

PUBLIC LAW BOARD NO. 7008

PARTIES TO THE DISPUTE:

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES'

Affiliated with the Teamsters Rail Conference

and -

CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM:

In accordance with the provisions of Rule 25, Section 3, of the June 1, 1999 Agreement between CSXT and BMWED, the following will serve as our appeal of the assessed discipline of termination of employment with CSX Transportation, including removal from all seniority rosters, contained in D. L. Moss, Jr., Director of Program Construction, Engineering-M of W Capital letter dated November 15, 2007 and received in this office on November 27, 2007, and addresses to P. R. Larson, ID #*****....

Due to the fact Mr. Larson is considered a 'disciplined employee' and according to Mr. Moss' letter dated November 15, 2007, the justification of discipline is based upon Mr. Larson's 'prior record', even so, would have nothing to do with anything in regard to Mr. Larson, and the incident at road crossing BAD 9.65, Shenendoah [sic] Subdivision being that he did not know that he hit the cantilever. Again, we emphasize that Mr. Larson be exonerated. The October 3, 2007 charge letter should be stricken from his record and Mr. Larson should be paid all straight time and overtime that he would have made had he not been terminated by the Carrier and all fringe benefits reinstated along all seniority rosters.

OPINION OF BOARD:

Production Foreman P. R. Larson ("Claimant" or "Foreman Larson") was hired by the former Baltimore and Ohio Railroad Company, a CSXT predecessor property, on August 13, 1980.

At all times relative to this issue, the Claimant was assigned to Floating Baltimore Service Lane

Production Foreman position 6DEC-060.

On September 17, 2007, the Claimant was operating a dump truck to distribute ballast around the 5th Avenue crossing in Ranson, WV. The record demonstrates that subsequent to dumping the load, the dump truck malfunctioned and the Claimant was unable to return the bucket portion to its lowered position. Regardless, the Claimant continued to move over the road crossing, and while doing so, he struck the cantilever (a vertical pole with a flashing unit, which provides crossing protection for highway vehicular traffic) of the signal mast with the raised bucket, causing "significant damage" to the cantilever. Although the Claimant did not notify his supervisor of the collision, a taxicab driver who witnessed the event informed Claimant's supervisor shortly after the incident occurred.

Thereafter, in an October 3, 2007 letter, Foreman Larson was instructed to attend an October 15, 2007 formal investigation relative to the following charge:

"...causing damage to the cantilever, leaving the scene and failure to report the incident. Your actions appear to be in violation of, but not limited to, CSX Operating Rules-General Rules A, F and L; as well as General Regulations GR-2, GR-3, GR-6, and GR-14".

Following one (1) postponement at Carrier's request, the investigation was held to completion on October 30, 2007, with Claimant and his representative in attendance. Thereafter, on November 15, 2007, the Claimant was informed that he had been found guilty as charged and, as a result, dismissed from service.

The Organization protested the discipline arguing that: *"The Claimant did not know that he had hit the cantilever. Without knowing that he hit the cantilever he would not be in violation of the stated rules due to the fact that he did not report because he did not know he did any damage. The Carrier cannot prove the Claimant willfully violated any of the cited rules if it cannot establish his*

knowledge of the event... ”.

BMW Vice Chairman Lopez went on to note that the traffic at the 5th Avenue road crossing was “very heavy” and the Claimant did not have the “benefit” of someone flagging the traffic for him while he was negotiating the road crossing. With regard to the quantum of discipline, Mr. Lopez asserted that the dismissal of the Claimant was “unwarranted and based on unproven charges”.

The Carrier confirmed the parties’ January 30, 2008 conference of the issue in a February 26, 2008 letter. In that correspondence, Carrier Director Labor Relations Amidon contended that: *“It was Mr. Larson’s responsibility to report the accident and damage to the cantilever. Mr. Larson’s failure to comply with CSXT policies and procedures promoted a very dangerous condition for the motoring public, pedestrians and CSXT employees. Mr. Larson confirmed that he was at the 5th Avenue road crossing and that he dumped ballast there on September 17, 2007....”.*

With regard to the damaged cantilever, Carrier pointed to Signal Maintainer Watkins’ testimony in which he stated: *“The extent of damage to the cantilever was to such an extreme that it was removed from service and repaired on an ‘emergency basis’.”* Mr. Watkins went on to opine that: *“If the pole had fallen the general public would have been in danger...I could have been in danger....any one that was there could have been in danger....”.*

Finally, with respect to the discipline assessed, Mr. Amidon argued: *“The facts of the investigation proved that the Claimant was in violation of the rules with which he was charged, and account of the seriousness of the proven violations, and consideration of Mr. Larson’s previous discipline record, the discipline of immediate dismissal is appropriate”.*

When the Parties were unable to reach a mutually acceptable resolution, the dispute was

submitted to this Board for adjudication.

Careful review of the record evidence demonstrates that all of the Claimant's due process rights were fully protected and the November 30, 2007 hearing was conducted in a fair and impartial manner. The Claimant and his representative were present throughout the proceedings, and both Mr. Larson and Mr. Lopez had an opportunity to examine evidence, as well as present and cross-examine witnesses.

Turning then to the merits of the dispute, the Claimant was charged with: "...*causing damage to the cantilever, leaving the scene and failure to report the incident. Your actions appear to be in violation of, but not limited to, CSX Operating Rules-General Rules A, F, and L as well as General Regulations GR-2, GR-3, GR-6, and GR-14*". In the circumstances, the record evidence supports Carrier's determination of guilt with regard to the charges supra.

At the outset, although the Claimant denied striking the cantilever or having any knowledge regarding damage to same, his vehicle log clearly indicated that he was operating at the 5th Avenue location and, by his own admission, that he moved over the road crossing with the bucket portion of the truck in its raised position. In that regard, the Claimant testified that:

- Q. Were you working at the road crossing in question at the 5th Ave. Road Crossing?
A. Yes
Q. Okay, and what was your assignment to do that day?
A. Dump a load of ballast.
Q. Was anyone there to accompany you in this work task?
A. No.
Q. You did dump the rock at the crossing, is that correct?
A. Yes
Q. And the truck malfunctioned after you dumped the rock, is that correct?
A. Yes.
Q. Did you report the damage or the inoperable dump truck to your supervisor?
A. I did not because I did not know I did any damage.

Q. But it is possible that you could have done some damage, is that correct?

A. That is possible, I guess.

Clearly then, the Claimant was in the vicinity where the accident occurred, and by his own admission, went through the grade crossing with the dump truck bucket in the upright position. In that connection, the Claimant testified that the dump truck malfunctioned at “approximately noon” on September 17, 2007. When asked: “What did you do from twelve o’clock until the time you got off from work”? The Claimant averred:

...I parked the truck in the 'bar parking lot' and I spent hours trying to get that bed down, and after I couldn't get it down, I walked up to the motel; I was about a mile away, and I got to the motel about 3 or 4 p.m. I waited for the mechanic to come back and then I told him about it. I figured if I could get Cecil to come down the next day, and if he couldn't come down, I was going to call the service center in Martinsburg to come down and put the bed down. I took care of it myself.....

When asked if he reported the malfunctioning truck to CSX Management on the afternoon of the occurrence, the Claimant stated that he had not done so, nor did he report the incident the following day when he reported for work.

With regard to the damaged cantilever, the Claimant stated, unequivocally, that he “did not know” that he had hit the cantilever. According to Mr. Larson, he “dumped the load” and when the dump truck bed did not go down, he “pulled straight at the cantilever” and then tried to “cut” around same, maintaining that he “didn’t notice” that he had hit it. However, premised upon Signal Maintainer Watkins testimony, quoted above, the Claimant’s protestations in that regard are simply not credible. Further, the record demonstrates that the damaged cantilever of the signal mast bore “paint traces” from the dump truck which Claimant, by his own admission, was operating on September 17, 2007.

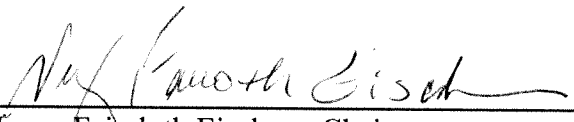
Finally, with regard to the quantum of discipline, the record demonstrates that the Claimant

was disciplined on at least four (4) prior occasions for very similar events. Numerous awards in this industry consistently maintain that a Carrier may assess the ultimate disciplinary penalty when all other attempts at progressive discipline have not corrected the behavior, which seems to be the case in these circumstances.

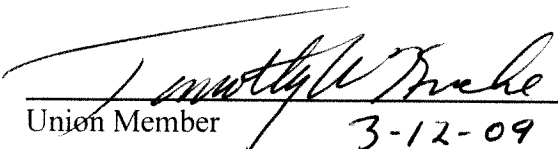
Premised upon all of the foregoing, including the Claimant's own testimony and personal record, this claim must be denied.

AWARD

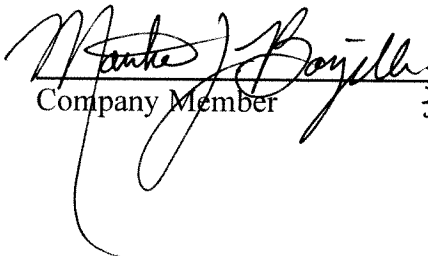
Claim denied.



Nancy Faircloth Eischen, Chair



Union Member 3-12-09



Company Member 3/12/09