

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD
NO. 7529**

**Brotherhood of Maintenance of Way Employees
Division - IBT Rail Conference**

v.

CSX Transportation, Inc.

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**Case No. 48
Award No. 48**

Statement of Claim

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s dismissal of Claimant M. Weaver for alleged violation of CSXT Operating Rules - General Regulations GR-2, MWI 2003-03 and FRA 214.105 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File D45368113/2014-157076).
2. As a consequence of the violation referred to in Part 1 above, Claimant Weaver shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement.”

Findings

Public Law Board No. 7529, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

This claim is before the Board in accordance with the terms and conditions for Special Board of Adjustment No. 7529. By electing to proceed under the terms and conditions of the Special Board, Claimant “understand[s] that the Neutral Member ... 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.”

Claimant entered duty October 17, 1994 and maintains seniority in the Bridge and Building (B&B) Department. On October 29, 2013 Claimant’s position was Bridge Mechanic for Gang 6P82 with an assignment on a bridge near Mile Post QT 69.12 of the Toledo Branch Subdivision in the area of Kenton, OH. The workday commenced with a job briefing about the assignment (tie replacements); it required Gang members to coordinate their tasks rather than engage in bridge work duties as a lone worker, apart from the team’s assignment. Also addressed during the briefing was equipment “Special PPE: Fall Protection” with hospital location and posted rescue plan. Gang members understood the briefing.

The bridge exceeded twelve (12) feet above ground. Under FRA 214.103(a), "a personal fall arrest system or safety net system shall be provided and shall be used where employees are working at least twelve feet above ground or water surface." Fall arrest procedures ensure that an employee cannot free fall more than six (6) feet and cannot contact any lower horizontal surface of the bridge. Further details and specifications addressing fall protection procedures are itemized in Federal regulations at 49 C.F.R. Part 214, Railroad Workplace Safety, Subparts A and B; the regulations are replicated in MWI 2003-03, Federal Railway Administration's Bridge Worker Safety Standards (49 C.F.R. Part 214).

For example, fall protection procedures are required when a rail, or portion thereof, is removed and the employee is within 6 feet of the remaining, existing rail or within 6 feet of the end of the bridge's back wall. Fall protection procedures are not required, however, as long as an employee remains inside of the track's gage and the rails are secured in place. That is, "work is performed exclusively between the rails (6 feet from any hole greater than 1' X 1') with no weight bearing portion of your body outside of the rails."

On November 1, 2013 Manager of Bridges Freeman, the charging official, directed Claimant to an investigative hearing.

The purpose of this formal investigation is to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 1545 hours, on October 29, 2013 at or near mile post QT 69.12[.] ... You failed to follow instructions at milepost QT 69.12 ... when you were observed not utilizing appropriate fall protection for the task assigned on multiple occasions after being briefed in both a group setting and on a personal level.

In connection with the above incident, you are charged with failure to properly and safely perform the responsibilities of your position, and possible violations of, but not limited to CSXT Operating Rules - General Regulations GR-2, MWI 2003-03 and FRA 214.105.

On December 23, 2013 Division Engineer Brass, the deciding official, notified Claimant of his dismissal based on the Carrier's review of the record.

The charge letter and all exhibits, which were reviewed and discussed during the course of the investigation, as well as the transcript, are attached in this packet for your review and records. A thorough review of the transcript and exhibits demonstrates that during the hearing you and your representatives were allowed to cross-examine all Carrier witnesses and present any witnesses, documents and testimony on your behalf, in accordance with your contractual due process rights. Additionally, all objections were handled appropriately, thus protecting your due process rights in accordance with your collective bargaining agreement.

A review of all the documents associated with the hearing demonstrate that you violated CSXT Operating Rules - General Regulations GR-2, MWI 2003-03 and FRA 214.105.

Because all the information, evidence and testimony associated with this hearing prove that you violated company rules and policy, it is my decision that the discipline to be assessed is your immediate dismissal in all capacities from [CSXT].

A precise review of CSXT Operating Rules - General Regulations GR-2, shows that it requires employees to behave in a civil and courteous manner when interacting with customers, co-workers and the public and it prohibits employees from engaging in insubordination, willful neglect of duty and endangerment of life or property. As for MWI 2003-03, it incorporates FRA 214.105, Fall Protection Systems Standards and Practices, and stipulates the minimum required safety standards for employees working on bridges, such as fall arrest protection, as well as the exception to the standards and practices for a bridge inspector engaged in particular activities.

The claim is assessed within the framework of the charged misconduct, the evidentiary record established by the Carrier and Organization and the applicable instructions and regulations; however, the first assessment is the requirement imposed on the Carrier to provide Claimant with a fair and impartial hearing. In this regard, the Organization asserts that the "explicit provisions of Rule 25(d)" obligate the Carrier to provide specific advance notice of the exact offense allegedly committed by Claimant and, in this claim, the lack of specific notice resulted in confusion at the hearing about the sections or items in the rules breached by Claimant.

The Organization asserts, furthermore, that the Carrier did not respond to or comply with its request for "all exhibits, documents, statements, and any other items specifically any statements the Carrier plans to enter at the hearing ... no later than five (5) days prior to the scheduled hearing" and the "list of witnesses you will have at the hearing in order to prepare our defense to their possible testimony." This failure by the Carrier to respond interfered with Claimant's ability to prepare and defend himself and is a violation of fairness and impartiality in the conduct of the hearing.

The applicable portion of Rule 25 states:

(d) An employee who is accused of an offense shall be given reasonable prompt advance notice, in writing, of the exact offense of which he is accused[.]

Having considered the pertinent wording in Rule 25(d) with the contents of the "advance notice, in writing," issued to Claimant, the Board finds that the Carrier provided sufficient specificity to Claimant of his "exact offense" when it identified his work-related conduct under investigation ("observed not utilizing appropriate fall protection for the task assigned") at a certain location and date and referenced the rules allegedly violated by Claimant's conduct (GR-2, MWI 2003-03, FRA 214.105). There are fourteen (14) components to MWI 2003-03 noted by the Organization at the hearing; however, only that component replicating FRA 214.105, cited in the notice, was under investigation as to Claimant's violation thereof. The hearing transcript displays Claimant's awareness of the relevant rules for fall protection procedures and personal fall arrest system as well as his knowledge of the rules related to the charged misconduct. There is no violation of Rule 25(d).

As for the Organization's request for documents and a list of witnesses, that matter was addressed by this Board in Award No. 1 - - "the Collective Bargaining Agreement between the parties has been interpreted to mean that the Organization does not have a demand right to review all investigative material prior to the Hearing[.]" Circumstances are not presented in this claim for the Board to deviate

from its interpretative precedent in Award No. 1. In sum, the Board concludes that the Carrier afforded Claimant a fair and impartial hearing in accordance with the terms of Rule 25.

Aside from the finding that Claimant received a fair and impartial hearing, the Board renders these findings as to the events of October 29, 2013. The Gang's assignment involved replacing bridge ties; this required the removal of a rail, secured by joint bars, from the track. While positioning himself inside the gage of the anchored rails, Claimant removed the bolts on the joint bar. Thereafter Claimant walked to the opposite end of the bridge and removed his personal protective equipment (PPE). Since the rail remained in place and Claimant walked within the track's gage, Claimant was not required to use fall protection procedures.

Claimant proceeded to use a truck to remove that portion of the rail connected to the bridge. With that portion of rail removed employees were required to use fall arrest protection when the employee was within 6 feet of the bridge's back wall or within 6 feet of the rail that remained in place. Claimant fastened a fall-protection harness on his body and began walking across the bridge; however, he did not "tie off" - - connect the harness to a cable or slider. When instructed by Manager Freeman, Claimant's supervisor, to "tie off" Claimant promptly complied with his supervisor's instruction. Claimant: "He said man I need you to tie off for the rest of this job. And I said Phil I will do whatever you want. Just tell me ... I told him, Phil you are the boss, I'll do whatever you tell me to do[.]"

This first observation occurred in the morning hours on October 29. Sometime after the first observation but prior to 1500 hours, Manager Freeman's supervisor (Rick Peery, Engineer of Structures) notified the Manager by telephone of an accident occurring that day (October 29) on the Jacksonville Division where an employee working on a bridge, and not using fall protection procedures, fell off the bridge and suffered critical injuries. Manager Freeman noted the purpose of the telephone call was "[t]o heighten awareness of the situation. This was the 3rd event; we've lost 2 bridge guys falling through grating this year and this is the 3rd big incident that we had and [Peery] wanted to make sure that our awareness was heighten and make sure we were doing the right thing so everybody could go home the way they came to work."

Manager Freeman assembled the Gang to share this information about a critically injured employee and to emphasize the importance of following and using the safety procedures for fall protection (MWI-2003-03 and FRA 214.105). Bridge Foreman Tooley testified about this safety briefing: "[Manager Freeman] made sure we did everything the right way ... hooking up and ... everybody doing what they were supposed to be doing." Bridge Foreman Tooley, a member of a service lane team on the Chicago Division, had not worked with Gang 6P82 prior to October 29; he is part of the Gang for the tie-replacement assignment but not part of the Gang as to the members' work relationships that naturally form through work support. In the Board's view, his testimony displays less tendency to recall the safety briefing in terms favoring either party. The Board credits his testimony that the safety briefing occurred on October 29, 2013.

After conducting this heightened-awareness safety briefing, Manager Freeman witnessed Claimant at approximately 1530 hours walking across the bridge without fall protection. Bridge Foreman Tooley, standing near Manager Freeman, observed Claimant wearing his fall-protection harness but not hooked to a slider or cable. This is the second observation on October 29 where Manager Freeman observed Claimant in this manner. Claimant reached that part of the bridge where the rail had been removed which required him to tie off for fall protection. Three times the Manager instructed Claimant to tie off.

The noise from tools and equipment did not interfere with Claimant's hearing Manager Freeman as Claimant acknowledged in his testimony the Manager's repeated instruction.

Once off the bridge, Claimant and Manager Freeman walked another twenty (20) feet. They were in an area where the Federal regulation did not require Claimant to connect his harness with a tie off to a cable or slider. Claimant proceeded to hook his harness to a lanyard and started walking towards a truck about twenty-five (25) feet away. The lanyard did not stretch the distance to the truck; Claimant testified he asked co-worker Calmes, positioned at the truck, to release Claimant from the lanyard. Claimant's request is not confirmed or addressed in Calmes' testimony; however, Calmes and co-workers positioned fifty (50) to seventy (70) feet away confirm yelling and shouting between Claimant and Manager Freeman.

Claimant and Manager Freeman testified to the back-and-forth exchange. After hooking to the lanyard, Manager Freeman testified that Claimant walked towards the truck "flailing his arms saying I can't get to the truck, I'm tied off, I can't get to the truck and get the igniter, I can't get it." According to Manager Freeman, the situation was "getting confrontational" with a "heated discussion but not abusive language or anything like that."

Rebuttal testimony by Manager Freeman: "'Hey you gotta tie off' or something to that effect, I yelled pretty loud and he looked at me he just kept walking right to me and he walked off the bridge and says yes I have to tie off and he made some derogatory remark about 'this is stupid.' I said you don't have to like it Matt, we just gotta do it. And he goes 'okay then, I'll tie off all of the time.' At that point, he turned around and went back over there and grabbed the ... retractable lanyard and put it on walked back over to where I was standing to the truck and started wailing his arm ... yelling out that he couldn't get to the truck" as he was tied off.

Manager Freeman advised Claimant to cease his conduct or he would be released from duty and returned to the hotel whereupon Claimant, Manager Freeman testified, stated "do it" more than once. The Manager released Claimant from duty.

Claimant testified that "[I] put the retractable lanyard on my harness ... I walked to the truck to get the face shield and gloves ... when I ran out of lanyard, I think it was 25 feet, I said Larry [Calmes] I need a hand, I can't unhook. . . [Manager Freeman] was behind me when I ran out of leash, I said that to Larry, Mr. Combs, and Mr. Freeman said ... it's like you don't even want to be here and I said, I love my job ... it wasn't a big argument ... it was along the lines of me [Claimant] not being productive and not helping the job. ... I said are you sending me home? ... [Manager Freeman] said something along those lines and so I said, so you are sending me home? And he, then said, Don [Hendrickson] I need you to take [Claimant] back to the hotel."

There is substantial evidence of a dispute between Claimant and Manager Freeman centering on Claimant's tie off and conduct. Claimant testified it "wasn't a big argument" but co-workers positioned up to 70 feet away heard yelling and shouting. Although Claimant stated to Manager Freeman during the first observation that "I will do whatever you want. Just tell me ... I told him, Phil you are the boss, I'll do whatever you tell me to do", Claimant did not "do whatever you tell me to do" because he did not tie off. Claimant understood from the first observation he was to tie off.

The Board finds there was a “big argument” as in a “heated discussion but not abusive language or anything like that” (Manager Freeman). The Board finds further that Manager Freeman instructed Claimant to cease his behavior with the tie off and lanyard; Claimant responded “are you sending me home?” rather than cease his conduct. Given these findings, the Board finds substantial evidence that Claimant was not complying with a supervisory instruction. Even though Claimant was released from duty prior to the completion of the workday on October 29, the Carrier compensated Claimant with eight (8) hours straight time plus four (4) hours overtime.

The Organization asserts that Claimant must be exonerated of any wrongdoing or the dismissal must be mitigated to a lesser discipline based on a practice whereby an employee with a bridge inspector’s climbing card, and not performing any duties or carrying tools while crossing a bridge, is not required to tie off. In support of its assertion the Organization submits Third Division Awards 30849, 32608, 33344, 34223 and 34975.

The awards are considered in the context of circumstances and findings in this claim as well as the Organization’s responsibility to prove any asserted mitigating factor that exonerates or mitigates misconduct. That is, a party seeking to establish a practice that deviates from a term in the collective bargaining agreement or the Federal regulation mandating minimum safety standards for bridge workers accepts the responsibility to establish the practice with probative evidence.

Having reviewed the awards, the Board finds that the Organization has not proven that the asserted practice is a “common method in the industry” for performing bridge work as was found to support a practice in Award 32608. If the Organization is not asserting that the practice encompasses the “common method in the industry” but is the “normal practice on this crew” there has not been a showing that the crew’s practice was, as occurred in Awards 30849, 33344, 34233, “used with the full knowledge of supervisory personnel” because Engineer of Structures Peery and Manager Freeman dispute the practice. The witness most likely to provide disinterested testimony is Bridge Foreman Tooley; he testified that employees used the practice as described by the Organization but he did not testify that management was aware of those situations and acquiesced to or approved them. The Board finds his testimony inconclusive on the asserted practice.

Even if there is a practice, Claimant was on notice as of the first observation that it was not in effect and he recognized the supervisor’s authority to direct him to comply with safety regulation as Claimant testified “you [Manager] are the boss, I’ll do whatever you tell me to do” but Claimant did not follow through. In Award 34975 the claimant did not receive notice that a local practice was discontinued; Claimant knew from the first observation the asserted practice was not in effect on October 29. The asserted practice does not insulate him from the consequences of his misconduct.

In sum, the Carrier has established by substantial evidence that Claimant did not comply with Manager Freeman’s instruction to tie off (second observation) and repeated his disregard of a supervisory directive during the “heated discussion” with the Manager. The instruction and directive were reasonable and work-related for safety. Claimant’s misconduct violates General Regulations - GR-2 and MWI 2003-03 and FRA 214.105 (not complying with safety fall protection procedures).

Notwithstanding the proven charge, the Carrier did not prove that Claimant committed the misconduct on “multiple occasions” as stated in the notice. Given that finding, the penalty of dismissal is excessive as it is not reasonably related to the peculiar circumstances in this claim. In determining that dismissal is

excessive, the terms of the Special Adjustment Board require this Board to consider Claimant's "prior service record" which is satisfactory with service since October 17, 1994. The Board finds that a one (1) week suspension is warranted given the Claimant's decision not to comply with a legitimate, reasonable work-related supervisory instructions on safety on a day when there was a heightened sensitivity to and awareness of the risks and dangers present when not following fall protection procedures. Claimant's record is cleansed of the dismissal and shall reflect the 1-week suspension with restoration of seniority rights and other benefits accrued had he not been dismissed.

Award

Claimant's dismissal is excessive. The proportional discipline for the proven misconduct is a 1-week suspension with restoration of seniority rights and other benefits that would have been accrued but for his dismissal.

Patrick Halter /s/

Patrick Halter
Neutral Member

Dated on this 7th day of
October, 2014