Award No. 54
Case No. 54

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 27, 2009, the Roadmaster at Queensgate Yard, Cincinnati, Ohio, notified M. A. Abbott ("the Claimant") to attend a formal Investigation at the Carrier's office conference room in Fort Wright, Kentucky, on August 6, 2009, as principal, "to ascertain the facts and place your responsibility, if any, in connection with several incidents that occurred between Thursday July 9, 2009 and Monday July 20, 2009 at or in the vicinity of Queensgate Yard on the Cincinnati Terminal Subdivision of the Louisville Division." The letter continued:

> More particularly, while you were working the Track Inspector position on gang 5PD3 you blatantly failed to comply with numerous CSX rules, Policies and Procedures such as but not limited to wearing jewelry above the neck (ear ring) on two occasions (7/9/09 and 7/13/09), being late for work on two occasions (7/14/09 and 7/20/09), work area unclean and disorderly (vehicle 94030, 07/14/2009), working without conducting a job briefing and using required form (7/14/09), driving without a seat belt (7/14/09), pulling into a parking space requiring backing out (7/14/09), not affixing "safety alert stop" to parked vehicle steering as required on (7/14/09), texting on cell phone (07/13/2009) and not participating in the morning job briefing with the Roadmaster on (7/13/09).

The letter stated that the Claimant was "charged with failure to properly perform the assigned duties of your position in a safe and efficient manner, willful neglect of CSX rules, Policies and Procedures, failure to follow instructions, failure to protect your assignment, and possible violations of, but not limited to CSX Transportation Operating Rule 700, General Rule A; General Regulations, GR-1, GR-2, GR-3, GR-6, GR-16; CSX Safe Way Safety Rules GS-3, GS-6, GS-24, ES-23, and Section 5 of Company Policy

Page 5 of 5." The letter noted that the Claimant was "being withheld from service pending investigation."

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 began his service with the Carrier on September 29, 2008, and at the time of the Investigation held the position of Track Inspector on gang 5PD3. He returned to work on July 8, 2009, from an absence the reason for which was not stated on the record. When he came back to work he was given On-Track Worker Safety, Rail Security Awareness, and other safety training.

Between July 9, and 20, 2009, the Claimant committed the following violations. On July 9, he wore an earring at the job briefing. That was a violation of General Safety Rule 6, titled Personal Protective Equipment, Clothing, and Jewelry, which states in part C., Wearing Jewelry, "Do not wear: . . . Any jewelry above the neck outside of an office environment." Immediately after the job briefing, the Assistant Roadmaster told the Claimant that he was not to have jewelry above the neck. The Claimant removed the earring. The Claimant wore the earring again at the job briefing held on July 13. Once more, right after the job briefing, the Assistant Foreman told the Claimant that it was a safety violation to wear jewelry above the neck, and the Claimant removed the earring.

On July 13, both the Roadmaster and the Assistant Roadmaster noticed during the job briefing that Claimant had his cell phone open in front of him with his thumb on the phone. He appeared either to be texting or asleep and was not paying attention to the job briefing. The Assistant Roadmaster testified that after the job briefing he pulled the Claimant aside and spoke to him about the importance of listening in the job briefing. The Claimant acknowledged this and said that he would not do it again.

The Claimant's regular work hours were 7:30 a.m. to 4:00 p.m. He called the Roadmaster at 9:00 a.m. on July 14 and said that his alarm did not go off. He asked if the Roadmaster wanted him to come into work. The Roadmaster told him, yes, because the position of the other Inspector was vacant at the time, and he needed someone to come in to get some track inspected. The Claimant arrived at work at 10:00 a.m.

The Roadmaster keeps a spreadsheet for all employees on which he makes entries of observations on his part where the employee violated a rule, failed a test, or complied with a rule or test. On the spreadsheet the Roadmaster puts an"O" for an observation, a "T" for a test, a "C" for compliance, and an "F" for failure. On July 14 the Roadmaster made six entries on the spreadsheet at 1:00 p.m. of alleged failures on the part of the Claimant. The first four entries were for so-called "tests" on which he stated that the Claimant violated the following rules: Engineering Department Safety Rule ES-13; General Regulations GR-1; General Safety Rule GS-8; Work Authorization Rule 700. In addition, the Roadmaster entered on the spreadsheet that the Claimant had failed two Observations: General Rule A and General Safety Rule GS-24.

The circumstances of the foregoing alleged violations were as follows. When the Claimant called in late on July 14th, the Roadmaster told him to come in to work and speak with the Assistant Roadmaster on arrival. On his arrival at the Cincinnati terminal,

the Claimant spoke by phone with the Assistant Roadmaster who instructed him to get a track inspector truck, pick up an employee named Ike Bronson at another part of the terminal, and inspect track together with Mr. Bronson. The Claimant drove the truck to where Bronson was waiting for him, and, after picking up Mr. Bronson, the Claimant proceeded to the track area where they were supposed to inspect the track.

Mr. Bronson is an experienced employee with over 30 years on the railroad. Before fouling the track with the Claimant to perform inspection work, he asked to see the Claimant's job briefing form. In addition to the oral job briefing, the Roadmaster provides the employees who participate in the briefing with a form on which they are supposed to write down the instructions received at the job briefing and take the form to the job site. Because he was late that morning, the Claimant had not participated in the job briefing. He did not have the job briefing form with him. Mr. Bronson told the Claimant, "You have to have a job briefing form before we get on the track." When the Claimant said that he did not have one, Mr. Bronson told him that they had to go back to the locker room and get one.

The Claimant drove the truck back to the office building and pulled into a parking space next to the building. The Claimant and Mr. Bronson went into the building where the Claimant took a job briefing form off the table in the locker room. They then went back into the truck to fill out the form. The Division Engineer came out and told them to come inside. Also present with the Division Engineer was the Roadmaster. Once they were inside, the Division Engineer told them that they were not wearing their seat belts when they drove back to the office and that they pulled into the parking space instead of backing in. Mr. Bronson explained that he had been working all morning and that he was there to show the Claimant the yard. The Division Engineer then told them to go and do

inspection work.

The Rule 700 alleged failure that the Roadmaster entered on the spreadsheet on July 14th pertained to the incident involving the job briefing form. Rule 700 is titled "Job Briefing" and states who is to conduct a job briefing "[p]rior to starting a work period that will require an employee to foul a track," the information to be included in the job briefing, and other details about the job briefing. Asked by the hearing officer how the Claimant violated Rule 700, the Roadmaster testified that on July 14th "when I asked to see his job briefing form, he told me he did not have it and it was not filled out." The Roadmaster added that "the whole reason for him coming back to the office at that point was to get the job briefing form because the partner with him asked to see it. . . ." (Tr.15).

In the charge letter the Roadmaster also listed General Safety Rule GS-3. Job Briefing, as one of the rules possibly violated by the Claimant. In his testimony the Roadmaster read out loud the portion of Rule GS-3 A. that states, "Conduct a job briefing: Before beginning a work activity." The Roadmaster testified, "When first observed they [the Claimant and his partner] were out inspecting track and then when he came back, back to the office when I asked for the job briefing he said he did not have it." (Tr. 16). On cross-examination the Roadmaster testified that prior to coming back to headquarters to get a job briefing form the Claimant "had left the office and was out of the truck getting ready to inspect track." (Tr. 25).

The Claimant testified, "We never set foot out of the truck" before he and Mr. Bronson went back to the office building to get the job briefing form. (Tr. 49). The Claimant questioned Mr. Bronson at the hearing, "Did me and you ever work without a job briefing that day." Mr. Bronson answered, "No, because we never got on the tracks.

No, we never got on the tracks. We didn't work without one because I seen what was going on and I stopped it." (Tr. 117)

Because of a fatality that had occurred in an accident involving a Carrier vehicle and an outside party, the Vice President Engineering, on June 30, 2009, circulated a memorandum requiring that any parked vehicle must have a Safety Alert Stop sheet of paper with printed "bullet points" regarding safe driving attached to the steering wheel. The driver was required to "review the points prior to driving the vehicle." One of the violations that the Claimant committed on July 14th was driving the truck without reviewing the Safety Alert Stop points before driving the vehicle or attaching the Safety Alert Stop sheet to the steering wheel of the truck after parking it. In his defense the Claimant testified that although the form had been mentioned in job briefings he attended after returning to work, there was no Safety Alert Stop sheet in the truck and that the first time he saw the sheet was when the Assistant Roadmaster brought it to him after speaking to him about not having it on the steering wheel. The Roadmaster disputed that testimony and said that he saw the form in the truck on July 14 when the Claimant drove the truck back to the office building.

The track inspector truck that the Claimant drove on July 14 to pick up Mr. Bronson was messy in the back with signs, tools, and debris that did not belong there. According to the applicable rule, he should have cleaned out the back of the truck before driving it. The Claimant defended his action by stating that he was instructed to take the truck and pick up another employee and understood that he was to go immediately to get that employee.

The next incident involving the Claimant occurred on July 20th. According to the Claimant's testimony he called the floating Assistant Roadmaster at 6:15 a.m. to report

that he would be late to work because he was having car trouble. He did not call the Roadmaster until 9:56 a.m. The Claimant testified that he thought that it was sufficient to give notice to any of his supervisors. General Regulation GR-1, in applicable part, states, "Employees must report for duty at the designated time and place. Without permission from their immediate supervisor employees must not: 1. Absent themselves from duty . . . ." The Claimant's immediate supervisor was the Roadmaster. The Claimant testified that the reason he called the Roadmaster at 9:56 a.m. on July 20th was that the floating Assistant Roadmaster called him around 9:45 a.m. and said that he needed to call the Roadmaster.

The Claimant testified that on July 20th when he called the Roadmaster, the latter "told me to take that day off that I was being charged with multiple charges, I guess and being pulled out of service." (Tr. 69). The Claimant stated that he told the Roadmaster that if he wanted the Claimant to come in, he (the Claimant) could find a ride and make it in. The Roadmaster, according to the Claimant, said, "No, take the day and we'll go from there."

The hearing officer asked the Roadmaster why he took the Claimant out of service on July 20. The Roadmaster answered, "Because I felt . . . after observing the employee for really such a short time – because the multiple things that we had found wrong there at one point, especially on one day considering the 14th, I felt that doing this would be able to bring awareness to him and talk to him. And I felt it was to look out for his safety mostly, because I wanted to make sure everything was squared away and he, he understood how important these items were – that I considered they were failures. So that's why I felt that. It was just that the short period of time is the reason why I felt it was necessary." (Tr. 107)

On cross-examination the Organization representative asked the Roadmaster what day he pulled the Claimant out of service. The Roadmaster said that it was on July 20th at 0956. Asked what reason he gave the Claimant for pulling him out of service, the Roadmaster testified, "Due to him being late that day and the multiple things that we had talked about before."

The representative of the Organization recalled the Claimant to testify and asked him what the Roadmaster told him when he pulled him out of service. The Claimant stated, "What I was told on the phone was that I was being pulled out of service for insubordination. I asked for what, and I was told that I did not contact the right personal [sic] when I was off – well, when I was late. I did not contact the right person to tell them that I was late." (Tr. 118).

The hearing officer recalled the Roadmaster to testify and asked him if he told the Claimant why he was removing him (the Claimant). The Roadmaster stated, "When I called him [sic], he told me about his incident with his truck. And I said okay, you're late again. I'm going to take you out of service pending an investigation. And he said well what am I being taken out of service for? I said well you was late again today, and then the other things we had talked about in the last two weeks." (Tr. 122)

After the conclusion of the hearing, by letter dated August 26, 2009, the Engineer of Track notified the Claimant of the Carrier's determination, after a review of the transcript and exhibits, that they "support the charges brought against you" in the charge letter. The decision letter continued, "Due to the nature of the charges proven in this case; it is my decision that the discipline to be assessed is a sixty (60) calendar day actual suspension that will be served beginning Monday, July 20, 2009 up to and including Thursday, September 17, 2009."

Two things stand out in this record which are troubling to this Board. First is the absence of any suggestion in the record that there were grounds under the Carrier's Individual Development & Personal Accountability Policy ("IDPAP") for removal of the Claimant from service prior to hearing or for a 60-day actual suspension for a first minor offense for which formal discipline was instituted against the employee.

The second thing that stands out is that the Claimant is seriously in need of improvement regarding his attitude and performance as an employee of the Carrier. Each of these elements will be addressed in this award.

It is the Board's understanding that the IDPAP applies to the Claimant in this case as it applies to all claimants in the disciplinary cases that come before this Board. Moreover the IDPAP has been consistently applied to Carrier contract employees in numerous Public Law Board cases by various Boards. For a small representative sample see Public Law Board No. 6813, Award No. 5 (Gerald E. Wallin, 14 December 2005), Public Law Board No. 6823, Award No. 21 (Lynette A. Ross, 23 May 2006), Public Law Board No. 4269, Award No. 532 (Don B. Hays, 13 October 2008), Public Law Board No. 6392, Award No. 100 (Gerald E. Wallin, 16 April 2007), Public Law Board No. 6444, Award No. 63 (Robert O'Brien, 24 April 2006).

The IDPAP is very clear: "Major Offenses are those that warrant an employee's removal from service pending a formal hearing and possible dismissal from service for a single occurrence if proven responsible." Examples of "major offenses," according to the IDPAP, are "occupying track without authority, failure to use 'fall protection' when required, equipment collisions, altercation, dishonesty, late report of an on duty personal injury, theft, insubordination, Rule G, weapons on the property, passing stop signals without authority, blue flag violations, major accidents, other acts of blatant disregard for

the rights of employees or the company, and acts that recklessly endanger the safety of employees or the public."

There was no rule violation on the part of the Claimant, either singly or in combination, that would have qualified as a "major offense" justifying removal from service prior to hearing. The earring violations did not take place while the Claimant was using tools or equipment in which the earring could have become caught or entangled. That is not to say that it is permissible to wear an earring during a job briefing, but it was a lesser degree of violation. Nor was the violation repeated after July 13, a week before the Claimant was taken out of service.

The Rule 700 and GS-3 violations alleged by the Carrier were not proven. Rule 700 requires that "[p]rior to starting a work period that will require an employee to foul a track, the employee-in-charge designated to provide on-track safety for all members of a group, or other designated employee, shall provide a job briefing. . . ." The testimony of the Claimant and of Ike Bronson are in agreement that the Claimant did not foul any track on July 14 before participating in a job briefing regarding the planned work. There was no witness who testified that he saw the Claimant on the track before a job briefing was conducted.

Although the Roadmaster testified on direct examination that the Claimant was observed inspecting track without a job briefing (Tr. 16), on cross-examination he was more precise and stated that the Claimant "was out of the truck getting ready to inspect track." (Tr. 25). The Roadmaster's testimony, however, was not based on personal observation, and there was no evidence that the Claimant ever fouled the track without a prior job briefing. In addition, Mr. Bronson, a disinterested witness, who had personal knowledge, testified positively that the Claimant did not. The Board finds that the Carrier

has not established by substantial evidence that the Claimant violated Rule 700. By the same token the Carrier has not proved by substantial evidence that the Claimant violated General Safety Rule GS-3 by failing to conduct a job briefing before beginning a work activity.

The cell phone incident and inattention to the job briefing on July 13 were worthy of note, but they were not repeated after the Assistant Roadmaster spoke to the Claimant about his conduct on the same date. The Board does not want to make light of the Claimant's violations of July 14 consisting of not cleaning out the back of his track inspector truck, driving without a seat belt in the terminal, pulling into instead of backing into a parking space, and not affixing the "safety alert stop" sheet of paper to the steering wheel of his vehicle when it was parked. But they were not acts, singly or in combination, that amounted to "blatant disregard for the rights of employees or the company" or "acts that recklessly endanger the safety of employees or the public" so as to justify categorization as a major offense under the IDPAP.

The theme of the IDPAP, except with regard to the most serious offenses called "major offenses," is "to provide everyone an opportunity to improve and grow through a measured, open, and just process." That was not done with regard to the Claimant. He was removed from service prior to hearing and slapped with a 60-day actual suspension despite the fact that he had never previously been the subject of any of the informal or formal disciplinary measures provided for in the IDPAP, including Informal Corrective Instruction, Incident Review Committee, Timeout, Overhead Record Suspension, and Suspension. The Employee Information System Document Search Report dated October 2, 2009, and made part of the record in the case shows no prior discipline for the Claimant. The removal of the Claimant from service and assessment of a 60-day

suspension as discipline violated the IDPAP.

The Carrier, through its IDPAP, has informed its managers, that, where reasonably possible, employees should be given an opportunity to improve where they fall short of the mark. Employees "are expected to be safe, conscientious, and dependable; to comply with rules; and display a positive attitude toward teamwork and Company objectives." Managers must hold employees to these goals. But when employees falter, management's response must be measured and not disproportionate to the offense. Although a supervisor must always keep a watchful eye, as a general rule, it is proper to give an employee the benefit of the doubt as to whether he is attempting in good faith to do things right and correct any deficiencies. The Board has found that really bad apples will eventually hang themselves or, so as not to mix metaphors, fall from the tree.

The Board has indicated where it believes that management did not properly fill its role in this case. We have noted, however, our serious concern with the Claimant. The number of violations in so short a time period and the nature of some of the violations are troubling. To come back to work after a long absence and then be very late twice within a one week period is very troubling to this Board.[1] Also alarming is the fact that his first week back to work the Claimant tuned himself out of his morning job briefing and fiddled with his cell phone instead of listening to the instructions of the Roadmaster. Although the Board has found that it was a violation of the IDPAP to take the Claimant out of service with his second act of being late, the repeated tardiness, together with the other violations that had accumulated in the meantime, clearly called for some kind of discipline consistent with the IDPAP. The ball would then have been in the Claimant's

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[1]On July 20th the Claimant was not prepared to start out for work, had he been permitted to work, until 2½ hours after his starting time. On July 14th, he reported for work 2½ hours' late.

court to demonstrate that he understood how he had failed as an employee and that he was acting in good faith to improve and grow.

In addition to his rules violations and questionable attitude the Claimant told obvious untruths in his testimony at the investigatory hearing. He seemed to change his story to put himself in the best light as the facts of the case emerged. The Board will provide examples. At first the Claimant testified that when he arrived late at work on July 14th, he spoke with the Assistant Roadmaster who told him to go get another employee who would be working with him inspecting for the day. (Tr. 49). That other employee, he stated, explained to him what areas they were going to be doing that day. (Tr. 49). The Claimant expressly stated that after he picked up the other employee, the two of them went back to get a job briefing form.

Later in the hearing the Claimant was being questioned as to why he did not have a job briefing form with him to begin with so that he would not have go back to the office to get one. He then changed his story and said that he had to come back to the office to talk to the Assistant Roadmaster about what he had to do for the day, that the Assistant Roadmaster "just told me to go get this employee and come back, which is what I did." (Tr. 85). Apparently the Claimant forgot that he had previously testified that in his original conversation with the Assistant Roadmaster, the latter "told me what I was going to do and what to go do." (Tr. 49). In his original version of the incident, there was no reason for the Claimant and his partner (Mr. Bronson) to come back to the office except for the fact that the Claimant did not have a job briefing form with him. However, when challenged by the hearing officer as to why he did not have the form with him to begin with, he invented the explanation that the Assistant Roadmaster told him to come back for further instructions.

The Claimant further testified that when he went back to the office after picking up the other employee, the Assistant Roadmaster "told us what tracks we were going to be inspecting for the day and where he wanted us to start at." (Tr. 85) This was a complete fabrication that contradicted the Claimant's previous testimony that he "picked up the employee and he [the other employee] explained to me what areas we were going to be doing for the day. . .." (Tr. 49). Not only was the Claimant's testimony self-contradictory, but it is clear from Mr. Bronson's testimony that a meeting with the Assistant Roadmaster did not take place when the two men returned to the office for a job briefing form.

The Board has decided that the appropriate remedial action in this case is to reduce the Claimant's discipline from a 60-day suspension to 30 days. There must be a reduction because there was no basis under the IDPAP for removing the Claimant from service prior to hearing or for imposition of a 60-day suspension given the fact that the Claimant had no prior discipline on his personal record. There must, however, be significant discipline to prevent the Claimant from thinking, for a moment, that he is innocent of wrong-doing and to preserve the integrity of the hearing process.

The Claimant is now at a crossroads. He can acknowledge that his return to work from his absence was a disappointing performance that left much room for improvement both with regard to execution and attitude. He can resolve to do much better and then make a good-faith sustained effort to adhere to the Carrier's rules, work safely, and be a conscientious and dependable employee with a positive attitude toward supervisors and fellow employees. Or he can continue in the way he was going before he was charged. Experience teaches that the latter road is a short one that will bring his career with the railroad to an abrupt end. The other path holds out the promise of personal satisfaction

and substantial reward. The choice is the Claimant's to make.

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 date the signed Award is transmitted to the parties.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
January 5, 2010