Award No. 57
Case No. 57

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated June 16, 2009, addressed to B. A. Gordon and R. C. Leizear, the then Division Engineer Ricky Johnson (since promoted to Assistant Chief Engineer of Production) directed them to attend a formal Investigation on July 1, 2009, in the CSX Division office in Mulberry, Florida, with each of them as principal. The purpose of the Investigation, the letter stated, was "to develop the facts and place your responsibility, if any, in connection with the condition of the work site at or near milepost SV-836.5 on the Valrico Subdivision on Wednesday, June 3, 2009. More particularly," the letter continued, "when I visited the location where you all had worked the previous day, I found debris that was not properly disposed of and materials that were not properly stored, creating unsafe conditions." The letter declared that "you are both charged with failure to properly perform the responsibilities of your respective assignments, creating an unsafe condition, neglect of your duties, incompetence, and possible violation of but not limited to CSX Operating Rules - General Rules A and F; General Regulations 2, 5, 6, 14, and 16; Safe Way GS-1, GS-3, and GS-4; and MofW regulation MWI 801."

The hearing was postponed to July 28, 2009. Although both employees were charged in a joint letter, the hearing on July 28 involved only Mr. Leizear ("the Claimant").

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, Mr. B. A. Gordon, were assigned to make welds on a rail plug. Division Engineer Johnson testified that when he visited the site the next day he noticed angle bars lying on the ballast line and some more angle bars at the edge of the signal bungalow nearby. He also noticed debris from the field welds that the Claimant had made at the site such as molds, bolts, a washer, pieces of rail, a crucible for pouring a weld, and water bottles.

The angle bars, Mr. Johnson stated, should have been loaded up onto a welding truck and brought back to headquarters at the end of the day to be stored and available for reuse. The site was near a crossing where conductors and others walk, Mr. Johnson testified, and the angle bars presented a tripping hazard. If an angle bar was kicked or thrown into the flangeway of the crossing, he stated, it could have caused a derailment. According to Division Engineer Johnson, the Claimant and his helper should have dug a hole and buried the debris. The rail scrap should have been put on the truck and deposited in the scrap bin at headquarters. The bottles should have been picked up and

placed on the truck to be disposed of as trash. Mr. Johnson testified that the Claimant did bury some of the debris produced by the job but not all of it.

Over the objection of the Organization that it was outside the scope of the charges, Division Engineer Johnson was permitted to testify that the Claimant improperly performed the welding assignment in that he left a gap between the tie plate and the bottom of the rail. There should be no gap there, Mr. Johnson stated; the tie should be cut off and not swinging. The gap left by the Claimant, Division Engineer Johnson testified, was not an FRA defect but, if not corrected, "will lead to a possible defect . . . and it will also lead to premature failure of the rail because of surface condition and the pounding that the field weld will take." According to Mr. Johnson, the Claimant failed to follow CSX procedures to tamp the ties off. It was an unsafe condition, according to Division Engineer Johnson, that could have been remedied by nipping the tie up with a bar and tamping the tie off. Mr. Johnson called it "neglectful" for the Claimant to leave the tie in that condition.

Frank Litchfield is Regional Welding Manager of Jacksonville, Atlanta, Florence Division. He testified that the MWI 801 Welding Manual provides that angle bars left over from a job should be carried in and that hot debris should be buried in a shallow hole that contains no water. The Manual states, ". . . The site should be left in a neat and orderly condition. All released track materials will be taken to the local material store at the site."

The hearing officer questioned Mr. Litchfield about the swinging tie addressed in Mr. Johnson's testimony. Mr. Litchfield testified, "[I]n our instructions we're supposed to tamp them off tight . . . we're supposed to tamp up the ties tight up underneath the weld." From a photograph of the tie and tie plate shown to him, Mr. Litchfield stated

that it did not look like it was tamped up tight. Failure to tamp up the tie beneath the weld, Mr. Litchfield testified, will cause the weld to break. Should the weld break, he cautioned, that could cause surface defects and a derailment.

Continuing to address the alleged failure of the Claimant to tamp the tie in question beneath the weld, resulting in a swinging tie, the hearing officer engaged in the following colloquy with Manager Litchfield:

Q. Looking at this picture, this Carriers Exhibit 9, that was entered into evidence. If an employee left the low joint and failed to tamp the tie or nip the tip; the first two different things there; if he fails to do that would he be in violation of GR-2, which says that he willfully neglected his duty? GR-2 is Carriers Exhibit 3; that says:

All employees must behave in a civil and courteous manner when dealing with customers and fellow employees and the public, and they must not: Willfully neglect their duty.

A. Well, I guess you could say it's neglection. We just failed to finish the job. I guess it would fall into neglection, we just failed to do the rest of the job.

Q. And if failing to finish your job that created a low joint that could possibly cause a broken rail; would that be endangering life or property?

A. Yes, it could. It could mean that.

Manager Litchfield testified that "Mr. Leizear knows his job and he has done it well in the past." The incidents involved in the present Investigation, Mr. Litchfield stated, are "not common" as compared with the Claimant's work in the past. (Tr. 57). On cross-examination by the Organization representative, Manager Litchfield stated that in the past he did not receive any report saying that Mr. Leizear left debris at a job site. (Tr.

62).

Roadmaster K. D. Green explained that a "welding blitz" was taking place during the week that the incident here in issue happened. Division Engineer Johnson had set up a project to get joints out of the rail. Roadmaster Green had eight sets of system welders working under his supervision on the project where normally he supervises only one set of welders. The Monday prior to the start of the project, Roadmaster Green conducted a job briefing where all of the welders were present, although the Claimant might have showed up a few minutes late that day. The Claimant's helper was present for the job briefing. In the job briefing the Welders were told to pick up the angle bars and where to store them. The incident where the debris was left at the job site, Roadmaster Green testified, occurred a couple of weeks into the welding blitz. On other occasions, Roadmaster Green stated, the Claimant picked up the angle bars and took them to the storage location.

Brian Gordon worked with the Claimant as a welder helper on June 2, 2009. They made two welds at the site in question, he testified, and then dug a hole to dispose of the debris left over after making the welds. Debris was placed in the hole, he stated, and the hole was covered up. The angle bars were not left at the site on purpose, he testified. The only explanation he had for not leaving the site neat and orderly, he testified, was a mental lapse caused by the heat they were working in. They were working at a crossing, he testified, "and the heat just radiates off that asphalt there."

The Claimant testified that on his and most welding crews, it is the helper who digs the hole for the debris and takes the crucible off the box of molds and throws it into the hole. The same, he stated, is done with the rest of the debris. "While I'm doing [the welding]," the Claimant testified, "the Helper is supposedly supposed to be cleaning up."

Every day they have a job briefing, the Claimant stated, and he informs the helper that it is his responsibility to bury the debris.

The Claimant testified that he did not know that the angle bars were left at the site. He was very busy, he explained, in that he had 707 authority; three other welding crews were calling him every five minutes; and he had to pick his boards up before his time went over. He also attributed his lapse in part to an injury he sustained earlier in the shift, which, he stated, affected his focus. "It was an oversight," the Claimant testified, and it was not done on purpose. The Claimant testified that it was the first time that he left bars at a worksite.

The hearing officer questioned the Claimant as to whether it was "unsafe to leave the tie swinging or having the tie not get nipped up?" He answered, "Well, when I left that job that day those ties was nipped up and tight to the bottom of the rail".

Following the close of the hearing, by letter dated August 17, 2009, R. Spatafore, Division Engineer, notified the Claimant that sufficient evidence was presented at the hearing to substantiate all of the charges alleged in the charge letter. The Claimant was permitted to present witnesses, documents, and testimony in his behalf, Division Engineer Spatafore stated, and to cross-examine Carrier witnesses. In addition, Division Engineer Spatafore wrote, "While your representative made numerous objections, each was appropriately responded to in accordance with your contractual due process rights." "Due to the seriousness of the proven charges," Division Engineer Spatafore declared, "it is my decision that you are to be suspended for a period of 30 calendar days from the service of the Carrier." The suspension was to run from August 18, 2009, through September 17, 2009.

Contrary to the assertion in the decision letter, not each of the Claimant's

representative's objections was appropriately responded to in accordance with the Claimant's contractual due process rights. Rule 25, Section 1(d) provides as follows:

> "(d) An employee who is accused of an offense shall be given reasonable prompt advance notice, in writing of the exact offense of which he is accused with copy to the union representative. . . ." (emphasis added)

The charge letter in this case, dated June 16, 2009, directs the Claimant to attend an Investigation "to develop the facts and place your responsibility, if any, in connection with the condition of the work site at or near milepost SV-836.5 on the Valrico Subdivision on Wednesday, June 3, 2009." There is no mention in the foregoing sentence of any shortcoming or deficiency with regard to the performance of the Claimant's work unrelated to cleanup. It is the condition of the worksite that is the essence of the complaint or charge against the Claimant.

Any doubt about what the Claimant was charged with is dispelled by the next sentence which states, "More particularly, when I visited the location where you all had worked the previous day, I found debris that was not properly disposed of and materials that were not properly stored, creating unsafe conditions." It is very clear that the Claimant is being charged with leaving debris and materials on the worksite that were not disposed of or stored as required. There is no suggestion of an allegation of deficient or substandard performance unrelated to disposal or storage of debris and materials .

It was therefore improper for the charging officer to inject into the hearing testimony and photographs relating to the Claimant's allegedly improper performance of his welding assignment by leaving a gap between the tie plate and the bottom of the rail and failure to tamp the tie. The Claimant's Organization representative immediately objected to the testimony, stating, "I object to this. Mr. Leizear's not here for an

investigation of charges for an FRA rule violation or anything of that nature. He's here for a condition where debris and , , , material . . . is not stored or properly disposed of or creating unsafe walking conditions, what I'm saying the charge, that is." (Tr. 11, emphasis added).

The Organization representative was right. The testimony and accompanying photographs relating to the Claimant's allegedly unsatisfactory performance of his job unrelated to cleanup or storage were outside the scope of the charges and should not have been allowed. Instead of sustaining the objection, the hearing officer overruled the objection. That was prejudicial error to the Claimant's case.

The charging officer attempted to defend his testimony about the Claimant's leaving of a gap beneath the tie plate and failing to tamp by noting that one of the regulations the Claimant was charged with possibly violating was MWI-801, the welding manual. (Tr. 11). The listing of MWI 801, together with a number of other rules and regulations, can hardly qualify as "reasonable prompt advance notice . . . of the exact offense of which he is accused . . . ." First, the paragraph of the charge letter in which the reference to MWI 801 appears begins with the words "In connection with the above. . . ." That would mean that MWI 801 was being cited only as it related to the previous paragraph. The previous paragraph did not mention any performance violation unrelated to cleanup but only the debris and other materials that were not properly disposed of or stored.

Second, as brought out at the hearing, regulation MWI 801 has specific language stating that after the welding job is finished the hot debris should be buried and the "site should be left in a neat and orderly condition." (Tr. 47). The most reasonable interpretation of the reference to MWI 801 in the charge letter is that it is alleging that the

Claimant violated regulation MWI 801 by failing to bury debris and leave his worksite in a neat and orderly condition. It cannot reasonably be said that the charge letter gave the Claimant notice that he was accused of any violation relating to leaving a gap between the tie plate and the bottom of the rail or failing to tamp a tie in performing his welding assignment at milepost SV-836.5 on June 3, 2009. The Claimant may not be put into a position where he has to speculate as to which section of a thick welding manual (MWI 801) he is accused of violating.

In the present case we did not have just a single instance of a question and answer about a gap between the tie plate and the rail or failure to tamp the tie. Here the charging officer gave a substantial amount of testimony relating to that alleged violation and the potential danger it posed. In addition, the hearing officer independently pursued the subject area with Regional Welding Manager Litchfield by questioning him as to whether the Claimant's alleged leaving of the gap and failure to tamp the tie constituted willful negligence and whether it endangered life and property. The hearing officer also independently pursued questioning in the subject area by asking the Claimant if it was unsafe to leave a swinging tie or fail to tamp the tie.

The Carrier has introduced substantial evidence to prove that the Claimant violated applicable Carrier rules and regulations as charged in failing to dispose of debris and collect materials for storage from a worksite where he and a helper performed a welding job on June 2, 2009. However, the record also shows that prejudicial error occurred during the hearing in permitting a substantial amount of testimony about allegedly deficient performance by the Claimant of his work assignment on that date, unrelated to the removal of debris or storage of materials, even though he was not charged with such a violation. Testimony was also permitted that the claimant's said unsatisfactory

performance could have caused a rail failure, constituted willful negligence, and endangered life and property. It is reasonable to believe, the Board finds, that the Carrier took such testimony into account in assessing the level of discipline in the case, namely, a 30 calendar day suspension. It is the Board's determination that the penalty should be reduced to a 15 calendar day suspension and that the Claimant should 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
February 5, 2010