cross ties.

In his inspection report on 12/27/16, Claimant noted insufficient fasteners at #7 switch. On January 10, 2017, Roadmaster Bourgeois informed Claimant that the defect had been repaired. On January 10, 2017 Claimant inspected the repair made and removed his notation that it was an FRA 213.9(b) defect. The repair lasted 16 days; the repair is supposed to be made to a

standard that the repair would last at least 30 days. Although the derailment occurred on January 26, 2017, the Track Inspection Report of December 27, 2016 was closed out on the Carrier's ITIS system on January 25, 2017.

Track Foreman Garrett, who was shadowing Claimant to become a track inspector placed in evidence a statement. In it, he noted that on the date of the initial inspection, December 27, 2016, the location involved in the derailment was inspected not only by Claimant and Garrett, but by DOT Inspector Wymans and Assistant Roadmaster Eyerly. Weather conditions of freezing and thawing occurred during the months of December 2016 and January 2017 prior to the derailment on January 26, 2017.

By letter dated April 17, 2017, Division Engineer J. E. Brass, upon his review of the record assessed a 3-day actual suspension for Claimant's violation of Operating Rules 100.1 and Rule 105.1 part 2 with regard to his alleged failure to sufficiently protect the track that led to a derailment on January 26, 2017.

Rule 105- Reporting Conditions

105.1 Protect trains and on-track equipment against any known condition that may interfere with safe operations. Immediately report the following conditions to the proper authority:

1. Accidents;
2. Defects in track, bridge, signal, or highway-rail crossing warning devices;
- ...
5. Any condition that may affect safe and efficient operations.

Board Findings

Procedural Objections

At the on property hearing, the Organization objected to the Carrier's failure to include in the January 31, 2017 notification letter the specific rule(s) allegedly violated by Claimant. This Board determined in Awards 106 (MacDougall) and 114 (Malamud); NRAB Third Division Award No. 35022, BMW v. BNSF (Kenis) that it was not necessary to specify the Rules allegedly violated. Under Rule 25, the Carrier had to provide sufficient information to alert Claimant of the conduct that is the subject of the investigation. The Carrier did so in the January 31, 2017 notification letter. After reviewing the entire record, the Board concludes that Claimant received a fair hearing.

Prior to the hearing, the Organization wrote to the Carrier and requested copies of the exhibits the Carrier would introduce into the record and the names of the witnesses who would testify. At the hearing, the Hearing Officer denied the Organization's objections to the introduction of exhibits offered into evidence. The Hearing Officer noted that neither the Agreement nor Rule 25 provide for pre-hearing discovery. However, the Hearing Officer provided the Organization with copies of the exhibits and afforded the Organization sufficient

time to examine the documents introduced. The Board concludes that Claimant was afforded a fair hearing.

The Merits

In his letter assessing discipline, Division Engineer Brass references Rule 100.1 that was not introduced into the record at the hearing. Since the Carrier does not list the Rules that Claimant is alleged to have violated in its notification letter, the Board concludes that finding Claimant violated a rule not placed in evidence at the on property hearing deprives Claimant and the Organization of the opportunity to defend against that charge. Reference to Rule 100.1 as part of the decision violates Rule 25.

Division Engineer Brass concludes Claimant violated Rule 105.1 part 2. What did Claimant fail to do? He reported the #7 track defect to the proper authority. During his inspection of this segment of track on December 27, 2016, Claimant identified this track with a 213.9(b) defect and inputted it in the Carrier's ITIS system. When Roadmaster Bourgeois informed Claimant that the defect had been repaired, he inspected it. He found it conformed to the Carrier's standards and requirements for this Class 1 track, and he removed the 213.9(b) defect from ITIS.

There was a derailment at the #7 location 16 days after Claimant inspected the track. The repair did not last 30-days. The Carrier asserts it is Claimant's fault. He was the last person to inspect it. The Carrier asks this Board to infer a deficiency in the inspection Claimant made, since a derailment occurred 16 days after Claimant inspected the repair made to the track.

The Carrier bears the burden of proof in a discipline case. It must establish by substantial evidence that Claimant violated the Carrier's rule(s). In un rebutted testimony, supported by the testimony of Track Foreman Garrett, who shadowed Claimant when he inspected the repaired track, Claimant conducted the inspection. When he inspected the track on January 10, Claimant found it conformed to Carrier standards. This testimony is un rebutted, as well.

Claimant did not make the repair. He inspected it. The Carrier failed to establish that Claimant failed to take any required action or that he conducted himself in a manner proscribed by Rule . The mere fact that the repair he inspected did not last for 30-days does not establish by substantial evidence that Claimant failed to comply with Rule 105.1 part 2.

AWARD

Claim sustained.



Sherwood Malamud

Neutral Member

Date: 2/27/2018