Award No. 27
Case No. 27

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 July 29, 2008, D.J. Rhodes, Manager System Production Teams, notified P.W. Hughes ("the Claimant") to attend a formal Investigation as principal on August 13, 2008, in the Carrier Division Office in Louisville, Kentucky, "to ascertain the facts and determine your responsibility, if any, in connection with an incident that occurred on 5XT9 System Tie Team, on July 15, 2008 at 1545 hours, near MP OHC 272.1, on the Henderson Sub, Madisonville, KY. On this day," the letter continued, "the tie inserter machine (TKO) that you were operating struck the trooper carrier ahead that was being towed by another TKO injuring three CSX employees." The letter stated that the Claimant was "charged with failure to properly and safely perform your duties, carelessness, reckless operation, and failure to control your machine, and possible violations to, but not limited to, CSXT Operating Rules GR-2, 720 and 722, CSX Safeway Rules GS-3 and ES-15."

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 July 15, 2008, at 1545 hours the Claimant was operating a Tie Inserter machine (also called TKO) as part of the T9 team. The team was traveling to clear for the day. The Claimant was towing five other pieces of machinery including a plate cart loaded with metal plates. He was following the lead TKO that was pulling a trooper carrier[1], carrying eight employees. The machines used by the team were being refueled 46 feet from the south end of a 30-foot crossing.

After receiving fuel, the lead TKO continued north through the crossing heading for the hole. The Claimant stopped, expecting that his machine would also be fueled, but the person in charge of the fuel truck waved him on. The Claimant continued on through the crossing at approximately 5 miles per hour. About 47 feet north of the crossing his machine ran into the trooper carrier that was being towed by the lead TKO. Three persons on the trooper carrier were injured. The front axle of the lead TKO derailed.

Two employees were taken to the hospital by ambulance from the scene, and a third employee also asked for medical treatment. The injuries consisted of a cervical strain or sprain and two head contusions on one employee; post-concussion syndrome on the second employee; and muscle strain and back pain on the third employee. The estimated lost time or restricted duty was two days each for the first two employees, and none, for the third employee. The total damage estimate for the equipment was $1,500. All pieces of equipment were operable after the collision.

John Christopher Brigman, Manager of Work Equipment, testified that he

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[1]The piece of equipment in question was interchangeably referred to as "trooper carrier" and "troop carrier" in this proceeding.

investigated the accident on the date that it occurred and that there were no visible skid or slide marks on the rail. Slide marks, he explained, would indicate that the wheels had locked up and slid on the rail. Therefore, according to Manager Brigman, there was no evidence on the rail that the Claimant had actually tried to stop the machine prior to the collision. Asked if he could estimate the speed at which the Claimant was traveling, he stated, "I must say five to ten miles an hour, no more."

Manager Brigman testified that he asked the Claimant what happened. Following is the Manager's testimony of what the Claimant told him:

> He stated to me that he had pulled up, came to a stop and was waiting for Mr. Shepherd to give him fuel. He said that he was waved through and told that he would get to fuel him up after he got to the hole.
>
> Mr. Hughes stated that the fuel truck driver Mr. Shepherd flagged him across the crossing. Mr. Hughes stated that he had looked up and he saw the booms of the tie handler, which were directly in front of the lead TKO. He saw the both of the tie handlers and they were moving out and they were traveling towards the hole. At that time Mr. Hughes said after he was waved through he was looking in both directions at the road blowing his horn at the road crossing; proceeded through the crossing and looked up and he saw the troop carrier, and he hit his brakes and it was too late.

Asked by the hearing officer if the Claimant had applied his brakes, the Manager testified, "I can't say. I mean, like I said there was no visual signs on the rail of . . . the machine sliding."

The Manager was asked by the Claimant's representative whether the brakes on a piece of railroad machinery always stop immediately when the brakes are applied. He answered, "Not immediately. Every piece of equipment differs by the weight." Questioned whether he was saying that any time that a piece of machinery does not immediately stop, it leaves a skid mark, the Manager stated, "No sir, that's not what I said. If the wheels lock up, come to a dead stop and lock up and slide, it leaves a mark."

Manager Brigman testified that after the accident he tested the brakes on the TKO operated by the Claimant and that the brakes were completely operational. He performed two additional tests. Using the same TKO as involved in the collision, he operated it in low gear with no air connected to the plate broom. He started 46 feet south of the crossing and applied the brakes when the front end of the machine reached the north end of the crossing. He slid for 10 feet, and the total stopping distance was 25 feet, 6 inches from where he applied the brakes.

He then repeated the test with air connected to the plate broom. He slid four or five feet in the TKO, and one or two on the broom. His total stopping distance was 23 feet, 6 inches. Manager Brigman testified that he performed the test going at full throttle, which he estimated was somewhere around 10 miles per hour. He then testified that it was no more than 10 miles per hour, but could have been less.

The Claimant had operated the TKO in question for approximately five or six weeks without incident. Asked by the hearing officer how the Claimant was doing as far as an operator, Manager Brigman testified, "He was doing great." He observed the Claimant several times, the Manager stated, "and I was very satisfied with his working skills." Questioned by the hearing officer whether prior to the collision the Claimant was a good employee, the Manager stated, "Yes sir. I had no problem with Mr. Hughes at all."

The Fuel Truck Operator testified that it was his understanding that the machines were headed for the hole. The Claimant stopped his machine, the Fuel Operator stated, and asked if he was going to get fuel. The Fuel Operator said, "No, you guys are going to be headed towards the hole." A mechanic named Walt, the Fuel Operator testified, had his truck right off the edge of the road, and it was blocking vision. The Claimant waved

at the Fuel Track Operator, the latter testified. The Claimant testified that he waved back to the Fuel Track Operator after the latter waved him on.

The Fuel Truck Operator testified, "I would just say that something good did come out because we have lights on the troop carriers now, which we didn't have before and the brake lights and everything. So as a safety aspect that's the real good thing."

He had no advance notice, the Claimant testified, that the operator of the TKO towing the trooper carrier was going to stop. His vision, the Claimant stated, was partially obscured by the design of the TKO that he was operating and by trees and vehicles in the area. According to the Claimant he was looking east and west for vehicular traffic as he approached the crossing in addition to looking at the track in front of him. The Claimant testified that he was looking at the crossing to make sure no vehicle was approaching, that he looked up and saw that the machine ahead of him "had already stopped" and that "by the time I hit the brake on the machine there wasn't any way for me to stop."

The Employee Summary Report introduced into evidence shows no prior discipline for the Claimant in his 4½ years of employment with the Carrier. The Summary Report shows that he was disqualified as foreman on June 6, 2008, by accepting the disqualification in lieu of hearing. His Employee History document in the section on Record of Reportable Injuries states "No injuries reported against employee." In the section called Crew Absenteeism, it states, "No absenteeisms reported against employee." Under Absenteeism, it states, "No absences reported against employee."

Following the hearing, by letter dated September 2, 2008, the Assistant Chief Engineer System Production notified the Claimant that the testimony and other evidence demonstrated that he was "guilty of the infractions upon which you were charged and that

your actions clearly violated applicable CSX Transportation Operating Rules and Regulations; CSX Safe Way Safety Rules; as well as, Engineering Department Rules and Instructions." Because of his guilt, the letter stated, "and due to the serious nature of the offenses, it is my determination that you are to be immediately dismissed from the service of CSX Transportation."

It is the position of the Carrier that the Claimant was provided a fair and impartial investigation that produced substantial evidence that he was guilty as charged. Although the Claimant contended at the hearing that he was denied a fair hearing because of the Carrier's failure to comply with the Organization's request to be provided copies of all relevant documents prior to the hearing in order to be able properly to prepare for the hearing, the Carrier contends that it had no contractual obligation to provide such documentation.

Regarding the Claimant's guilt, the Carrier contends that it presented substantial evidence to demonstrate that he was guilty of the rules violations as charged and that, in addition, the Claimant admitted his guilt during his testimony. Thus, the Carrier asserts, the Claimant acknowledged that it was his duty to keep a safe stopping distance between his machine and the vehicle in front of him. This was not done, the Carrier maintains. The Carrier also argues that the Claimant admitted his responsibility for the injury of his coworkers. Admission of guilt, the Carrier reminds the Board, satisfies the Carrier's burden of proof.

The level of discipline, dismissal, cannot be viewed as arbitrary or capricious, the Carrier contends, given the severity of the evidence, namely, injury to three employees as a result of the Claimant's negligence. Employees who engage in negligent behavior, the Carrier asserts, can be subjected to severe disciplinary measures. The Carrier requests the

Board to uphold the discipline assessed.

The Board will first address the procedural issue of whether the discipline should be reversed and the case dismissed because of the Carrier's failure and refusal to provide the Organization with copies of all relevant documents that it intended to rely on in presenting the Carrier's case against the Claimant. The Organization contends that it needed the documentation in order properly to prepare a defense to the charges. Being shown such documentation at the hearing, the Organization argues, does not provide it with sufficient time and opportunity to prepare an adequate defense.

A similar argument was made before this Public Law Board No. 7120 in Case No. 3, Award No. 3. In that case we pointed out that Public Law Board No. 7008, Award No. 16, dated November 2, 2007, involving these same parties rejected the Organization's claim that the claimant was denied due process because the carrier "did not provide us our request for management records for the purpose of researching issues related to this investigation in order for us to not only prepare, but also provide [the claimant] with a fair and impartial hearing." Public Law Board No. 7008, Award No. 16 held as follows: "On the threshold issue of due process and 'pre-investigation discovery', the language in Rule 24 (i) does not require the Carrier to provide summaries of testimony or investigative materials to the Organization prior to hearing. Consequently, we find no evidence of a fatal due process violation on this record."

Public Law Board No. 7008 made the same holding in Award No. 25, dated April 11, 2008, stating, "However, there is no provision in Agreement Rule 24[i], or any other Agreement rule which requires the 'right of discovery'. Therefore, in that regard we find no violation of the Agreement." We hold in this case, as we did in Award No. 3, "In the absence of contrary authority cited by the Organization this Board will not find 'a fatal

due process violation' in the failure of the Carrier to provide any of the materials requested by [the] Organization for review prior to the investigatory hearing."

Further, the Board has carefully reviewed the record, including all of the documentation relied on by the Carrier in this case. The Board is satisfied that there was nothing in the documentation of a surprising nature, or so complex in nature, that the Organization or the Claimant was prejudiced by not having the material available for perusal prior to the hearing. The record reflects that the Organization and the Claimant were afforded whatever time was reasonably necessary, or requested by them at the hearing itself, to examine any documentary evidence in the case. The Board finds that the failure of the Carrier to provide the requested documents to the Organization prior to the hearing did not prejudice the Claimant and is not a basis for disturbing the discipline administered by the Carrier in the case.

The Board agrees that the Carrier has shown by substantial evidence that the Claimant was guilty of negligently operating his TKO machine. Even if we make allowance for the fact that the Claimant had to watch not only ahead of him but to the side because of the crossing, he still had enough time to stop his machine. This is shown by the post-collision re-enactment of the accident by Manager Brigman. Using the same equipment as the Claimant, he did not apply the brakes until he was at the north end of the crossing, and he was still able to stop the TKO and the equipment being towed well short of the 47-foot mark where the collision occurred.

Nevertheless there are significant mitigating elements in this case. According to the Claimant's testimony, not challenged by any Carrier witness, the TKOs with the equipment that they were towing, were in bunching mode because they were going over a crossing. (Tr. 52). Machines are permitted to be within 40 feet of each other when

bunched up to go through a crossing. In response to the hearing officer's question, the Claimant testified that he did not tell the lead TKO that he was going to bunch with him, but stated that this was something that they regularly did.

The record shows, moreover, that the lead TKO did not tell the Claimant by radio or otherwise that he was going to stop just 47 feet past the crossing. Common sense would dictate that when machines are traveling so close to each other, the lead machine operator warn the operator of the machine behind him if he is going to stop. This is especially true when the last car on the lead train, the trooper carrier, does not have a brake light. Query whether immediately before the machines stopped to be fueled and were about to traverse the crossing there should have been a job briefing about safe procedure and perhaps to set up a warning system should the lead TKO have to stop suddenly.

The fact that the Carrier equipped the trooper carrier with rear lights and a brake light after the accident is implicit acknowledgment by the Carrier that it was not safe for the trooper carrier to be on the rails without brake and rear lights. Although rules of evidence prevent the introduction of evidence of safety measures taken after an accident to prove negligence, the reason for excluding such evidence is not lack of probative significance but a policy against discouraging the taking of safety measures. McCormick on Evidence (1981) §275. The rule of evidence, however, does not bar the consideration of such conduct on the Carrier's part as a mitigating element. The fact that the Carrier installed the rear lights and the brake light on the trooper carrier immediately after the accident is persuasive that the Carrier believed that due care required the installation of such equipment on the trooper carrier as a safeguard to make the car more visible and to alert anyone following that the car was stopping.

Further the facts that the Claimant had a clean record regarding discipline and no absences on his record in four-and-a-half years of employment; and that Manager Brigman testified that prior to the collision the Claimant was a good employee and that he had no problem with him at all; are additional elements of mitigation in the Claimant's favor. Prior arbitration awards, moreover, involving these same parties show that the Carrier does not have a policy of automatic dismissal for at-fault accidents involving a collision with other equipment. See Third Division Awards Nos. 38958, 33379, and 31299, which involved considerably more damage to the equipment than occurred in this case and in none of which cases the carrier imposed more than a 30-day suspension. While it is true that the other cases did not also involve personal injuries, the personal injuries were not of such magnitude in this case as to justify such a difference in penalty as between dismissal and a 30-day suspension--at least in light of the mitigating elements here present.

In all of the circumstances, for the reasons stated, the Board finds that dismissal was excessive discipline in this case and that the Claimant should be reinstated to his former job without loss of seniority or of continuous medical insurance coverage but without back pay.

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
March 1, 2009