

PUBLIC LAW BOARD NO. 7529

Brotherhood of Maintenance of Way)
Employes Division - IBT Rail)
Conference)
)
and)
)
)
CSX Transportation, Inc.)

Case No. 60
Award No. 60

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline of Claimant B. Borland, in the form of a fifty-five (55) day actual suspension for the alleged violation of CSXT - Operating Rules 100.1, 706.1(3) and 706.2 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (Carrier's File 2014-165364).
2. As a consequence of the violation referred to in Part 1 above, Claimant B. Borland shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement."

Background

On February 20, 2014, the Carrier issued a notice of investigation to Claimant stating:

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 2145 hours, on February 9, 2014, on the RF&P Subdivision, in the vicinity of milepost CFP22.0, when, while you were make a reverse movement while unloading Backhoe (BAM382) from Equipment Ramp Car (CSXT 912297), you failed to insure that all tracks in your intended route were properly protected which resulted in you crossing over the non-controlled team track that had no protection in place.

In connection with the above incident, you are charged with failure to properly and safely perform the responsibilities of your position, careless operation of your assigned equipment, and possible violations of, but not limited to, CSXT Operating Rules 100.1, 706.1(3) and 706.2.

Rule 100 – Application of Rules and Special Instructions, requires employees to know and comply with rules, instructions and procedures governing their duties and, in doing so, to take the safest course but to contact a supervisor should there be a need for clarification on that course (Rule 100.1).

Rule 706 – Working Limits on Non-Controlled Tracks states that "to establish work limits on non-controlled tracks" those tracks must be "inaccessible to all trains, locomotives, and on-track equipment" (706.1(3)).

Rule 706.2 states that tracks are rendered inaccessible by one of several methods such as posting a flagman, lining and locking switches, applying and locking a derail or “discontinuity of rail to prevent movement into the working limits.”

On March 13, 2014, an investigative hearing convened wherein Claimant and his representative were afforded the opportunity to present witnesses, cross-examine Carrier witnesses and offer statements as well as information and documents pertinent to the matter under investigation.

On April 2, 2014, the Chief Engineer notified Claimant as follows:

A review of the evidence, testimony, and all other documents associated with the hearing demonstrate that the charges against you were proven[.]

Accordingly, based upon my finding of guilty and the seriousness of the offenses, it is my decision that the discipline to be assessed is a total of fifty-five (55) calendar days[.]

On April 3, 2014, Claimant elected to proceed with a review of the imposed discipline by submitting a claim to this Special Board of Adjustment No. 7529. In doing so, Claimant acknowledged that the decision of the Neutral Member of the Board is based on the notice of investigative hearing, transcript of hearing, notice of discipline, Claimant’s prior service record and Rule 25 of the Agreement.

Organization’s Position

Claimant, assigned to Gang S2, is a machine operator with seven (7) years of seniority. On February 9, 2014, at the morning job briefing Employee-in-Charge (EIC) Fortune stated all CSX tracks in the area were controlled. Late in the day on February 9 Gang S2 unloaded equipment from a work train. When Claimant unloaded the backhoe, he crossed CSX controlled tracks. Manager Rhodes observed Claimant and asserts Claimant also traversed non-controlled tracks.

Claimant was withheld from service without receipt of a hearing as required by Rule 25(a) which states “employees shall not be suspended nor dismissed from service without a fair and impartial hearing nor will an unfavorable mark be placed upon their discipline record without written notice thereof.” For support, the Organization relies on Award 49 of Public Law Board 5959 and Second Division Award 13267 (must be a severe offense to suspend an employee pending investigation). Withholding Claimant without a hearing shows the Carrier prejudged his guilt and the formal hearing was a formality.

There is no evidence that Claimant committed the charged rules violations. At the morning job briefing EIC Fortune stated all tracks were controlled; Manager Rhodes and EIC Fortune confirm this statement. Claimant relied on and acted upon the EIC’s statement. Co-workers Blankenship, Normann and Foreman Borland were present at the job briefing and confirming Claimant’s position were not present for the hearing because the Carrier refused to make arrangements for them. Claimant is a dedicated employee confronted with nebulous and confusing instructions on the evening the alleged infraction occurs. Under these circumstances, the benefit of the doubt tilts to Claimant as occurred in Award 39 of Public Law Board 7120.

There is no dispute that the Board has authority to rescind in total or mitigate Claimant’s suspension which is excessive and unwarranted.

Carrier's Position

Claimant received a fair and impartial investigative hearing. Award 1 of this Board establishes precedent that the Organization has no right to receive a witness list or other investigative material prior to the hearing. Regardless, the Carrier presented Manager Rhodes to testify by telephone which is permissible under Rule 25. In accordance with Third Division Award 23857, the Carrier advised the Organization it could arrange for other witnesses to present testimony. Since the Carrier charged Claimant with a major offense, pursuant to Rule 25(a) it withheld him from service pending the outcome of the formal investigation. Finally, the co-hearing officer received documents from Manager Rhodes the day prior to the hearing as the Manager was testifying by telephone. Receipt of those documents for the purpose of distributing them at the hearing marked the extent of the co-hearing officer's involvement in the proceeding.

There is substantial evidence that Claimant drove the backhoe across non-controlled, unprotected tracks when he unloaded it from the work train on February 9, 2014. EIC Fortune advised members of Gang S2 during the morning job briefing that protection was in place on CSX controlled tracks 1 through 4; however, there were two (2) non-controlled tracks outside of the EIC's protection authority (707). Also a train was on those non-controlled tracks at time of the incident. The non-controlled tracks required derails for protection.

Claimant proceeded over controlled track 4 and the 2 non-controlled tracks. Immediately prior to traversing the tracks, Claimant contacted EIC Foreman and was advised to place derails on the non-controlled tracks. Whether or not Claimant misunderstood EIC Fortune does not insulate him from his rules violations. This major offense warrants discipline as there could have been serious consequences for the gang members, crew of the rock train or Claimant.

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.

A decision by this Special Board of Adjustment No. 7529 is based on the notice of investigative hearing, transcript of hearing, notice of discipline, Claimant's prior service record and Rule 25 of the Agreement. Within that evidentiary framework, the Board renders these findings.

The Carrier complied with Rule 25 with respect to documents, witness list, testimony presentation and removal of Claimant from service prior to the hearing as the incident involved an alleged major offense. Prior to the date of the investigative hearing, the Board notes that the hearing officer arranged for witnesses requested by the Organization, and viewed by it as having knowledge of the incident which would be favorable for Claimant, to be available for telephone testimony.

Regarding the alleged major offense, there is no evidence that Claimant (i) failed to properly and safely perform the responsibilities of his position, (ii) carelessly operated equipment assigned to him or (iii) violated CSXT Operating Rules 100.1, 706.1(3) and 706.2. During the morning job briefing the EIC informed the members of Gang S2 that he had authority on "all tracks" with derails in place. There was

no discussion of non-controlled tracks and the EIC did not discuss with Claimant the non-controlled tracks but he testified Claimant “should have been aware of them.” The EIC is responsible for track authority and Claimant’s witness present for the briefing and at the incident testified that the EIC “made it perfectly clear we had protection on all tracks” and there was no updated job briefing at the work location changing his instruction that there was protection on “all tracks.” Foreman Borland marked the briefing form indicating switches had been lined and locked and derails installed. No one present at the morning briefing, including Manager Rhodes, sought clarification of the EIC’s “all tracks” protected instruction.

After Claimant crossed the tracks with the backhoe, Manager Rhodes asked Foreman Borland about protection on those tracks. Foreman Borland: “And that’s when I told Rhodes the EIC just told Claimant before he made that move that those tracks were protected by derails. And we were talking on Channel 45 and the whole team heard it and that’s when Claimant crossed the track.” Claimant performed his duties in accordance with the information relayed to him by the EIC over the radio. There was no need to seek clarification of the Foreman’s and EIC’s communication.

In view of the findings set forth in the preceding paragraphs, the charged rules violations are unproven, arbitrary and in violation of the Agreement. The claim is sustained.

Award

Parts 1 and 2 of claim sustained.

Patrick J. Halter /s/

Patrick J. Halter
Neutral Member

Dated on this 4th day of
December, 2015