

PUBLIC LAW BOARD NO.7008

PARTIES TO THE DISPUTE:

CSX TRANSPORTATION, INC.

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION OF THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

STATEMENT OF CLAIM:

In accordance with the provisions of Rule 25, Section 3, of the June 1, 1999 Agreement, the following will serve as our appeal of discipline assessed to BMW employee B.J. Mackey ID#****, as a result of the hearing held January 5, 2006, in Atlanta, GA.

For the reasons stated herein and our objections put forth during the hearing, the Carrier should immediately return Mr. Mackey to service, make him whole for all losses suffered, and clear his personal record of the charge letter and all matter relative thereto.

OPINION OF BOARD:

B. J. Mackey ("Claimant") was hired by CSXT in the Engineering Department on November 8, 1999. At all times relevant to this dispute, the Claimant was assigned as a Backhoe operator, headquartered at Union City, GA.

On October 5, 2005, Claimant was instructed to reestablish the ballast shoulder of one of the lead tracks in Union City, which led onto one of CSXT's mainline. According to the Claimant, as he was moving the ballast around the shoulder, he "felt" the front wheel of the backhoe drop down along the shoulder of the track to which he was assigned. Claimant reported that he put the down

rigger to the ground to serve as a counter-weight to reestablish proper placement of the backhoe. Mr. Mackey alleged, however, that he was not able to put the down rigger "all the way out", and as he was moving the jib of the backhoe to the left side of the machine, the backhoe "flipped over" and fall "several" feet down an embankment. Subsequent to the accident, Claimant was transported to a local hospital where he received appropriate medical attention.

The following day, October 6, 2006, "several" Carrier Officers began a Key Factor Analysis (An internal document which Carrier develops to assess the ways of preventing similar injuries in the future. According to Carrier it is "not used to enhance a discipline charge, nor is it introduced as evidence into a hearing") to determine the root cause of the previous days' incident. As Engineer of Track Frazier and Roadmaster Skinner began their investigation and surveyed the scene, it became "apparent" that the Claimant's explanation regarding the accident was not "entirely accurate". In fact, Messrs. Frazier and Skinner discovered that the backhoe did not merely "tip over" as the Claimant had reported, but rather, there was a "clear reverse movement". Moreover, the reverse movement, measured to be "several feet", was in "direct contradiction" to the Claimant's rendition of events. According to his superiors, it showed "negligence on the part of Claimant Mackey".

As a result of the Track Engineer and Roadmaster's investigation, the Claimant was directed to attend a formal investigation scheduled for October 27, 2005. Claimant was charged with violations of CSXT Operating Rule GR-2, Parts 6 and 7, because he "allowed the machine to tip over causing yourself to be injured. Your account of the details leading up to and including the incident are not consistent with facts gathered after the incident". Carrier further informed the Claimant that he was being withheld from service pending the outcome of the investigation.

After several postponements by mutual agreement of the parties, the hearing was convened

on December 1, 2005, without the Claimant in attendance. Therefore, the parties agreed, once again, to postpone the hearing until January 5, 2006, and by letter dated December 19, 2005, Claimant was apprised of the postponement. The hearing was held, as scheduled, on January 25, 2006, with both Claimant Mackey and his representative in attendance. Thereafter, by letter dated January 25, 2006, Claimant was informed that he had been found guilty as charged and, as a result, was dismissed from service.

The Organization appealed Carrier's decision, raising several arguments. First, Vice Chairman Smith contended that "Carrier has identified two (2) charge letters in the hearing transcript. One letter was dated November 17, 2005, and scheduled the hearing for December 1, 2005...the Carrier's decision is procedurally defective due to the fact that the hearing was scheduled to begin outside the 30-day time limit requirement as provided in Rule 25 of the June 1, 1999 Agreement". The Vice Chairman further contended that "the transcript reveals prejudgement on the part of the Carrier, that the investigation was nothing more than a witch hunt conducted by Staff Engineer White, because he accepted 'opinion', not facts, from other Carrier officials (not witnesses to the incident) and refused consideration for evidence and/or testimony from witness, Foreman R. Chaney...." In that connection, the Vice Chairman maintained that the Claimant was "excluded" from the investigation. The Vice Chairman went on to argue that "We believe witness/official Moore's testimony that he became aware of the charge letter, signed the charge letter, and did not draft the charge letter. We do not believe his testimony of no knowledge of who drafted the charge letter. His credibility is seriously questioned." Finally, the Organization asserted that: "We take strong exception to Carrier's statement that Mr. Mackey's previous record was used for the purpose of determining the appropriate degree of discipline. First, Mr. Mackey's personal record was not

discussed or reviewed at the hearing and was not made a part of the record of hearing. Second, Mr. Macky has never been involved in any incident where a machine he was operating overturned”.

In its denial of the appeal, Carrier noted that the initial charge letter, dated October 14, 2005, initially scheduled the investigation for October 27, 2005, well within the time limits as provided in Rule 25 of the Agreement. The Carrier went on to note that the Organization had “ample time” to provide the evidence it alleged was lacking, i.e., Mr. Chaney’s statement or Mr. Chaney’s presence at the hearing. With regard to the drafting of the charge letter, Carrier asserted that the Organization “failed to articulate the relevance” of Mr. Moore’s failure to draft the letter on his own behalf. With regard to the Organization’s assertion that the Claimant was “excluded” from participating in the October 6, 2005 investigation of the previous days’ accident, Carrier argued: “The Carrier obtained the necessary statements from Mr. Mackey as to the events leading up to the backhoe tilting over. The Carrier is under no obligation to include the principal in its investigation of the scene”. Finally, the Organization maintained that the discipline of dismissal was harsh given Claimant’s personal record in which there was no indication that he had ever overturned a piece of equipment prior to October 5, 2005. However, Carrier argued that due to the “seriousness” of two (2) previous events contained in Claimant’s record, the discipline of dismissal was “in line with the nature of the charge”.

Despite the numerous procedural arguments advanced by the Organization, the record demonstrates that Claimant Mackey’s due process rights as provided for under Rule 25 (Discipline) of the Agreement were fully protected and the hearing, when it eventually commenced, was conducted in a fair and impartial manner.

Turning to the merits of the dispute, the record evidence supports Carrier’s charge that

Claimant violated CSXT General Rule 2 Parts 6 and 7 when he failed to provide accurate statements of the root cause of the accident, as well as his failure to properly perform his duties on October 5, 2005.

At the January 5, 2006 hearing, the Claimant provided the following dissertation regarding the October 5, 2005 accident at :

“As I was going out, I put my bucket down and stated going forward first, and I got the vegetation out of the middle of the road, cleaned it up. Well, I had my bucket down at my front right wheel, went off the edge of the road. Now to my right side the vegetation was thick; I couldn't tell though, that it was a big drop off...it was carpeted real heavy. So, as my front wheel went off, I was still going forward, I stopped the backhoe, put it in neutral, swung around, unlocked my feet, swung around and put my boom to the high side, which would have been my left side; at the same time I was letting my outrigger down. Well, as I was swinging my boom up to the high side, the backhoe rocked and I tried to keep myself back around to brace myself in time and that time it had already rolled over and rolled and I was pending the backhoe on my side. I hit my ribcage on the control panel, my knee on the steering wheel. I couldn't get out of it (the backhoe) and I kept calling the radio, 'Mr. Chaney, turn around and come help me out'. I was trying to get to my knife to cut the seatbelt off because I couldn't get the seatbelt loose, but finally I kept on working it until I got it unloose and then fell out. And then, that's when I proceeded up the hill and I called for Mr. Chaney to come back. He came back and we went to the emergency room and I was seen by a doctor. Then Mr. Frazier showed up and asked me to fill out the paper work”.

The Claimant's account was considerably different from the facts developed by the Carrier Officers who conducted the Key Factor Analysis. Specifically, Engineer of Track Frazier testified

that, given the physical evidence, the incident could not possibly have occurred as the Claimant suggested. To wit, under questioning from Mr. White, Mr. Frazier stated:

Q. When you investigated the accident, what did the facts, what did the marks, the position of the backhoe, what did it tell you?

A. The location of the backhoe in relationship to the road surface and the tire marks indicating it had gone in a reverse direction, down diagonally down the hill indicate—the facts indicate that the backhoe either voluntarily or involuntarily made a reverse movement down the hill before turning over.

Q. Mr. Frazier, the tire marks that you saw that had not been disturbed; did they indicate how far the backhoe had backed up?

A. It was approximately 7 feet.

Of note, the record photographs buttressed the Carrier Officers' testimony.

CSXT GR-2 Parts 6 and 7, state: "All employees must behave in a civil and courteous manner when dealing with customers, fellow employees and the public. Employees must not: 6. Endanger life or property; and 7. Make any false statements". In the circumstances, Claimant clearly violated the rule(s) with which he was charged.

Finally, with respect to the quantum of discipline, since the Claimant's hire date of November 8, 1999, he has established the following disciplinary record:

3/28/05	Possession of stolen property on Carrier property—10 day actual suspension.
8/26/05	Permitted contractor to occupy main track w/o authority-30 day actual susp.
1/26/06	Failure to properly perform duties; false injury report-Dismissal

Given the Claimant's past disciplinary record and the severity of this latest infraction, the

AWARD NO.2
NMB CASE NO.2
UNION CASE NO.B09142806
COMPANY CASE NO.12(06-0059)

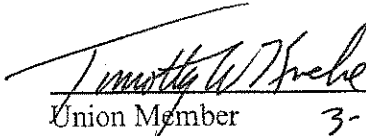
discipline of dismissal was appropriate, and therefore, cannot be considered disparate or unduly harsh.

AWARD

Claim denied.



Nancy Faircloth Eischen, Chair



Union Member 3-20-08



Company Member 3/20/2008