

PUBLIC LAW BOARD NO. 6564

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

CSX TRANSPORTATION, INC.

Case No. 29

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

1. The twenty-five (25) day suspension assessed Flagging Foreman K. L. Stephenson for his alleged involvement in a flagging incident on September 29, 2003, on the Miami Subdivision was without just and sufficient cause and based on unproven charges [System File B16128803/12(03-0942)].
2. Flagging Foreman K. L. Stephenson shall now have his record cleared of the incident and be compensated for all wage loss suffered.

Background:

Claimant K. L. Stephenson was hired on October 2, 2000, in the Engineering Department. In September, 2003¹, Claimant was a Basic Track Foreman assigned to the Stationary Flagging Team on the Miami (Florida) Subdivision. Basic Track Foreman W. G. Aman was also assigned to the Stationary Flagging Team. On September 29, Aman was assigned to act as employee in charge (EIC) of track work authority under the Carrier's On-Track Worker Rule 707, for main line track from milepost SX 981.3 to milepost SX 987.6 (six and three-tenths miles), in the Boynton-Delray Beaches area. Under Rule 707, the EIC is responsible for making sure track workers and equipment are clear of the track before permitting a train to move through the area of the EIC's authority. The EIC is also responsible for making sure trains authorized to pass through

¹ All dates are 2003 unless otherwise indicated.

have cleared the area before allowing workers and equipment to again foul the track. The EIC coordinates with a train dispatcher and communicates necessary information to points-of-contact (POCs) stationed where work is occurring along the line. Miami Subdivision "Radio/Communication Instructions for All Constructions Activities" state:

EIC alerts POC of the approach of a train.
POC acknowledges receipt of the train approach alert from the EIC.
POC contacts and alerts all of his assigned parties, notifying them to stand down...
After the POC has confirmed that all of his responsible parties are in the clear and stood down, the POC responds back to the EIC that "all of his work zone is stood down."
EIC records on his flagging form that each of his POC are stood down and accounted for, then the EIC releases the train through his 707 limits.
When the train has passed the POC, the POC then calls the EIC and identifies by engine number that the train has passed and requests permission to resume work. The EIC then can give permission and record resume time on the flagging form.

In the early morning on September 29, Claimant had been assigned to show Aman, who was a new employee, where to put up advance warning boards and where the job briefing for the day's work would be conducted. At approximately 9:00 a.m., Track Engineer M. R. Cooper called Claimant to his office and instructed Claimant to assist Aman for the day. Cooper instructed Claimant not to interfere with Aman's track work authority, and specifically told him not to use the radio to communicate with the POCs working within Aman's track work authority area.

When Claimant returned to Aman, Aman said he was having trouble with the volume of traffic passing through the area and that he wasn't sure where all the POCs were located when he was speaking to them. Claimant subsequently took over radio communication with the POCs. From approximately noon, Claimant contacted the POCs in the track work authority area and relayed information received from Aman regarding

trains that were coming through. Claimant also relayed back to Aman information received from the POCs when trains had passed. At some point, Claimant began communicating with Aman by Nextel instead of his radio.

At approximately 4:40 p.m., a train passed through Aman's track work authority area without warning to the POCs, resulting in near misses with workers and track equipment, including an excavator that was partially on the main track. The instruction permitting the track to be fouled had been given by Claimant. After a series of trains had passed through the area, a POC notified Claimant that three trains had passed through. Claimant subsequently permitted the POC to foul the track. According to Claimant, Aman hadn't told him there was a fourth train coming.

An internal investigation was conducted by Cooper and Assistant Roadmaster D. W. Hampton. On October 14, the Carrier issued a letter instructing Claimant:

... to attend a formal investigation ... in connection with your involvement in a September 29, 2003, 707 track work authority incident, whereby permission was given by you to contractors to return to work and foul the main track prior to P-619-29 proceeding through the entire length of the work limits.... You had been assigned to only mentor employee in charge W.G. Aman that day, but against instructions became involved in the actual operation of the 707 track work authority.

You are charged with violation of CSX On-Track Worker Rule 600, CSX Operating Rule 501, failure to follow instructions and failure to follow the procedures set forth specifically for flagging operations on the Miami Subdivision.

On-Track Worker Rule 600 provides in part, "Engineering Department employees must do not work that will interfere with the safe passage of trains.... Equipment or work that is fouling or occupying a track must be protected." Operating Rule 501 provides in pertinent part: "Employees must not ... [b]e disloyal, dishonest, insubordinate...." The Carrier's flagging instructions state: "The standard for

communications with TCRC personnel is the TCRC Motorola radio. NEXTELS should only be used in case of emergency.... This is a safety concern to have all parties on the same form of communication....”

A hearing was held on October 27. On November 12, the Carrier assessed Claimant a twenty-five-day actual suspension. Separately charged in relation to the September 29, 2003 incident, Aman waived his right to an investigation and was assessed a thirty-day actual suspension. The Organization appealed Claimant’s suspension by letter dated December 1. The matter was discussed in conference on January 14, 2004. By letter dated February 9, 2004, the Carrier denied the appeal. The matter not having been resolved, it is presented to this Board for final decision.

Carrier’s Position:

The Carrier contends that the suspension assessed Claimant was justified. According to the Carrier, the charges against Claimant were serious in nature and were proven at hearing. Claimant admitted that Cooper had instructed him not to communicate by radio with anyone within Aman’s track work authority area. Claimant also admitted that he disobeyed this instruction and used the radio to communicate with the POCs in the area. The Carrier argues that the result was a communication breakdown that allowed a train to enter the work area unannounced. Claimant further admitted that he and Aman were conversing with each other by Nextel, which the Carrier contends is impermissible except in an emergency. Finally, the Carrier asserts, anyone doing flagging protection is required to have a flagging form on which to document all train and POC activity. Although Claimant was controlling the POC activity, he did not have or fill out such a

form. For all of this misconduct, the Carrier submits, the twenty-five-day suspension assessed Claimant was warranted.

Organization's Position:

The Organization contends that Claimant's actions on September 29, 2003, should be commended rather than condemned. According to the Organization, Aman—a new employee unfamiliar with the territory and inexperienced with heavier traffic—was assigned to provide track authority protection for several outside contractor crews. The Organization argues that Claimant took over radio communication with the POCs while Aman communicated with trains to comply with Cooper's instruction to assist Aman and in an effort to ensure safety for all concerned. The Organization submits that the communication breakdown that allowed the unannounced train to enter the area was caused by Aman, who admitted failing to tell Claimant that a fourth train was coming through, and who accepted discipline for that mistake. The Organization further argues that Claimant did not use his Nextel until his radio failed, which he considered to be an emergency. The Organization contends that Claimant did nothing wrong on September 29, and no discipline for his conduct was warranted.

Findings:

The Board finds that the Carrier proved all charges against Claimant in relation to his conduct on September 29, 2003, and that the twenty-five-day suspension assessed was justified. It is undisputed that Claimant was instructed to assist Aman. It is also undisputed that part of those instructions specified that Claimant was not to perform the function of communicating by radio to the POCs within Aman's track work authority area. It is further undisputed that Claimant nevertheless assumed that very function

during the afternoon of September 29, and was in fact performing it when at 4:40 p.m. a train passed through unannounced and had a near collision with workers and an excavator that was partially on the track.

Claimant testified at hearing:

I briefed with Mr. Aman and say ... hold it, you know, let's reorganize this. I used my safety empowerment to work safe and make safe decisions. He had asked me about maintaining the radio, and based on the comments that he made to me, *I took the radio and became his point of contact and I told him, I say, you're going to have one point of contact. I'll be your point of contact.* Now that will free you up to talk with your trains and to get a better feel of what's going on. (Tr. at 25) (Emphasis added.)

...

[M]y understanding was that I was supposed to go up and help [Aman] out.... I was already under the assumption that he didn't need a mentor because he ran that 707 for a period of time by himself[sic]....

...

[H]e had a nervousness about himself[sic] in talking with the trains. He didn't do it as fluently as he could have. I got to say once I got there *and I relieved him of some of his duties* ... then he seemed to flow a lot better. (Tr. at 27.) (Emphasis added.)

It is clear from Claimant's own words that he took it upon himself, despite explicit instructions to the contrary, to insert himself into the Rule 707 procedures being conducted by Aman as EIC. By becoming Aman's "one point of contact," Claimant acted as go-between, relaying information between EIC and POCs, instead of the EIC and POCs being in direct contact as contemplated by Rule 707. Neither Aman nor Claimant had the authority to modify procedures in this manner. Even assuming *arguendo* that Claimant had legitimate safety concerns about Aman's ability to handle the 707 work, the appropriate response would have been to contact Track Engineer Cooper or Assistant Roadmaster Hampton for instruction on how to solve the problem. The Carrier's Safety Policy, on which Claimant relied at hearing as empowering him to make

autonomous decisions on behalf of safety, states: “[W]e must rely on good judgment, following the safest course available. *We may have to contact a ... supervisor ... for guidance.*” (Emphasis added.) The Board finds that Claimant should have done exactly that.

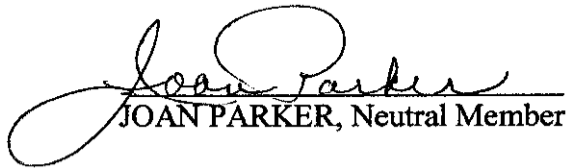
Claimant may have had the best of motives, but in taking over radio communication with the POCs, he not only exhibited poor judgment, he failed to follow Cooper’s explicit instructions. The Board therefore finds that Claimant was insubordinate. The Board also finds that Claimant’s use of the Nextel to communicate with Aman was a violation of the Carrier’s flagging instructions. Claimant’s assertion that he used his Nextel only because he lost contact by radio, which constituted an emergency and thus accorded with the Carrier’s flagging instructions, is without merit. The Board notes that if Claimant had obeyed Cooper’s instructions and stayed out of the 707 procedure, Claimant would have had no reason to be communicating with anyone by either radio or Nextel. Similarly, once Claimant took it upon himself to perform a flagman’s function, he was required to fill out a flagman’s form recording POC activity. Claimant did not have such a form to fill out, which the Board finds was a further violation of the Carrier’s flagging instructions.

Claimant had no business assuming part of the responsibility properly belonging to Aman under Rule 707 on September 29, 2003. Having chosen to share the responsibility, Claimant must also accept his share of the blame. It was Claimant’s communication to a POC that permitted workers and equipment to foul the track while a train was coming. If proper 707 procedure had been followed, EIC and POCs would have been in direct contact and perhaps the miscommunication that resulted in a near

miss might not have occurred. The fact that no damage was done to life or property was purely fortuitous. The outcome of the incident on September 29, 2003, could easily have been tragic. The Board finds that the twenty-five-day suspension assessed Claimant was warranted.

Award:

The claim is denied.


JOAN PARKER, Neutral Member


CARRIER MEMBER


ORGANIZATION MEMBER

DATED: 04-18-05

DATED: 4-18-05