

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated June 2, 2007, the Manager System Production Teams instructed Mr. D.T. Carter (hereinafter "the Claimant") to attend a formal hearing on June 21, 2007, at the Carrier's Division Office Conference Room in Selkirk, New York, "to determine the facts and place your responsibility, if any, in connection with an incident that occurred on the afternoon of Tuesday, May 29, 2007, where you allegedly were sleeping while operating the Rail Heater (RHRR 200503), which struck another employee that was working ahead of the Rail Heater (RHRR 200503)." The letter continued, "In connection with the above matter, you are charged with failure to properly and safely perform the responsibilities of your assignment, and failure to control your machine." The letter stated that "there may have been a violation [of] CSX Operating Rules, Safety Rules, and Procedures" and that the "purpose of the formal investigation will be to discover whether or not any rules were violated."

By mutual agreement the Investigation was rescheduled to July 19, 2007, and then, at the request of the Carrier, with the Organization's agreement, postponed until further notice. By mutual agreement it was then rescheduled to August 14, 2007, on which date the hearing/Investigation was held.

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds

that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On May 29, 2007, the Claimant was assigned as Rail Heater Operator on the C6 team. About 1400 or 1430 hours he climbed onto the Rail Heater to move it forward and fell asleep. Foreman Kacenski was measuring gauge on the track. While the Foreman was on the track, the moving Rail Heater, with the Claimant asleep at the controls, bumped into the Foreman, who was able to get off of the tracks after being bumped. The blower hose unit mounted on the front of the Rail Heater made contact with the Foreman. The Foreman then ran after the Rail Heater and had to bang twice on the propane tank of the Rail Heater in order to wake up the Claimant. The weather was clear and sunny, and the temperature, about 80 degrees. Michael A. Aquilina, Manager of Work Equipment and Production Manager, investigated the incident together with another manager, Conner Johnson, and asked the Claimant if he had proper rest the prior evening. The Claimant said that he did have. He said that he fell asleep, that he did not know why, and that he had traveled approximately 150 to 200 feet.

Manager Aquilina testified that in his opinion the Claimant violated the following rules:

General Regulation GR-2

All employees must behave in a civil and courteous manner when dealing with customers, fellow employees and the public. Employees must not: . . . 6.

Endanger life or property

General Rules D. Sleeping While on Duty

Employees must not sleep while on duty, except as outlined under Operating Rule D-1. An employee lying down or in a reclining position with eyes closed, covered, or concealed will be considered to be sleeping.

Engineering Department Safety Rules

ES-15. Mechanized Equipment

Operator must: . . . e. Stop equipment when the operator's attention cannot be directed exclusively to controlling the movement. . . .

On-Track Worker Rules, and Qualifications

727. Spacing of Equipment

1. Work (Red) zones: . . . d. Machinery approaching On-Track workers; the operator must communicate with the workers before coming closer than 15 feet.

Mr. Aquilina testified that the Claimant was visibly shaken at the time of questioning. He exhibited nervousness and was lethargic in that he was very slow to respond to questions that Mr. Aquilina and Conner Johnson asked him. In talking to them, the Claimant, according to Mr. Aquilina, was fidgety and bounced back and forth. Mr. Johnson asked the Claimant to remove his sunglasses and, Mr. Aquilina testified, "[h]is eyes were pinpointed." Aquilina testified that he has received training in the signs of drug abuse and that as a result of his observations of the Claimant, he requested him to undergo reasonable suspicion testing. Mr. Aquilina and Mr. Johnson, who had to drive to the scene of the incident, spoke to the Claimant about ten minutes after the incident occurred.

Mr. Aquilina arranged for the Claimant to be tested for drugs at a local hotel where

the screener came to take a urine sample. Mr. Aquilina informed the Claimant that the latter would be out of service until notified of the results of the test. Thereafter Mr. Aquilina took the Claimant out of service pending the results of the Investigation.

The Foreman testified as follows. He was working behind the Spiker Gauger and was checking the gauge. He turned around, as he does periodically, and noticed the Rail Heater was about 150 feet behind him. He bent down to check the gauge with a tape measure and, while in a stooped position, he heard a noise. He saw something but did not know what it was. He was struck by something and jolted forward. It almost knocked him over. He did not fall down but was kind of stumbling. He had a broom handle in his hand that he uses to push the gauge. As he turned around, there was a Rail Heater that was going by him. He had been struck by the Rail Heater. As he looked up, he saw the Claimant was on the Rail Heater with his head down sleeping. He took the broom handle, and, with some force, struck the propane tank twice that was on the Rail Heater. The machine was moving at faster than a walking speed. The Claimant woke up and proceeded to bring the Rail Heater to a stop. The Foreman was very angry and told his Assistant Foreman that the Claimant had just hit him with the Rail Heater and that he could have been seriously injured. He was not injured in the incident, but he was a little sore. He lost no time from work.

The Assistant Foreman told the Foreman that the Hotel Manager had stated that he suspected that the Claimant and the person he roomed with in the hotel were using marijuana because in his opinion he could smell this. About two years earlier, according to the Foreman, there had also been talk that the Claimant and three other employees were using marijuana. The matter was handled "in-house," he stated, without getting management involved.

The Foreman testified that he has known the Claimant on and off since 1978 and has worked on various teams with him. He has been the Claimant's foreman on various occasions through the years. He has never had any problems with the Claimant, the Foreman testified. The Claimant is a good Rail Heater Operator, the Foreman stated, and all of his paperwork is the way it should be.

The Claimant testified as follows at the Investigation. He is a Machine Operator. He has held the position on and off for 29 years, since 1978, when he got hired. He did not have to heat the rails that day, May 29, 2007. It was around 80 degrees, so the rail was hot enough, and he had the control in the lowest mode. He was pretty much in the creep mode. He had maybe 250 or 300 feet to move it up from the anchor machine to the gauger spiker. The next thing he knew Foreman Kacenski was knocking on the tank with a broom handle, and he hollered at the Claimant, "Doug, you almost ran me over." He ran up to the Claimant, and he was hollering at him. The Claimant apologized to him. At the time he did not know why he fell asleep. It was not an intentional thing. He did not lay down or kick back to sleep. He never does that. He never fell asleep before on a moving piece of machinery.

The night before [the Claimant's testimony continued] he got only 4½ hours of sleep because he got a late start out of Springfield to go to Buffalo. During the night he got a severe hay fever allergy attack and took a Benadryl capsule and had to get up at 4:30 in the morning. He got on the bus at 6:00 a.m. and went to work and everything was okay. He quartered the rail, walked a mile or two miles or whatever it was. Then the incident happened. It was around 2:00 in the afternoon. He just fell asleep. It never happened before, and he was a little shaken by it. After Foreman Kacenski hollered at him, he stopped the machine. As the gang kept moving on, he kept moving his machine

forward for the next 40 or 45 minutes at which time he was taken over to the right of way and questioned. Conner Johnson asked him to take off his sunglasses. He had his sunglasses on because it was bright and sunny out. Whether his pupils were pinpointed or not he does not know because he could not see them. But he would imagine that if you take sunglasses off in the bright sun your pupils are going to contract. He was told right there on the right of way that they were taking him out of service. Mr. Aquilina then drove him to the hotel where he took a urine drug screen.

The Claimant was asked at the Investigation whether, in respect to the drug test, he got a statement from the Medical Department that he was not under the influence of narcotics. He answered, "Confidential." He was asked whether he would say that he was under the influence of a drug. He answered, "Nothing other than Benadryl. And I don't think I was under the influence of Benadryl. I took some the night before to try [sic] myself up for an allergy attack. Benadryl does make you sleepy. And that's the only thing I can pinpoint. I was under the influence of nothing on the tracks on the day I was out there or any other day."

The Claimant acknowledged that he violated General Rule D, Sleeping on Duty. He stated that he would have violated GR-2, 6 if the Foreman had not gotten out of the way. He was also in violation of Rules ES-15 and 727.

Asked, "Do you use marijuana?" the Claimant answered, "No." The conversation that took place between him and the Foreman on that subject, the Claimant stated, was that the Foreman had heard that there were several guys on the gang that were smoking pot and that his (the Claimant's) name had come up as one of them. He unequivocally denied to the Foreman, the Claimant testified, that he smoked pot.

The Claimant further testified as follows. He has been operating the Rail Heater

for about 2½ years. On the day in question he knew that the Foreman was on the track in front of him checking gauges. He had a good job briefing. He had no idea when he took the medication that Benadryl could possibly affect his driving during the day. There is a 100 gallon tank of hydraulic oil close to the driver's seat. On an 80 degree day, the oil in the tank is at least 190 degrees. The heat coming off of the tank, the slowness and the drone of the machine, and the fact that he did not sleep well that night he thinks were multiple factors that caused him to fall asleep. He never before dozed off on the machine.

The day before the incident [the Claimant's testimony continued] was a holiday, the Memorial Day weekend. He got to the hotel the night before probably around 10:30. It takes a couple of hours to unwind from driving the distance from Springfield to Buffalo. It was a five hour plus ride. He probably got to sleep around midnight, and his alarm was set to go off at 4:30 for a 6:00 a.m. starting time on the bus.

After the incident [to proceed with the Claimant's testimony] he was asked by Mr. Aquilina and Mr. Johnson, and he stated that he had taken some Benadryl the night before because he was ill. The warning label on the Benadryl says that it may cause drowsiness. He went to sleep around midnight. He woke up because he was having a terrible allergy attack probably around 1:00 a.m. He does not know how long Benadryl lasts. He was absolutely not under the influence of drugs.

Asked by the hearing officer, "Are you in any treatment for any drugs?" the Claimant answered, "That's confidential." He testified that he did receive a letter from the Medical Department, but when questioned, "Did they recommend anything?" he stated, "That's confidential." Asked if he ever had any drug issues in the past with CSX, the Claimant testified, "Negative."

At the conclusion of the hearing the Claimant was asked if he was released to

return back to work. He answered no, that he still had some medical treatment until the end of the week and that he would then be qualified to go back to work. He was asked why he was not medically qualified to return back to CSX. He replied, "That's confidential." He was asked when he became medically unqualified. He stated, June 11, 2007. The hearing officer asked, "So you actually received a letter from CSX Medical Department stating you are not medically qualified to work at CSX. Is that correct?" The Claimant answered, "That's confidential." The representative of the Claimant objected to the questioning of the Claimant about his medical qualification.

The Claimant testified that he did not recall the exact wording of the correspondence from the Medical Department. "I'm on sickness benefits and that's all I have to say," the Claimant stated.

Following the hearing, L.E. Houser, Assistant Chief Engineer System Production Teams, notified the Claimant by letter dated August 31, 2007, of the Carrier's determination upon review of the transcript that "the facts support and confirm the charges against you." The letter stated that the Claimant's testimony and that of the Carrier's witnesses "confirm that you were sleeping while operating the Rail Heater (RHRR 200503) thus striking another CSX employee thus proving that you failed to follow rules, policies and procedures that were de[s]igned to protect other employees against controllable hazards. Your disregard for these rules, policies and procedures," the letter continued, "endangered your fellow employee and cannot be tolerated under any circumstance." The Assistant Chief Engineer stated that it was his decision to assess "the discipline of termination of employment with CSX Transportation, including removal from all seniority rosters."

The General Chairman, Consolidated Rail System Federation, of the Organization,

by letter dated September 10, 2007, appealed the dismissal of the Claimant. The appeal noted that the Claimant was a long-time employee of nearly 30 years with an unblemished record prior to the present incident. The appeal attributed the fact that the Claimant “dozed off” to his arrival at the hotel the night before at a late hour, that it was a hot day of at least 80 degrees, that he had a medical condition that awakened him in the middle of the night for which he took medication. The appeal stated that neither the Organization or the Claimant was “making light of what could have been a serious situation, but nothing happened.”

In an oblique reference to the testimony at the Investigation about drug use and the Claimant’s medical condition, the General Chairman stated the following:

It is further apparent from the record that the Carrier officers involved in this case believed and may still believe that something else was responsible for the cause of this incident. There were too many questions involving previous alleged incidents that were discussed that had nothing to do with the case at hand. There was no direct evidence of any wrong doing, but I believe that certain conclusions may have been drawn that have affected Mr. Carter. The past had nothing to do with the present, although the Carrier tries to insinuate that there must be a connection. There was not and is not any other reason this incident happened.

In conclusion, we believe that this is a case where the “punishment does not fit the crime.” The assessment of dismissal is not warranted in this case. As stated before, Mr. Carter is a long time employee with a clean record and we now request that he be restored to duty with all seniority rights unimpaired and that he be paid for all lost wages and benefits.

The Carrier’s Director Labor Relations replied to the appeal by letter dated October 25, 2007. He took the position that the Claimant was given a fair and impartial Investigation in accordance with the Agreement, that the Carrier sustained its burden of proof, and that the discipline assessed was warranted and fully justified. The Carrier asserted that any alleged extenuating circumstances did not ameliorate the Claimant’s “total disregard for his safety as well as that of his fellow employees. . . .” The discipline

assessed was warranted, the Carrier contended, and the offense committed was major because the Claimant showed a complete disregard of the duties of his position and endangered the life of a fellow employee by striking him in the back by the machine the Claimant was operating while asleep. In spite of the Claimant's "fairly 'clean record' throughout his 29 years," the Carrier asserted, it "had an obligation to take this course of action based on the severity of the infraction as well as the potential for catastrophic results." If the Claimant did not have sufficient sleep the night before, the Carrier argued, it was his responsibility to inform his supervisor of his situation.

In this Board's opinion there are unanswered questions on the record regarding why the Claimant fell asleep while operating his machine on the day in question. His testimony at the Investigation contradicted what he told Manager Aquilina, who investigated the incident for the Carrier. He told Mr. Aquilina that he had slept the night before and that he did not know why he fell asleep. At the Investigation, however, the Claimant testified that he had little sleep the night before and attributed his falling asleep to taking a Benadryl capsule for an allergy.

Mr. Aquilina also testified that because of the Claimant's lethargic behavior and slow response to questions, his "pinpointed pupils," and because he was moving back and forth when he and Connors Johnson were talking to him, they ordered "reasonable suspicion testing" for drug use. The hearing thus fairly raised the question of whether drug use on the Claimant's part contributed to his falling asleep while operating his machine.

Instead of dispelling that possibility through his testimony, the Claimant's answers to questions put to him at the hearing served to lend credence to Mr. Aquilina's suspicions. When asked whether, after taking the drug test, the Medical Department

informed him that the results showed that he was not under the influence of narcotics, the Claimant answered, "Confidential." When questioned if he is presently under treatment for drug use, he answered. "That's confidential." He had the same answer when questioned if the Medical Department recommended anything. He testified that as of the date of the hearing he was not medically qualified to go back to work, but stated that the reason he was not qualified to go back was confidential.

In its appeal the Organization argued that the hearing was not fair and impartial "to the extent that during the hearing, although charged with a specific violation on a specific date the Hearing Officer questioned witnesses and the accused numerous times about incidents which may have taken place and about different matters not contained in the hearing notice." The Board disagrees because the charge letter notified the Claimant that the "purpose of this investigation is to determine the facts and place your responsibility, if any, in connection with an incident that occurred on the afternoon of Tuesday, May 29, 2007, where you allegedly were sleeping while operating the Rail Heater . . . which struck another employee that was working ahead of the Rail Heater"

The questions to which the Organization objects went to the cause of the Claimant's falling asleep. The hearing officer, in this Board's opinion, was attempting to determine if drug use contributed to the Claimant's falling asleep. That was a perfectly proper area of inquiry on the part of the hearing officer. Just as the taking of medication could arguably be considered a mitigating consideration for the Claimant's falling asleep, the taking of drugs would be an aggravating consideration. The hearing officer cannot be faulted for exploring the circumstances that contributed to the Claimant's falling asleep.

The Claimant's right to keep his medical records confidential does not mean that a negative inference may not be drawn from his failure to be completely forthcoming about

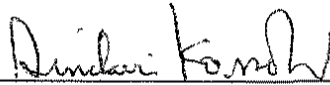
all of the facts surrounding his falling asleep while operating his machine and thereafter becoming involved in an accident. The Board finds no reasonable basis on the record in this case to disturb the Carrier's assessment of discipline against the Claimant for the violation committed.

A W A R D

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant not be made.



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
January 5, 2009