Award No. 24
Case No. 24

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 May 22, 2008, Mike McGowan, Supervisor Program Construction, instructed K. J. Miltenberger ("the Claimant") to attend a formal Investigation on June 5, 2008, at the CSX office building in Cumberland, Maryland, "to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 1600 hours on Friday, May 9, 2008, when while you were driving CSX vehicle 106013 you stopped at the Chessie Federal Credit Union ATM drive through in Cumberland, Maryland, and when you made a reverse move your vehicle hit the right front bumper of a vehicle being operated by Ms. Kathy Reed from Flinstone, Maryland. Also," the letter continued, "you reported this incident to me at approximately 1900 hours on Friday, May 9, 2008." Regarding the incident, the letter stated, the Claimant was "charged with failure to properly and safely perform the responsibilities of your assignment, failure to timely report the incident to your supervisor, endangerment, carelessness, as well as, possible violations of, but not limited to, CSX Operating Rules – General Rule A and F, General Regulations - GR-2; CSX Safe Way General Safety Rule GS-5 and ES-13."

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.

The Claimant has been employed by the Carrier in the Engineering department since July 8, 2002. He has no prior discipline on his record. At the time of the incident he held the position of Assistant Production Foreman in the Baltimore Service Lane on team 5DCT. On May 9, 2008, the Claimant was operating a company truck that he had to drop off at a garage for routine maintenance work.

En route to the garage he stopped in the Chessie Federal Credit Union to make a deposit. In the parking lot, he could not make a right turn into a parking space in one movement and had to back up. Although he stated that he looked in the mirrors of his vehicle, he did not see a vehicle behind him. His right rear bumper made contact with the right front bumper of a 2005 model Chevrolet Tahoe vehicle, scratching the Tahoe's bumper. The repair bill for the Tahoe was $1,600. There was no damage to the company truck.

The accident occurred approximately 1600 hours or a little later. After the Claimant exchanged pertinent identification and insurance information with the driver of the other vehicle, the Claimant tried to call his foreman and Supervisor Program Construction Mike McGowan, but was not able to reach either. He left messages for both. Later the foreman called the Claimant back and then called Supervisor McGowan. The foreman called the Claimant a second time after speaking with Supervisor McGowan, and the Claimant then called Supervisor McGowan again and this time spoke with him. The Claimant testified that he began making his calls about 5:00 p.m. after he and the other party had exchanged information and after the other party had left the scene of the accident.

After the close of the hearing, D. L. Moss Jr., Director of Program Construction, notified the Claimant by letter dated June 24, 2008, that based on the evidence "sufficient proof exists to demonstrate that you were guilty as charged, with the exception of CSX Safe Way General Rule GS-5 specifically, failure to timely report the incident to your supervisor, consequently that charge only is hereby dropped." With respect to the remainder of the charges, the letter stated, "a review of the material associated with this matter demonstrates that your actions clearly violated the remaining CSX Transportation Operation Rules and Regulations; CSX Safe Way Safety Rules; as well as Engineering Department Rules and Instructions that were referenced." Director Moss assessed a ten-calendar day suspension from July 11 through July 20, 2008, as discipline.

The Carrier contends that the evidence established the Claimant's guilt in that his written statement of the incident admitted his guilt. The level of discipline assessed, the Carrier argues, "cannot be viewed as arbitrary or capricious given the severity of the offense." The Carrier cites Awards Nos. 20, 29, and 40 of Public Law Board No. 6564 as supporting its position regarding the ten-day suspension given as discipline.

In his testimony Supervisor McGowan acknowledged that he received "a voice message from Mr. Miltenberger stating to call him ASAP" but said that the voice message did not have a time on it. He called back, he testified, as soon as he noticed that he had missed the call. It was at that time, he stated, that he learned that the Claimant had been involved in an at-fault vehicle accident. Supervisor McGowan also acknowledged that the Claimant had called and spoken with his (the Claimant's) foreman about the accident.

The Claimant did not report the accident to the police. The hearing officer asked Supervisor McGowan if a police report was required. Supervisor McGowan answered, "By Company perspective, a police report is in the rules to be filled out." According to Supervisor McGowan's testimony, the Claimant violated General Rule A, General Rule F, General Regulation GR-2, and General Safety Rule GS-5. Supervisor McGowan testified that although he included Engineering Department Safety Rule ES-13 in the charge letter, there was nothing in the rule that pertained to the Claimant's situation.

The only Engineering Department rule that the Claimant was charged with violating was Engineering Department Safety Rule ES-13. In his decision letter of June

24, 2008, the Director of Program Construction included ES-13 among the rules that the Claimant was found to have violated. That finding was clearly in error and not supported by substantial evidence. Thus in his testimony Supervisor McGowan, who was the charging officer, acknowledged that ES-13 "does not pertain" to the incident in question. (Tr. 11). In effect, Supervisor McGowan admitted that the reference to ES-13 was mistakenly included in the charge letter. There is no basis in the record for finding that the Claimant violated Engineering Department Rule ES-13.

Nor does the Board find substantial evidence in the record that the Claimant violated General Rule F. That rule states in pertinent part:

> **F.** The following conditions must be reported promptly and by the quickest means to the proper authority:
>
> 1. Accidents;
>
> * * *

According to Supervisor McGowan's testimony, in order to comply with Rule F, the Claimant should have notified the police and his supervisor of the accident and should have filed a Donlen report (Tr. 19). The Claimant did report the accident promptly to his supervisor. Rule F does not use the plural "authorities," but the singular "authority." The word "authority" is defined in The New Oxford American Dictionary (2001) in the sense used in Rule F as "a person or organization having power or control in a particular, typically political or administrative, sphere".

Clearly the Claimant's supervisor fits the definition of "authority" with regard to

reporting of accidents in that he is the person having administrative control on behalf of the Carrier in relation to the employee who is involved in an accident. Supervisor McGowan acknowledged as much when, in his testimony, he included the supervisor along with the police department as a "proper authority" to be notified of an accident. In the absence of the use of the plural "authorities" or any specific reference to the police in the rule, the Board is of the opinion that so long as the Claimant gave prompt notice of the accident to his supervisor, he did not violate General Rule F. In this connection the Board notes that in the last paragraph of the rule, dealing with the reporting of crossing warning malfunctions, in the three examples given of the authority to be notified, in each case only one notification need be given, not multiple notifications.

What we have in this case is a minor vehicle accident. Part VI of the Individual Development & Personal Accountability Policy ("IDPAP") specifically covers the situation of this case. Part VI contains the definition of the term "Minor Offenses." :

- All rule infractions that do not result in a derailment, or damages to equipment, or a personal injury, except as specified under Serious/Major.

- All at fault vehicle accidents that do not meet the criteria of a Serious Offense.

Part VI of the IDPAP defines "Serious Offenses," in pertinent part as follows:

- All rule infractions that result in a derailment, or damages to equipment, or a personal injury

- At-fault vehicle accidents involving one [of] these criteria:

A) Human fatality

B) Bodily injury with immediate medical treatment away from the scene

C) Disabling damage to any motor vehicle requiring tow away

If one reads the definitions of "Minor Offenses" and "Serious Offenses" together, it is clear that a motor vehicle accident involving damage but no personal injury may still be considered a minor offense so long as neither vehicle is disabled requiring towing. This is plain from the part of the definition of "Minor Offenses" that states "All at fault vehicle accidents that do not meet the criteria of a Serious Offense." Damage to a vehicle is not sufficient under the IDPAP to call an at-fault motor vehicle accident a serious offense where there is no personal injury. The damage to the vehicle must be disabling.

In the present case the May 9, 2008, motor vehicle accident of the Claimant did not involve a personal injury or disabling damage. The May 9 incident therefore came within the language of the IDPAP definition of "Minor Offenses." The Claimant had no prior discipline on his record. The IDPAP states with regard to Minor Offenses:

> Managers are encouraged to utilize informal corrective instruction based upon individual circumstances. At minimum, the first offense committed by an employee in a three-year period will be handled with informal corrective instruction, including a letter sent to the employee's residence.
>
> The main concern is with repetitive behavior. Repeated violations of the rules may require more focused intervention with each succeeding offense.

The Claimant's offense was his first in nearly six years of employment with the Carrier. His accident on May 9 cannot fairly be described as anything other than a "fender bender." It was a minor collision between two motor vehicles with no injury involved. It is common knowledge that a $1,600 repair bill is not inconsistent with minor damage to a vehicle. No testimony or other evidence was offered, and no explanation appears in the record, that would justify a more severe penalty than Informal Corrective Instruction for the Claimant's offense of May 9, 2008, as provided for in the IDPAP. The Claimant is entitled to be made whole for all wages lost by him as a result of the ten-calendar day suspension administered to him. The Board so finds.

The Board has perused all of the awards cited by the Carrier in its submission in this case. None of them involved a first offense by the claimant in the proceeding. In addition, the negligence involved in each of the cases was of a much more serious nature that in the present case.

AWARD

Claim sustained in accordance with the findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award

effective on or before 30 days following the postmark date the Award is transmitted to the parties.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
July 10, 2009