

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated July 3, 2008, T. Fullen of the Carrier's Baltimore Division Engineering Department instructed S. W. Pritchett ("the Claimant") to attend a formal Investigation on July 16, 2008, in the Engineer/Track's Office in Hagerstown, Maryland, "to determine the facts and place your responsibility, if any, in connection with collision of BR9811 and MT 2000707 on June 24, 2008 on the Old Main Line Subdivision at MP BAC 26.6 at approximately 1130 hours." In connection with that incident, the letter stated, the Claimant was "charged with possible violation of, but not limited to Operating Rule A, Operating Rule 707, Operating Rule 720, Operating Rule 414, Operating Rule 416 and Operating Rule 424." At the Organization's request the hearing was postponed to July 29, 2008.

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 and its predecessor since April 13, 1977. On June 24, 2008, the Claimant, a Machine Operator, was operating a Ballast Regulator as part of a surface gang. The plan was for the gang first to finish work on a crossing on the main track for which D. R. Myers was the Employee-in-Charge ("EIC") with Rule 707 authority. After work on the crossing was completed the surface gang was to travel east for additional on-track work for which Foreman J. A. Caywood was the Employee-in-Charge with Rule 707 authority. The two Rule 707 areas abutted each other: EIC Myers's limits were from BAC Milepost 28.8 to 36.3 while Foreman Caywood's, were from BAC Milepost 21.7 to 28.8.

The Tamper Operator on the surface gang, Mr. L. M. Whetzel, finished his work at the crossing at Milepost 33.1 first and proceeded into Foreman Caywood's authority to perform additional work there. The Claimant continued working in EIC Myers's 707 authority for another 45 minutes to an hour. After completing his work at the crossing, the Claimant proceeded on his Regulator toward Foreman Caywood's area of authority. EIC Myers testified that while the Claimant was en route to his assignment within Foreman Caywood's limits, he (Myers) received a communication from the dispatcher to

clear his area for a train.

EIC Myers, according to his testimony, called the Claimant on the radio and instructed him not to go past the switch at Sykesville because they had to clear up for a train. Asked by the hearing officer whether the Claimant acknowledged that communication, Mr. Myers testified, "I can't say that he might have acknowledged it. I know that I talked to him on the radio." The switch at Sykesville was within EIC Myers's limits.

Later Mr. Whetzel, the Tamper Operator, called EIC Myers by cell phone. He wanted to know, Myers testified, if they had to clear up or not. According to Mr. Myers, he told Mr. Whetzel, yes, and that he had instructed Mr. Pritchett not to go by the switch at Sykesville. The dispatcher had also told EIC Myers that he could not get in touch with Foreman Caywood and to let Mr. Caywood know that they had to clear up. Mr. Myers then called the Claimant a second time and asked him if he would get on the radio and holler for Mr. Caywood. Mr. Myers subsequently learned that the dispatcher had got in touch with Mr. Caywood on his own.

James Caywood testified that on June 24, 2008, he was foreman of the surfacing team consisting of Regulator Operator Pritchett and Tamper Operator Whetzel. The surfacing team's assignment was to go onto D. R. Myers's 707 authority to retamp a road crossing that was worked on the previous day and then to proceed east into Foreman Caywood's 707 limits and work on some curves that had alignment issues. Foreman

Caywood was supervising the operation from his truck, although from time to time he would climb into the cab of the Tamper that was being operated by Mr. Whetzel.

Foreman Caywood testified that Claimant Pritchett had problems on his wing cables that delayed him on the crossing assignment. Foreman Caywood informed Claimant Pritchett that he was going to bring the Tamper (operated by Mr. Whetzel) into his (Caywood's) limits to work on the spots needing alignment at Milepost 25.4 and that Mr. Pritchett had permission to come down there after he finished at the crossing. Foreman Caywood testified that he believes that he advised EIC Myers that the Tamper was clear of Mr. Myers's limits.

Foreman Caywood overheard Operator Whetzel talking to the dispatcher. He then personally called the dispatcher and was told that he had to clear the area so that a train could go by. This meant that the Tamper had to go back up the track in a westerly direction to Sykesville to clear for the train. The hearing officer asked Foreman Caywood, "But you knew the Regulator was coming down, so how did you know it was safe to go back up the track?" Foreman Caywood answered, "Well, the only way we knew was when I asked Mr. Whetzel to call Danny Myers and had him try to get in touch with Steve Pritchett, and get him stopped before he got down there too far, because we were going to have to come back."

Mr. Whetzel, in accordance with Foreman Caywood's instruction, called EIC Myers by cell phone. He asked Mr. Myers to inform Claimant Pritchett to stop at the

Sykesville switch. According to Mr. Whetzel's testimony, Mr. Myers told him that he had already talked to Mr. Pritchett and that Mr. Pritchett was to stop at Sykesville. Mr. Whetzel testified that he did not remember the exact words that Mr. Myers used but that he felt safe in going back west after the conversation with him. Asked by the hearing officer if he would have gone west if he knew that Mr. Pritchett was coming down the track towards him, Mr. Whetzel stated, "No, sir, I wouldn't have. I wouldn't have moved until we made contact."

Foreman Caywood brought his truck around to go back west to Sykesville at the same time as the Tamper proceeded west towards Sykesville. He testified that he called Mr. Pritchett constantly on the way back to Sykesville and continued to call after he arrived at Sykesville. "I couldn't believe," Foreman Caywood stated, "with the volume of work that we left him at the crossing that he had even got back to Sykesville." Foreman Caywood attributed his inability to make contact with Mr. Pritchett by radio to the obstructions in the area and the fact that both he and Mr. Pritchett were moving at the time.

Mr. Whetzel testified that when he went west he felt that he was operating prepared to stop within one-half the range of his vision. The reason he believed this according to Mr. Whetzel was "[b]ecause I was within the 720 Rule, and I had stopped within one third of my sight distance." He had a speedometer on his Tamper, Mr. Whetzel stated, and he was running from 15 to 17 miles per hour prior to braking. He

stopped before the impact, Mr. Whetzel testified. Asked by the hearing officer how he could explain the collision, Mr. Whetzel stated, "There should be no reason for it."

In response to questions from the Organization representative, Mr. Whetzel testified that although he heard radio transmissions between the dispatcher and Mr. Myers and between the dispatcher and Mr. Caywood, he heard no radio conversations between Mr. Pritchett and anyone. He had no conversation by cell phone with Mr. Pritchett, Mr. Whetzel stated, because he did not have Mr. Pritchett's number with him.

Claimant Pritchett testified that before Foreman Caywood left the site at the crossing in EIC Myers's 707 territory, he helped the Claimant put the cable on the Regulator. At the time that Foreman Caywood left, the Claimant testified, the Foreman said to the Claimant, "Go ahead and finish up here and come on down to 25.4 east of the signal."

Claimant Pritchett denied that he had a conversation with EIC Myers in which Mr. Myers told him to stop at the switch at Sykesville. When he finished at the road crossing, Mr. Pritchett testified, he heard the dispatcher calling Mr. Myers. Mr. Myers, according to Mr. Pritchett, was called to the radio by another employee and spoke with the dispatcher. The Claimant testified that he heard the dispatcher tell Mr. Myers to clear the track. "I heard that and I was right there with Danny [Myers]," the Claimant stated.

After Mr. Myers spoke to the dispatcher, the Claimant testified, Mr. Myers asked him to get a hold of Jim Caywood. According to the Claimant, he told Mr. Myers that he

would call Mr. Caywood on the cell phone. The dispatcher had been unable to reach Foreman Caywood, and EIC Myers asked the Claimant to inform Mr. Caywood about the necessity to clear for a train. The Claimant then started traveling east toward Foreman Caywood's 707 territory and, while traveling, was trying to call Mr. Caywood by cell phone. Mr. Myers, the Claimant stated, called him by radio and asked whether he had spoken to Jim Caywood yet. The Claimant testified: "I said, no, I said, I tried his cell phone, but I think he forgot it today. I said, I'll get him on the radio, and I'm still traveling. I don't know where I was at, but I'm traveling." (Tr. 55).

The Claimant testified that "he [Mr. Myers] called my name that was breaking up, but I could make it out it was my name." The Claimant stated, "And then I never heard no more, and I kept going." According to the Claimant, while he was traveling he called Jim Caywood and Mr. Whetzel maybe a dozen times but "I never got a reply from anybody." The Claimant further testified that he "never got any reply. So, I kept going." The Claimant stated that he was thinking that Jim Caywood and Mr. Whetzel did not know that they had to clear and that he was the one to give them that information.

Asked by the hearing officer what made him think that he was the one that had to go find Foreman Caywood and tell him to clear up, the Claimant stated, "Because of Danny [Myers] telling me to go tell him." The hearing officer asked the Claimant, "Were you aware of where you guys were to clear?" He answered that he was, that they were to clear at Sykesville. The Claimant testified that he did not tell EIC Myers when he was

clear of Myers's limits. He stated that he did not know why he did not tell him, that he was aware of the rule that "we're supposed to let people know when we're clear of their limits."

The hearing officer asked the Claimant whether he was operating the Regulator prepared to stop within one-half the range of his vision. He answered, "Yea, I was." The hearing officer came back, "And if you were then how did you collide?" The Claimant stated that he slowed his machine down coming around the curve; that his machine did not have a speedometer, but that he estimated his speed as no more than 10 miles per hour; and that at the same time he was grabbing his radio and hollering at Mr. Whetzel to stop his machine. According to the Claimant, Mr. Whetzel finally heard the Claimant tell him to stop his machine.

Terry Fullen, Engineer Track and the charging officer for the Carrier, testified that he investigated the collision that occurred at BAC Milepost 26.6 between the Ballast Regulator operated by the Claimant and the Maintenance Tamper operated by Mr. Whetzel. As a result of the collision, he stated, the two machines were wedged and tangled together, and the Ballast Regulator derailed. Claimant Pritchett testified that in the accident he received a broken hand, bruised arm, bruised buttocks, a cut on the side of his knee and on his right leg, and a cut on his forehead at the hairline.

On Track Worker Rules 720, Maximum Speed, states:

Do not exceed the speed that will permit stopping within one-half the range of

vision, the speed authorized for trains on the same track, or the speed listed below, whichever is less.

The listed speed in Rule 720 for Tampers and Ballast Regulators is 30 MPH. The maximum speed authorized for trains on the track that the Claimant and Mr. Whetzel were operating their machines, Mr. Fullen stated, was 25 miles per hour.

The collision occurred on curved track. The investigation under Mr. Fullen's direction determined that the total sight distance from the point where the Tamper and the Regulator first came into sight of each other on the curve was 469 feet. The investigation further showed that the Tamper traveled 100 feet from the point of sight to the point of collision. The Regulator traveled 369 feet to the point of collision. The Claimant was asked by the hearing officer if he had an explanation of why he would have traveled 369 feet without stopping if his speed was 10 miles per hour. He answered, "Unless it's just me hollering at Mick [Mr. Whetzel] to stop, maybe it was because of that." On further questioning by the hearing officer, the Claimant testified that he thought that he was going slow enough to stop but could not explain why he did not stop.

In response to questions from the Organization representative, the Claimant testified that when he finished at the road crossing at Milepost 33.3 he was traveling to Milepost 25.4 pursuant to instructions from Foreman Caywood, the Employee-in-Charge. Asked by the Organization representative if he received any instructions over the radio from EIC Myers while traveling east from the road crossing, the Claimant answered,

“Yes.” Questioned, “What were those instructions?,” the Claimant stated:

First he asked me had I talked to Jim Caywood, and I said, no, and then he wanted me to see if I could get him. I said, okay. I’m headed east. Well then I remember Jim [Caywood] didn’t have his phone so I started calling him on the radio. I’m still headed east. Then Danny [Myers] calls me on the radio and asks me did I get a hold of Jim yet, and I said no. I said, he forgot his phone today. I’ll get him on the radio. No more reply. I kept going. Then I heard my name or I know it was my name, it wasn’t clear, and that’s all I heard. Nobody, well, nobody told me to stop at Sykesville.

After the foregoing testimony in response to the Organization representative’s questions, the hearing officer asked the Claimant, “. . . you did testify you knew that you had to go in the clear is that correct?” The Claimant answered, “Yes.” The hearing officer then asked the Claimant, “And you knew you had to go in the clear at Sykesville, is that correct?” The Claimant again answered, “Yes.”

After the close of the hearing, by letter dated August 18, 2008, G. Wilhite, Division Engineer, notified the Claimant that he was “found guilty of violating Operating Rule 707, Operating Rule 720, Operating Rule 416 and Operating Rule 424 as well as failing to operate your equipment in a safe manner.” The letter stated that there was no evidence presented indicating that he violated Operating Rule A or Operating Rule 414. “As a result of the serious nature of these rules violated and the resulting incident, but taking into account your Personal Record,” the letter concluded, “you are assessed discipline of 60 days suspension commencing with the date you were removed from service, June 25, 2008 and ending on August 23, 2008.”

By letter dated July 13, 2008, addressed to the charging officer of the Carrier, and orally at the hearing, the Organization objected to the fact that the Claimant was being kept out of service since June 24, 2008, without written confirmation thereof. The Organization asserted that this was in violation of Rule 25, Section 1(b) of the Agreement, which states, "When a major offense has been committed, an employee suspected by the Company to be guilty thereof may be held out of service pending his hearing and he shall be given written confirmation thereof."

The letter noted that normally written confirmation of removal from service is given in the charge letter, but that it was not done in this case. The Organization also asserted that contrary to the statement in the charge letter that the purpose of the investigation was to determine the facts and place responsibility for the incident in issue, by removing the Claimant from service beforehand, the Carrier showed that it had already determined the facts and placed the responsibility for the incident on the Claimant. As a remedy for the alleged violation of Rule 25, Section 1(b), the Organization requested that the charge letter be stricken from the Claimant's record and he be made whole for all lost time and lost benefits.

The Organization is correct that the contract required the Carrier to provide the Claimant with written confirmation of his being held out of service. It is the Board's experience that such written confirmation is normally given in the charge letter, as the Organization asserted. The remedy for failure to provide written confirmation, however,

is not exoneration of the employee involved. Exoneration depends on whether or not the employee is guilty of the offense charged.

Rule 25(b) of the Agreement clearly permits the Carrier to hold out of service an employee suspected of a major offense. The alleged offense here involved was major. There is no indication that the failure in this case to provide written confirmation of the removal from service was other than inadvertent on the Carrier's part. The Carrier is directed to comply with the written confirmation requirement of Rule 25, Section 1(b) in the future should it have grounds to hold out of service an employee suspected to be guilty of a major offense.

On the merits, the Carrier contends that Claimant Pritchett was provided a fair and impartial investigation, and that it established by substantial evidence that due to his negligence a collision occurred. The Claimant was guilty, as charged, the Carrier contends, and the level of discipline, a 60-days actual suspension, was fully warranted. The Carrier requests the Board to uphold the discipline assessed.

The evidence in the record shows that the Claimant acted negligently and that his negligence was a proximate cause of the collision. There is some conflict in the record as to when the Claimant was informed that he had to clear the track for a train. According to the Claimant's testimony, before he left the road crossing within EIC Myers's 707 limits, he heard a radio conversation between the dispatcher and EIC Myers in which the dispatcher said that the track had to be cleared for a train to pass (Tr. 55). According to

EIC Myers's testimony, the Claimant had already left the road crossing when Myers was informed by the dispatcher of the necessity to clear up for a train. Mr. Myers testified that he then told the Claimant by radio that they had to clear up for a train and that the Claimant should not go by the switch at Sykesville (Tr. 23).

It is not necessary to resolve the discrepancy between the two versions, however, because under both versions the Claimant was informed that he had to clear up for a train. In addition the Claimant admitted that he was aware that he had to clear at Sykesville. Under those circumstances the Claimant was not permitted to operate his Regulator past the Sykesville switch. Had he complied with the instructions given to him, the collision would not have occurred.

It is true that prior to the conversation between the dispatcher and EIC Myers, the Claimant had been told by Foreman Caywood to proceed to Milepost 25.4 after he finished his work at the road crossing. Plainly, however, as the Claimant knew, or should have known, the dispatcher's instruction to clear the track at Sykesville took precedence over Foreman Caywood's instruction to travel to Milepost 25.4. The proper course of action for the Claimant to have followed was to clear at Sykesville, let the train pass through, and then re-enter the Rule 707 working limits when authorized by the appropriate Employee-in-Charge to do so.

The Claimant had no reasonable explanation for failing to clear at Sykesville and, instead, continuing on into Foreman Caywood's 707 limits. His only explanation was

that he had been told by EIC Myers to tell Foreman Caywood to clear. Mr. Myers testified, however, that what he told the Claimant was to call Jim Caywood on the radio (Tr. 25). The reason for that was that the dispatcher had told Mr. Myers that he could not get through to Mr. Caywood to tell him to clear. At no time did Mr. Myers tell the Claimant that he had to speak in person to Mr. Caywood as opposed to by radio or cell phone. The fact that, by his own testimony, the Claimant kept on trying to reach Foreman Caywood by radio indicates that he understood that Mr. Myers wanted him to make radio or cell phone contact with him, not personal contact. Nor did Mr. Myers ever rescind his prior instruction to the Claimant to clear at Sykesville. The Claimant could have fulfilled both of EIC Myers's instructions to him by traveling to the Sykesville switch and clearing there; and then attempting to reach Foreman Caywood by radio or cell phone from Sykesville.

Aside from the fact that the Claimant disregarded the instruction to clear at Sykesville, he did not operate his machine with the requisite care needed under the circumstances. The Claimant was aware that not only the employees within EIC Myers's 707 limits had to clear, but also those in Foreman Caywood's. In fact the Claimant was attempting to deliver a message to Foreman Caywood to clear up. Since the clear up point was Sykesville and Mr. Whetzel was tamping several miles east of there within Foreman Caywood's 707 limits, the Claimant should have been aware that Operator Whetzel might be traveling westward, on the way back to Sykesville, on the same track

that the Claimant was traveling east.

The Claimant, of course, should not have moved beyond Sykesville in view of the instruction to him to clear up at that point. If he found himself east of Sykesville, he should have stopped and gone back to Sykesville. He should not have been traveling east of Sykesville once he was informed--as he repeatedly admitted in his testimony that he was so informed--to clear at Sykesville. However, if, for whatever reason, the Claimant decided to travel east beyond Sykesville, he should have been moving slowly and with the utmost caution, knowing that Mr. Whetzel was operating his Tamper on the same track. The fact that the Claimant traveled 369 feet without stopping after Mr. Whetzel's Tamper came within his sight shows that he was not traveling at the proper speed and with the requisite care required in the circumstances. Any doubt in the matter is removed by the fact that Mr. Whetzel was able to stop his Tamper within 100 feet of sight of the Claimant's Regulator.

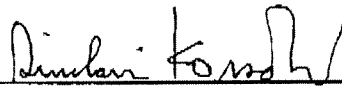
The Carrier has shown by substantial evidence that the Claimant's negligence was the proximate cause of the collision between the Ballast Regulator that he was operating and a Maintenance Tamper operated by Mr. Whetzel that occurred on June 24, 2008, injuring the Claimant and causing extensive damage to both pieces of equipment. His offense was a major one for which he was properly held back from service. The discipline assessed was not excessive for the offense involved. The claim will be denied.

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.

A handwritten signature in cursive script, appearing to read "Sinclair Kossoff", written over a horizontal line.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
July 16, 2009