Award No. 56
Case No. 56

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 19, 2009, the then Division Engineer Ricky Johnson (since promoted to Assistant Chief Engineer of Production) directed R. C. Leizear ("the Claimant") to attend a formal Investigation on July 1, 2009, in the CSX Division office in Mulberry, Florida, with himself as principal, "to determine the facts and place your responsibility, if any, in connection with information that I received on June 3, 2009, regarding an injury report that you filed on Tuesday, June 2, 2009, for an incident that you allege occurred earlier the same date. More specifically," the letter continued, "the information that you provided in your written report does not coincide with the evidence at the incident site (MPSV-836.5) or with the information that you personally gave me during several conversations we had the morning of June 3, 3009." An additional purpose of the Investigation, the letter stated, was to "determine the facts and place your responsibility, if any, in connection with your failure to promptly report this incident to your immediate supervisor." The letter continued that the Claimant was "charged with conduct unbecoming an employee of CSX Transportation, concealing facts and providing false information concerning matters under investigation, and possible violations of, but not limited to, CSX Transportation Operating Rules - General Rule A; General Regulations GR-2 and GR-16; and CSX Safeway Rule GS-5." At the request of the Organization the hearing was postponed to July 28, 2009.

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 employment with the Carrier on August 25, 2000, and at the time of the incident in question was a Welder on a service lane work team force on the Jacksonville Division. On June 2, 2009, he and his helper were assigned to make welds on a rail plug. In the course of carrying out the assignment the Claimant was struck in the mouth by a rock, which knocked out his tooth.

At the end of his shift the Claimant prepared a Form PI-1A Employee's Injury And/Or Illness Report. The District Engineer found the report to be incomplete because it did not provide sufficient details of how the accident happened. The Claimant then prepared another report which described the incident as follows:

> I pulled up at the SV 836.5 to make 2 welds on a plug. Myself and my helper got everything off the truck to make the welds. One end of the plug was battered. So, I cut a 2¼" piece out to get rid of the batter. While my helper was putting the rail saw back on the truck, I started knocking anchors off standing on the guage [sic] side. I had my one foot on the anchors and started knocking them off. There was ballast around the anchors. I took my foot and moved the ballast away. About the seventh anchor a rock struck me on my tooth and knocked it out. There was no pain because the tooth had a root canal done on it years ago. The tooth was dead. I finished the day. I was knocking anchors off to slide the rail down to even the gaps out so I could make the welds.

Division Engineer Johnson investigated the incident the next morning at the site

where it occurred and took photographs of the rail. From his observations he concluded that the Claimant had not knocked the anchors off the rail as stated in his PI-1A report. Instead, the Division Engineer determined, the Claimant had driven (or slid) the anchors along the rail. The Division Engineer reached his conclusions based on the slide markings he found on the rail and the positions of the hammer marks on the anchors.

The Division Engineer testified, "You're supposed to knock [the] anchors off and reapply [them]. If you don't, then you're driving this anchor up against the rock and debris and stuff will fly everywhere." The Division Engineer believed that by driving an anchor against the rock the Claimant caused one of the rocks to fly up and knock out the Claimant's tooth.

In the course of his investigation at the site, the Division Engineer showed the Claimant the slide marks on the rail and asked him how that could have happened if the anchors were knocked off. The Claimant insisted that he had knocked them off and, in explanation of the slide marks, suggested that perhaps his helper, Brian Gordon, had driven the anchors sideways along the rail. The Division Engineer then questioned Mr. Gordon, the welder helper, who provided a written statement that he was inside the truck putting the rail saw away while the Claimant was attempting to knock off anchors with the sledge hammer. In his statement Mr. Gordon also stated that he (Gordon) did not knock off any anchors. The Division Engineer testified that he questioned Mr. Gordon further about the incident "and basically he told me that he was in the back of the truck, that Rich [the Claimant] handled all the anchors and that he did not do anything whatsoever with the anchors."

The reason for knocking off the anchors is so that one is able to slide the rail plug to get it into proper position for the welding operation. According to the evidence the

proper way to remove an anchor is to stand in the gauge of the track, clear away with one's foot all of the rock on the gauge side of the anchor, keep a foot on the edge of the anchor so that it does not fly into the air when struck, and then strike the anchor with a sledge hammer from the side facing the outside of the rail so that it pops off of the rail towards the gauge of the track. After the weld is completed the same anchors are reapplied that had previously been knocked off.

Consistent with his testimony that the anchors were not knocked off of the rail, the Division Engineer testified that he saw no evidence that the anchors were knocked back on to the rail. Regarding the reapplication of the anchors, the Claimant testified, "I'm gonna tell you, I didn't knock em on, I'm gonna tell you that right now. I did not knock em back on. So Brian [the welder helper] had to knock em on. I know that for a fact. Well I know the fact I didn't knock em back on. . . ."

Recalled as a witness, the Division Engineer testified that in none of his conversations with Mr. Gordon, the welder helper, did Mr. Gordon indicate that he had knocked the anchors back on. "He told me," the District Engineer testified, "that he did not, he did not do anything with the anchors that day, on that plug."

After the close of the hearing Division Engineer Dick Spatafore notified the Claimant by letter dated August 17, 2009, that the charges against him of conduct unbecoming an employee of CSX Transportation, concealing facts, providing false information concerning matters under investigation, and possible violations of CSX Transportation Operating Rules - General Rule A; General Regulation GR-2, GR-16; and CSX Safeway GS-5 were substantiated. "Also," Division Engineer Spatafore stated, "a review of all testimony gathered during this hearing shows that you failed [to] abide by the requirements of CSX to properly dispose of debris and store material creating unsafe

conditions." Division Engineer Spatafore assessed discipline of a 90 calendar day suspension from September 18, 2009, through December 16, 2009.

There are three elements of proof that support the charges related to the allegedly false information provided by the Claimant concerning the circumstances of his injury on June 2, 2009: 1) the fact that the Claimant was injured by a flying rock despite the fact that he claims that he cleared the rock and ballast away from the anchor before knocking the anchor off the rail with a sledge hammer; 2) the Claimant's suggestion that welder helper Brian Gordon may have driven (or slid) the anchors along the rail; and 3) the Claimant's admission that he did not reapply the anchors to the rail after welding in the rail plug. Each of these items will be discussed in the following paragraphs.

In the normal course, had the Claimant performed the job properly he would not have been struck in the mouth by a flying rock because he would have cleared all of the rock and ballast away from around the anchor before hitting it with the sledge hammer to pop it off the rail. The hearing officer asked the Claimant how he was injured if he did the job properly. He answered, "It was an accident. You can't prevent all accidents. If we lived in a perfect world we could, but we don't." The Board accepts that it is possible that there may have been some ballast that was not in plain sight and may have been knocked loose and into the Claimant's mouth when he hit the anchor with the hammer. Even Division Engineer Johnson, when asked by the hearing officer whether the incident could have occurred had the Claimant followed the proper procedures for knocking anchors off, testified, "I cannot say that it would never occur."

The Claimant's testimony that welder helper Gordon may have slid the anchors along the rail, however, is not easily explained. The statement was made by the Claimant when Division Engineer Johnson showed him the slide marks on the rail and asked him

how that could have happened if the Claimant had knocked the anchors off. In reply the Claimant stated that possibly Brian Gordon, his welder helper, had driven them sideways instead of knocking them off. This was an implicit admission by the Claimant that the slide marks were inconsistent with his claim that he knocked the anchors off. The Claimant offered no credible explanation to account for the slide marks, which were physical evidence that the anchors were driven along the rail instead of being knocked off as they were supposed to be. Division Engineer Johnson testified that he questioned Brian Gordon, who told him that the Claimant handled all the anchors and that he (welder helper Gordon) did not do anything whatsoever with the anchors. The Organization did not call Brian Gordon as a witness to refute that testimony.

Also damaging to the Claimant's case was his testimony that he did not reapply the anchors to the rail that he allegedly knocked off the rail. If he knocked the anchors off the rail, why didn't he reapply them after the welding job was finished? The anchors had to be replaced. Yet, according to the Claimant's testimony he did not personally replace the anchors or observe them being replaced. Thus the Claimant testified, "I did not knock em back on. So Brian had to knock em back on. He didn't knock em off, but Brian had to knock em on. I know that for a fact. Well I know the fact I didn't knock em back on." (Tr. 48)

It is clear from the Claimant's testimony that he is not claiming that he saw Brian Gordon knock the anchors back on. Rather he is deducing from the fact that he did not reapply the anchors, that Brian Gordon must have done so. But the Claimant was in charge of the job. It is not reasonable that he would not personally have reapplied the anchors or instructed the helper to do so if, in fact, they had been removed in the first place. He would not have to assume that Brian Gordon replaced the anchors.

Nor did the Claimant and the Organization have any answer to Division Engineer Johnson's testimony that Brian Gordon told him that he had nothing whatsoever to do with the anchors, that the Claimant handled all of the anchors. No request was made by the Claimant or the Organization to call Mr. Gordon as a witness to establish that it was he who reapplied the anchors. We are thus left with a record where the Claimant admits that he did not reapply the anchors to the rail after allegedly knocking them off the rail and where the only other person who could have put them back on has denied to the Carrier that he did so.

This Board must base its decisions on evidence, not assertions. The Carrier presented a prima facie case that the anchors in question were slid along the rail instead of being knocked off the rail as asserted by the Claimant. It did this by showing the existence of slide marks on the rail, hammer marks on the anchors, and the inability of the Claimant to provide a satisfactory explanation for the marks when questioned at the scene of the incident by Division Engineer Johnson the next morning. The burden then shifted to the Claimant and the Organization to provide some credible explanation of the markings that was consistent with the Claimant's having knocked off the anchors. They failed to provide such evidence. In addition, the Claimant admitted that he did not reapply the anchors to the rail, something that has to be done at the end of the job when anchors are removed. The individual, a welder helper, whom the Claimant assumed replaced the anchors denied to the Carrier that he did anything whatsoever with the anchors. On this record the Board must find that the Carrier has established by substantial evidence that the Claimant was guilty of the charges brought against him.

With regard to the amount of discipline assessed, the Board notes that the decision letter of Division Engineer Spatafore included a finding of guilt of an allegation not

included in the charge letter. Thus the letter stated, "Also a review of all testimony gathered during this hearing shows that you failed [to] abide by the requirements of CSX to properly dispose of debris and store material creating unsafe conditions." That allegation was part of a separate charge against the Claimant in a separate charge letter and which was the subject of a separate hearing held on the same day as the present hearing.

Division Engineer Spatafore assessed a 30-day suspension in that case, which is before this Board on appeal in Case No. 57. Mr. Spatafore's decision letter in that case, which has the same date as the decision letter in this case, includes the statement, "Also, a review of all testimony gathered during this hearing shows that you failed [to] abide by the requirements of CSX to properly dispose of debris and store material."

The Board, after careful consideration, has decided that it cannot rule out the possibility that the Carrier official who assessed discipline in this case took the fact that the Claimant allegedly failed to dispose of debris on the job, thereby creating unsafe conditions, into mind when assessing discipline in this case. Where the deciding official specifically mentions an alleged violation in his decision letter, the Board must assume that such alleged conduct was part of the totality of conduct on the part of the Claimant relied on by the official in determining the degree of discipline. Since, however, the alleged failure to dispose of debris was not included in the charges against the Claimant in this case, it was improper for the Carrier to take such conduct into consideration in assessing discipline in the case.

Because, in assessing discipline, the Carrier improperly relied on alleged misconduct that was not included in the charge letter, the Board has determined that the amount of discipline assessed must be reduced. The Board has decided not to reduce the

discipline by the full 30 days assessed in the companion case because from the record in that case it appears that the Carrier relied on other alleged unsafe acts on the part of the Claimant besides his failure to dispose of debris and to store material.[1] The Board has decided to reduce the length of the Claimant's suspension by 15 days from 90 days to 75 days. The Claimant shall be made whole for the difference.

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 17, 2010

[1]The Board is aware that in rendering an award it is not permitted to go outside the record in the case. In the present case, however, the deciding official's decision letter is part of the record and shows on its face that the Carrier relied on alleged misconduct that was not included in the charge letter. It was therefore not necessary for the Board to go outside the record to determine that the discipline assessed in the case must be reduced. The Board believes that, for the limited purpose of determining the appropriate remedy in this case, it was permissible for it to take arbitral notice of the content of a record in a companion case involving the same parties and the same Claimant that has been filed with this Board for decision.