PUBLIC LAW BOARD NO. 7599

AWARD NO.2

CASE NO. 2

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes Division
IBT Rail Conference

vs.

Grand Trunk Western Railroad Company

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The suspension of Mr. M. Kline for violation of USOR General Rule A - Safety, USOR General Rule C - Alert and Attentive, USOR General Rule K - Equipment Inspection, On-Track Safety Rules - Appendix C: Roadway Maintenance Machines (RMM) in connection with a personal injury sustained by Mr. J. Ortiz on August 16, 2010 was arbitrary, disparate, excessive and based on unproven charges (Carrier's File GTW-BMWED-2012-00004 GTW).

2. As a consequence of the violation referenced in Part 1 above, Claimant M. Kline shall be granted the remedy in accordance with Rule 25, Section 4 of the 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.

Claimant was disciplined for alleged violation of Carrier's rules pertaining to safety of on-track equipment. He was assessed a 15-day actual suspension in addition to a 15-day deferred suspension. The discipline also triggered a 5-day deferred suspension. At the time of the incident in question, claimant had some 32 years of service with the Carrier exclusively as a mechanic.

The reason for the deferred 5-day suspension was not explained by the record but the record does establish that it was assessed for conduct that occurred *after* the conduct which is the subject of the instant dispute. Typically, a deferred suspension may only be triggered by *later* misconduct that occurs during the deferral period. According to the evidence of claimant's work record that was

introduced in the record, claimant's previous discipline, at the time of the incident in question, was limited to absenteeism issues that had occurred more than ten years beforehand. During his testimony, claimant revealed that he had never before attended a disciplinary investigation.

The investigation in this matter was convened after Juan Ortiz, a machine operator on a track maintenance gang, fainted on August 16, 2010. Claimant was one of three mechanics regularly assigned to the gang to perform maintenance as needed on the 16 to 18 machines used by the approximately 30-person gang.

The investigation was postponed several times and did not take place until January 20, 2012, some sixteen months after the events in question. It took more than ten hours to complete and produced a transcript exceeding 300 pages in addition to another 95 pages of exhibits.

The investigation was contentious and saw several procedural objections raised by the Organization and the machine operator. A somewhat extended discussion of the background facts is likely necessary for the reader to understand the basis of the procedural objections as well as our disposition of them.

Unless noted otherwise, the following facts were established by the record without dispute. Juan Ortiz was a 21-year employee who had served as Foreman, Assistant Foreman, Machine Operator, and Trackman. At all times relevant to the dispute, he was assigned to operate one of two rail lifter machines on the gang. On July 20, 2010, Mr. Ortiz first operated the machine and became aware that the exhaust pipe of its diesel motor was cracked and leaked exhaust fumes. When he operated the machine, he stood about two feet away from the side of the machine as it moved along; he was in the open air and not in an enclosed cab. He did not like being exposed to the leaking fumes. However, his testimony on pages 286-290 is unequivocal that he did not think the machine was unsafe to operate. Carrier rules give employees a method of declaring machines and equipment to be unsafe to operate and if an employee does so in good faith, the employee is protected from adverse consequences by the Carrier. At no time did Mr. Ortiz declare the machine to be unsafe to operate.

On July 21, 2010, claimant had been called to perform repairs on one of the gang's other machines. As he walked toward the other machine, he was intercepted by Mr. Ortiz who informed him about the cracked exhaust pipe on the rail lifter. Claimant asked Mr. Ortiz to check the parts catalog for the machine and give Claimant the part number so he could order a replacement part. According to Claimant, that is how things were done with the mechanics and the machine operators. Mr. Ortiz obtained the part number, gave it to Claimant, and Claimant ordered the part, which was a new exhaust pipe. The part number was the correct part number and the part ordered was the correct part. Installing the new pipe would have completely fixed the problem of leaking exhaust fumes.

Because Claimant was caught by Mr. Ortiz while he was in the middle of working on a different machine, Claimant did not inspect the rail lifter before ordering the part. He did inspect the machine at the end of the day after the machine had heen shut down for the day. Claimant noted that the pipe was covered by a white colored asbestos "sock" to protect personnel from coming in direct contact with a bot exhaust pipe. There was only a small area of blackened discoloration on the sock which suggested to Claimant the leak was not extensive. Moreover, at no time had Mr. Ortiz asserted to Claimant that the machine was unsafe and Mr. Ortiz had operated it all day long without any further complaints to Claimant.

The foregoing events of July 21, 2010 constitutes the entirety of Claimant's involvement with the machine. Indeed, on the day Mr. Ortiz fainted, nearly a month later on August 16th, Claimant was not even present; he was absent from work that day.

Mr. Ortiz, however, continued to operate the machine eleven more days thereafter on the days that the gang worked. His log book for the machine reflects his performance of the daily inspection he was required to make on the machine which included tasks such as checking the oil level and the braking system. Every log book entry notes that the exhaust pipe had not been fixed. Some entries reflect that he informed his supervisors about the condition of the machine. Mr. Ortiz called two witnesses, who were other members of the gang, to provide corroboration for his contention that he complained to supervision that the fumes were bothering him. The supervisors who testified in the investigation flatly denied ever hearing any such complaints from Mr. Ortiz.

It is undisputed that supervisors also periodically walked the length of the gang while they performed their track maintenance. They could have observed the rail lifter with the exhaust leak while it was in operation. At no time did any supervisor declare the machine to be unsafe.

On or about July 29th, however, another member of the gang reported the exhaust leak to the foreman. The foreman, in turn, contacted his supervisor who, coincidentally, was in a hardware store at the time of the foreman's call. The supervisor at the hardware store called the Work Equipment Supervisor, who is Claimant's direct supervisor, to discuss what was needed to effect a temporary repair to the cracked exhaust pipe. The supervisor at the hardware store was told to buy some metal flashing to be wrapped around the exhaust pipe along with a couple of hose clamps to secure the flashing material. One of the other mechanics for the gang was given the materials to apply the temporary fix; Claimant had no involvement in making the temporary repair. Claimant did notice the temporary repair some unspecified day thereafter and thought it probably did the job. It did not.

Mr. Ortiz continued to note the existence of continued fumes in his log. On August 12th, however, he did discuss the situation with his foreman. The foreman promised to have it fixed by one of the mechanics. Mr. Ortiz finally expected the leak to be fixed. However, the end of the work day came and the employees departed for home before the foreman could find a mechanic so nothing could be done that day.

On August 16th, Mr. Ortiz found the macbine still in the same leaking condition and went to his foreman to find out why nothing had been done. At the time, Mr. Ortiz had started up the machine to let it idle to warm up the engine but he was not using it to perform any work. Upon hearing from Mr. Ortiz, the foreman was reminded of his commitment to get the leak stopped and went off in search of a mechanic. As he was looking for a mechanic, the foreman received a call on his cell phone informing him that Mr. Ortiz had fainted and was down on the ground. As previously noted, Claimant was not at work this day.

Neither the transcript nor the exhibits establish where Mr. Ortiz was in proximity to the machine when he fainted. The only descriptive information was that he was found lying in some kind of a ditch but whether he was next to tbe machine or some distance away from it is not established in the record.

Mr. Ortiz was taken to a hospital and later returned to the work site. The record does not contain any competent medical evidence to establish what caused Mr. Ortiz to faint. Indeed, not even the Carrier's witnesses claimed any connection between the fumes and the fainting spell. Rather, the Carrier's lead witness quickly challenged the Organization's representative when his question assumed there was a causal connection between the fumes and the fainting. This colloquy transpired on page 128 of the transcript:

> Q. In your opinion then, why would anybody who saw a man pass out from inhaling fumes not find that piece of equipment to be dangerous?
>
> A. Do you know what he passed out from? Is it proven what he passed out from?

The answer to the two questions posed by the Carrier's lead witness is, "No." As noted, the record does not contain any competent medical evidence to establish a causal connection.

Finally, the record establishes the identity of the other mechanic who made the temporary repair to the exhaust pipe. He was not charged with violating any safety rules hy allowing the machine to continue to operate. In addition, two other members of the gang operated the machine while it was still leaking fumes and neither was charged with any safety rule violations. One operated the machine on August 3rd and the other operated it after Mr. Ortiz' fainting spell but before any other repairs had been made to it.

On February 8, 2012, some 18 months after the events in question, the Carrier assessed Claimant with discipline by saying this:

> The record contains credible testimony and substantial evidence

> proving that you violated USOR - General Rule A -Safety, USOR - General Rule C - Alert and Attentive, USOR - General Rule K - Equipment Inspection, on-Track Safety Rules - Appendix C: Roadway Maintenance Machines (RMM).

General Rule A reads as follows:

> A. SAFETY. Safety and a commitment to obey the rules are the most important elements in performing duties. If in doubt, the safe course must be taken.

The only allegation that Claimant violated this rule comes from the opinion of the Carrier's lead witness. He said, at page 72 of the transcript:

> I allege Mr. Kline failed to take the safest route when he did not inspect the rail lifter after Mr. Ortiz notified mechanic Kline on July 21, 2010, by not personally inspecting the rail lifter to ensure the proper part was being ordered.

Two facts established in the record may be recalled at this point. First, it is undisputed in the record that obtaining the part number from the machine operator, who had possession of the parts catalog, was the way things were done on the gang. This is what Claimant did. Second, it is undisputed that the part number was the correct part number for the correct part that needed to be ordered.

In addition, it is clear that the allegation of the lead witness was his opinion. Rule A does not, by its actual wording, explicitly require an immediate inspection to ensure that a correct part he ordered. Rule A is worded in very general and non-specific terms. To give effect to this general language in a discipline case, there must be more specific evidence to give actual meaning to its general terms. In this case, the lead witness did not attempt to provide any more specific rule citations that, by their terms, would have required Claimant to disregard the other machine that he was working on to divert his immediate attention to inspecting the machine in question to determine the proper part number. Moreover, the lead witness did not attempt to introduce any written maintenance policy, on which Claimant might have heen trained, that imposed the same immediate inspection requirement. Finally, the lead witness did not attempt to describe how there was any kind of work practice that would have called for such a diversionary immediate inspection requirement. None of the Carrier's other witnesses attempted to supply the missing evidentiary facts to support the opinion of the lead witness. Simply put, no such evidence exists in the record to support the opinion of the lead witness.

To be prohative, an opinion must be supported upon a proper factual foundation. Without such a foundation, an opinion is unfounded and, as a result, unwarranted. And an unwarranted

opinion does not constitute substantial evidence.

General Rule C reads as follows:

> C. ALERT AND ATTENTIVE. Employees must be alert and attentive when performing their duties, taking care to prevent injury to themselves or others.

The only allegation that Claimant violated this rule again comes from the opinion of the Carrier's lead witness. He said, at page 73 of the transcript:

> I allege that Mr. Kline failed to be alert and attentive to the possible risk of operating a defective piece of equipment by not performing his duties properly.

As with the allegation of Rule A violation, the record does not contain any specific evidence that establishes, in detail, how or in what manner Claimant should have responded to Mr. Ortiz' report of the exhaust leak. More importantly, the record does not establish any causal connection between the condition of the machine and any injury sustained by Mr. Ortiz. The cause of his fainting spell is simply not established in the record. That is not the opinion of this Board. It is our recognition that the record does not contain any competent medical evidence that seeks to establish any causal connection.

General Rule K reads as follows:

> K. EQUIPMENT INSPECTION. Employees must observe the condition of equipment and tools they use. Defective equipment must he reported to the proper authority and not used.

As worded, the normal meaning of the words would apply them to the user of the equipment, which would be the machine operator and not a mechanic. Moreover, the allegations of rule violations made by the Carrier's lead witness against Claimant are found on pages 70 through 74 of the transcript. Those pages contain no mention whatsoever of "Rule K" being violated.

The second paragraph of Appendix C: reads as follows:

> APPENDIX C: ROADWAY MAINTENANCE MACHINE (RMM)
>
> * * *
>
> If a roadway machine or hi-rail vehicle does not comply with FRA regulations or is not in a safe condition, an employee may refuse to

> operate the machine or vehicle if they make a good faith challenge to their supervisor. The employee is not required to operate it until the challenge is resolved.

Once again, the allegation that Claimant violated this rule was advanced by the Carrier's lead witness. He described the violation on pages 70-71 as follows:

> Also on Document Number 35, Appendix C, in the second paragraph, which I've already read, I feel - - I alleged Mr. Kline was also in violation of this rule because he failed to inspect the machine after being notified of the exhaust leak by Mr. Mr. Ortiz on July 21, 2010. Mr. Kline did have the part ordered after asking Mr. Mr. Ortiz to look in the parts book for the rail lifter to identify the part number needed for the repair. Mr. Kline failed to inspect the rail lifter himself to ensure the proper part was being ordered or to determine if a proper repair could be made at that time and that the machine was safe to operate in the current condition. * * *

Our previous discussion in connection with the alleged violations of Rule A and C apply here as well. Once again, the record does not provide any factual support for the opinion of the lead witness. But his unfounded opinion is deficient in at least three additional significant respects. First, there was no evidence introduced to show non-compliance with FRA regulations. Therefore, the rule would not apply in that respect. Second, the record does not contain any evidence that the machine was not in a safe condition on July 21st, when Claimant was told about the leak by Mr. Ortiz. Mr. Ortiz, himself, was emphatic in his testimony that he, as the operator of the machine, did not think it was unsafe. Therefore, the rule would not appear to apply in this respect as well. Finally, by its expressed terms, the second paragraph is directed toward the operator of the machine. Its terms say nothing to extend its reach to someone other than the operator.

With the foregoing background facts and observations about the rules and the evidentiary record in mind, we turn to the procedural objections raised by the Organization.

Rule 25(a) of the Agreement prohibits the Carrier from disciplining an employee without first providing the employee with "... a fair and impartial investigation ..."

Rule 25(d) of the Agreement reads, in pertinent part, as follows:

> An employee who is accused of an offense shall be given at least five (5) days advance notice, in writing, of the *precise charge* of which he is accused with a copy to the union representative. The investigation *shall be scheduled to begin within thirty (30) days from the date management had knowledge of the employee's involvement.* * * *

(Italics supplied)

The Carrier's initial notice of charges was issued on August 23, 2010 and scheduled the investigation to begin on Thursday, September 9, 2010. The notice was addressed to both Mr. Ortiz and Claimant. It described the precise charge as follows:

> The investigation is being held to develop the facts and to determine your responsibility, if any, and whether you violated company rules, instructions and/or policies in connection with an incident that occurred on or about 08:45 hours on August 16, 2010 at Battle Creek, Michigan, during which it is alleged that Mr. Mr. Ortiz sustained an injury.

It is undisputed that Claimant's only involvement with the machine in question occurred on July 21, 2010 when he learned of the exhaust leak, requested the part number from Mr. Ortiz, obtained the correct part number from Mr. Ortiz, and correctly ordered the correct part. He later inspected the machine that same day. The record does not establish any factual basis for him to have determined the machine to be unsafe at that time when the Mr. Ortiz, the operator, had not declared it to be unsafe for him to operate. Given the text of the notice, we find the Carrier failed to provide Claimant and the Organization with a precise charge within the meaning of Rule 25(d) because it operated to misdirect them and divert their attention away from the time of Claimant's only involvement on July 21st. The Carrier's failure to provide proper notice of the precise charge violated the Agreement.

It is also undisputed that Claimant's supervisor, the Work Equipment Supervisor, also knew of Claimant's involvement not later than July 29, 2010. This fact is clearly established by Exhibit Number 16 of the record. Given that knowledge, Rule 25(d) also required the Carrier to schedule the investigation to begin not later than August 28, 2010. The Carrier did not schedule the investigation to begin until September 9, 2010. Accordingly, we find the Carrier violated this time limit requirement of the Agreement. By doing so, the Carrier effectively waived any right it may have had to discipline Claimant for his actions on July 21, 2010.

During the investigation, the Carrier's lead witness also read from prepared notes when providing his testimony. The Organization properly objected to the use of notes unless it was provided a copy to use for its cross-examination of the witness. The hearing officer refused the Organization's request and permitted the witness to use the notes. It is well settled that witnesses are expected to testify from their memory. If they need to refresh their memory from notes, the opposing party is entitled to have copies of the notes to use in its cross-examination. This is fundamental fairness as well as a requirement of due process. By denying the Organization's rightful request for copies of the notes, the hearing officer effectively failed to provide the Claimant and Organization with a fair and impartial investigation. The Carrier, therefore, violated the Agreement in this regard as well.

Given the described violations of the Agreement by the Carrier, we find the claim must be sustained in its entirety.

AWARD:

The Claim is sustained.

Gerald E. Wallin, Chairman
and Neutral Member

R. Hidalgo,
Organization Member

C. K. Cortez,
Carrier Member

Date: 11/4/2016