

**BEFORE
PUBLIC LAW BOARD NO. 7526
CASE NO.5
AWARD NO. 5**

**Union File: 204540
Carrier File: 2011-098039
NMB Subject Code: 119**

UNITED TRANSPORTATION UNION (Yardmasters))	
vs.)	PARTIES TO THE
)	DISPUTE
CSX TRANSPORTATION, INC.)	

STATEMENT OF CLAIM:

"...based on the foregoing, the Committee again request that Yardmaster Jennings's personal record be cleared of this entire incident and that Yardmaster Jennings be compensated for all lost earnings. Also, all vacation entitlements and railroad credits be restored, plus eight (8) hours pay for April 13, 2011."

FINDINGS:

The Board, upon consideration of the entire record and evidence herein, finds that the Carrier and the Organization involved in this dispute are respectively Carrier and Organization within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Public Law Board Agreement dated January 25, 2012, that this Board has jurisdiction over the dispute involved herein, and that the parties were provided due notice of the instant proceedings.

After a thorough review of the record and the eloquent and well-presented arguments by both parties at a hearing in Jacksonville, FL on April 4, 2012, the Board concludes that Yardmaster J. A. Jennings, was hired on December 11, 1977, and attained yardmaster seniority on December 9, 1989. On January 31, 2011, the Claimant was working as a yardmaster in Kingsport Yard. He was responsible for giving a job briefing to two crews who would be working in that yard that day. During the course of their work, the two crews coupled into each other unexpectedly, resulting in a neck injury to one of the engineers. Yardmaster Jennings was charged with a failing to ensure a safe operation.

An investigation was held, after agreed-upon postponements, on April 13, 2011. As a result of that investigation, the Carrier determined that the Claimant was guilty of violating CSX Transportation SOFA Rule 2 and he was assessed a formal reprimand on May 10, 2011. The Organization appealed the discipline and the Carrier denied the appeal. The case was conferenced on the property and is now properly before this tribunal.

Carrier's Position:

1. Procedural Issues

The Carrier says that the investigation was conducted in a fair and impartial manner, as evidenced in the transcript of the proceedings. They further say that there is no pre-hearing discovery requirement in the Collective Bargaining Agreement and quote a number of arbitration awards in this industry confirming that, absent such a clause, there is no requirement in this industry.

2. Burden of Proof

The Carrier says that the Claimant violated Switching Operations Fatality Analysis (SOFA) (2). Of the 5 Lifesavers, Lifesaver 2, they say, is most pertinent to the facts at issue:

When two or more train crews are simultaneously performing work in the same yard or industry track, extra precautions must be taken:

- *Same track – two or more crews are prohibited from switching into the same track at the time, without establishing direct communications with all crew members involved.*
- *Adjacent Track – protection must be afforded when there is a possibility of movement on adjacent track(s). Each crew will arrange positive protection for an adjacent track(s) through positive communication with the yardmaster and/or other crew members.*

The Company says that here, the crews were working on the same track (Tr. p. 67). Accordingly, they must establish direct communications with all crew members involved. The conductors and engineers testified that the Claimant gave a job briefing when they reported for duty to work. The Carrier says that the job briefing covered standard procedure for one crew to assist another but at no time did the Claimant or anyone else indicate that the two trains would couple together. The engineer who was injured testified that he was sitting in his train waiting for further instructions when there was a "sudden, abrupt coupling or collision" (Tr., p. 28, ll. 14-20). The Carrier says that the Claimant's failure to notify Mr. Clapp that the Y225 while performing work in the same track would couple to the Y226 was a violation of SOFA (2) because direct communication was not established. Simply put, they say, the Claimant failed to coordinate safe movement in the yard.

The Claimant acknowledged that he was responsible for the "safety and operating rules and efficiency of train operations" and that he was working as the yardmaster at the time of the incident (Tr., p. 89, ll. 3-19).

Additionally, the Claimant admitted that he did not specifically inform Mr. Clapp and his crew that the Y225 was going to be giving them a car (Tr. p. 90, ll. 4-7). The Claimant stated (Tr. p. 90, ll. 37-39):

"No particular car. I just discussed with them what needed to be done, what needed to be built, that they'd be working together and they had their switch list."

Moreover, no updated job briefing was conducted (Tr. p. 92, ll. 10-13). This is tantamount, the Carrier says, to an admission of guilt.

3. Discipline

The Carrier says that under its Individual Development and Personal Accountability Policy, the instant charge is constitutes a major offense. Major offenses are defined as acts that recklessly endanger the safety of the public or employees. The Claimant's failure to ensure direct communication between crews operating on the same track qualifies as such reckless act. Accordingly, the Claimant may be dismissed from service for this single event.

The Carrier says that it took the Claimant's long service and his work history (one other incident in the prior 3 years, involving a classification issue with 2 trains, resulting in an Informal Corrective Instruction) into account when assessing discipline.

For all of these reasons, the Carrier says that the discipline of a formal reprimand was warranted. They say that any further reduction in discipline issued would amount to leniency. Arbitral Boards, they say, are unanimous in the opinion that exercising any degree of leniency is outside their jurisdiction. Rather, leniency is at the sole discretion of the Carrier.

Organization's Position:

1. Procedural Issues

The Organization raises two procedural issues, which, it says, prevented a fair and impartial hearing. First, some 2 months prior to the ultimate hearing date, they requested and did not receive advance production of statements, radio transmissions and downloads. Second, they state more generally in their brief that the Carrier failed to perform a fair and impartial hearing.

2. Burden of Proof

The Organization says that the Claimant gave a proper job briefing to all of the crews. They say that the Claimant was not responsible for the crews coupling into each other. They point out that it is the crews who must communicate with each other. During the investigation, they clarified that the crew members understood the job briefing. The engineer confirmed, in his testimony, that the yardmasters do not tell them how to perform their duties (ie. no car counts as they are going down a lead, no instruction to couple up, etc.) They point out that the yard office has no view of the yard.

They say that even the Carrier witness found that the Claimant did nothing wrong. They reference p.66 of the transcript wherein Hearing Officer Carson asked the Carrier Witness Bevins:

"Carson...did Yardmaster Jennings fulfill his responsibility of Operating Rule GR-46 with regards to his job? Did he comply with Operating Rule GR-46?"

Bevins: In good conscience I cannot answer no to that question.

Carson: So that would be a yes?

Bevins: In a sense, yes.

Carson: As far as you know, yes?

Bevins: As far as I know, yes sir."

It should be pointed out that Operating Rule GR-46 involves yardmasters being responsible for the safe, efficient operation of the yards. While the Carrier says in the discipline letter that the Claimant is guilty of violating CSX Transportation Sofa Rule 2, they also say, in the first paragraph of the discipline letter that he "failed to ensure safe operation of Kingsport Yard by not notifying crew working Y22631 that yard job Y22531 was performing work in same track failing to coordinate safe movement of both yard jobs..."

The Organization says that no Carrier witness testimony substantiated any wrongdoing by the Claimant.

3. Discipline

The Organization says that since the Carrier failed to meet its burden of proof, no discipline can be sustained.

Result:

1. Procedural Issues

With respect to discovery, the Carrier's position is to be preferred. As many Boards have stated, absent an agreement to the contrary, which is not alleged here, there is no pre-hearing discovery in this industry. Further, the Investigating Officer granted whatever postponements the Organization requested during the course of the on-property hearing for documents to be reviewed. This Board finds that the accepted proper course of action in this industry is to grant reasonable postponements to review documents. This was clearly done here.

This Board has reviewed the record in full and sees no procedural issues which would prevent moving to the merits of this case

2. Burden of Proof

The Board finds that the Carrier has, indeed, failed to meet its burden of proof in this case. The Carrier witness essentially says that the Claimant did act in a manner which was safe and efficient. He then tries to say something different later in his testimony, but he can't have it both ways. The Board finds that the evidence shows that this long-service yardmaster did do a proper job briefing. The argument by the Carrier at the hearing effectively amounted to the fact that a proper job briefing by a yardmaster would involve telling the crews every move they had to make throughout their shift, including any work on or in the same track.

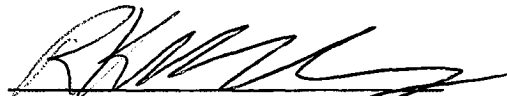
While the Rule in question says that the crews must communicate, it does not say that a yardmaster must tell the crews every move they must make. In fact, to do so in this industry would likely have a serious adverse effect on productivity. The issue as between the crews is not before this tribunal, and this Board makes no comment as to the liability any such crew members might have for failing to communicate adequately with each other.

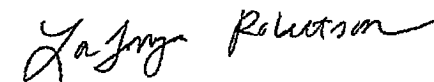
3. Discipline

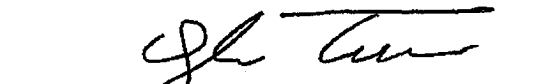
Having ruled that the Carrier has not met its burden of proof, this Board has no need to examine the degree of discipline assessed – none can stand.

AWARD

The claim is sustained.


Roger K. MacDougall
Chair and Neutral Member


LaTonya Robertson
Manager Labor Relations
Carrier Member


Doyle Turner
General Chairman, UTU L&N & C&O
Yardmasters
Organization Member

Dated: 6/5/2012 At: Chicago, IL