

**PUBLIC LAW BOARD NO. 7104**

<b>BROTHERHOOD OF</b>	)	
<b>MAINTENANCE OF WAY EMPLOYEES</b>	)	
<b>DIVISION – IBT RAIL CONFERENCE</b>	)	
	)	<b>CASE NO. 10</b>
<b>vs.</b>	)	<b>AWARD NO. 10</b>
	)	
<b>CSX TRANSPORTATION, INC.</b>	)	

**STATEMENT OF CLAIM:**

**Claim of the System Committee of the Brotherhood that:**

- 1. The disqualification of Machine Operator Paul Acree as a spike driver operator effective January 24, 2007 is unjust, unwarranted and in violation of the Agreement [System File D21703707/212(07-0503)].**
- 2. As a consequence of the violations referred to in Part (1) above, the charge letter and all matters relative thereto shall be removed from Machine Operator Paul Acree's record and he shall be made whole for losses suffered as a result of the Carrier's actions.**

**FINDINGS:**

Public Law Board No. 7104, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

The Claimant, P. Acree, has been employed by the Carrier since 1978. On January 25, 2007, the Carrier, by letter, notified Claimant that he had been disqualified as a Spike Driver Operator effective 0700 hours January 24, 2007. The letter further informed Claimant that a hearing was scheduled for February 15, 2007, to develop the facts in connection with his disqualification. Following the hearing, the Carrier, by letter dated March 5, 2007, found as follows:

[T]he facts support and confirm (your) disqualification, as you failed to safety perform your duties as a spike driver operator in a satisfactory manner as required for System Production. You failed on numerous occasions to use the proper lock out/tag out procedures as required by the

CSX operating rules and Federal Regulations. Additionally, you admitted in your testimony that you failed to use lock out/tag out procedures. Your lack of proper safety procedures placed you and your fellow employees in harms way. Also, your inability to keep up with the machines in front of you, delayed the machines behind you.

Dennis J. Rhodes, Carrier System Production Team Manager on T-9, stated at the investigation that Claimant was working under his supervision as a Spike Driver Operator on January 24, 2007. He stated that Claimant had been with the crew for approximately one week. He testified that on or about January 16, 2007, and on another occasion, he observed Claimant working on a hammer without the guns pinned up, properly locked down and tagged out, and that Claimant's hands were in the machine's moving components. He stated that he brought to Claimant's attention the seriousness of the situation and the possibility that he could be hurt.

Mr. Rhodes further testified that on January 23, 2007, he called a meeting of the hammer operators and spoke to them about the necessity of locking out and tagging the hammers, and noted that an employee had been seriously injured the year before when he had his hand in the gun. Mr. Rhodes explained that the proper lock out and tag out procedure involved idling the machine, cutting off the electricity, putting the pins in the head to the outside to keep them from leaking, putting the private lock on the battery box and putting out the orange cones to notify other employees that the machine was being worked on. Mr. Rhodes stated that he believed that he had the employees' commitment to observing the proper procedure, but later that day he observed Claimant lying on the ground with a hammer, hitting upward underneath the machine. Mr. Rhodes stated that when he observed Claimant working on the guns of his machine he had not followed the procedures he had outlined. He also stated that on the same day Foreman Mike Powell informed him that Claimant had run into a frog and derailed the equipment. While Mr. Rhodes acknowledged that Claimant was knowledgeable in the machine's operations, he stated that he did not believe Claimant was operating his machine safely enough to be considered a qualified operator. Mr. Rhodes concluded that the safety concerns alone would be enough to warrant Claimant's disqualification, and that he had warned him about the matter on more than one occasion.

With respect to Claimant's productivity, Mr. Rhodes stated that he had timed the four spikers on his team, and while the other three employees averaged 5 to 6 ties per minute, Claimant averaged 12 ties in 20 minutes. Mr. Rhodes stated that Claimant's productivity was unacceptable and would also be enough to disqualify him. Mr. Rhodes further testified that when another employee was assigned to Claimant's machine after his disqualification, that employee spiked approximately three ties per minute.

Mike D. Powell, Lead Foreman on T-9, also testified at the investigation. He stated that Claimant was a member of his team, working under his direct supervision. He testified that shortly before Claimant was disqualified, Mr. Rhodes called the team together, reminded them of his expectations for the proper lock out tag out procedure, and informed the employees that he would not tolerate their failure to lock the machine in the

proper manner. Mr. Powell stated that without this procedure performed, it was unsafe to work on the machines and several employees had suffered severe injuries as a consequence. He stated that during the meeting Claimant was "pretty blunt" about his belief that pushing the yellow button which waived the electronics was a sufficient safeguard, even though Mr. Rhodes had instructed the employees to also insert the locking pin and discontinue the power source before working on a machine. Mr. Powell stated that Claimant commented that if he was caught not following the practice management should just disqualify him on the machine. Mr. Powell further testified that the issue had been discussed with Claimant on several occasions, and that he had personally observed Claimant failing to follow the proper procedure.

Mr. Powell further stated that Claimant did not take sufficient responsibility for derailing at the frog, and that his production was lacking. He concluded that based upon his observations Claimant simply "wasn't the same guy this year," and that he was not performing sufficiently to be a qualified spiker operator.

Glen D. Combs, Assistant Foreman on T-9, testified at the investigation that Claimant was a member of his team on the day he was disqualified. While he testified that Claimant was an excellent, knowledgeable spiker operator who did everything he was supposed to do, he also acknowledged that he had observed Claimant, on more than one occasion, perform maintenance on the machine without it having been properly locked out and tagged out, in violation of the Carrier's safety policies. He further acknowledged that such action put Claimant and other employees at risk, and that he had spoken to Claimant about it.

Claimant stated at the investigation that he had been a spiker operator since 1981. He acknowledged that Mr. Rhodes, Mr. Powell and Mr. Combs had warned him about safety concerns, although he denied that any Carrier officer discussed his productivity. He stated that he had been part of the group discussion where Mr. Rhodes discussed the importance of the lock out tag out procedure, and admitted that he stated that if he forgot to follow it Mr. Rhodes would just have to take him out of service. Claimant testified that he had problems with forgetting because of past harassment. He admitted that he had violated the policy, which was for the employees' safety, and did not deny that he had done so on the very day that Mr. Rhodes instructed all of the employees on the importance of adhering the proper procedures. Claimant also testified that Mr. Powell and Mr. Combs told him that he was doing a good job day after day.

The Carrier first contends that all of Claimant's due process rights were fully protected and the hearing was conducted in a fair and impartial manner. On the merits, the Carrier contends that it demonstrated with substantial evidence the circumstances upon which Claimant's disqualification was based. The Carrier points to the testimony of Claimant's supervisor, Manager of System Tie Teams Rhodes, which established Claimant's continued failure to safely perform his duties and his lack of adequate production. Moreover, the Carrier points out, other management witnesses corroborated Mr. Rhodes' assessment. Thus, the Carrier states, the record justifies Claimant's disqualification.

The Carrier further asserts that it is well-established that the Carrier possesses the unfettered right to determine employee qualification to perform work safely and properly. Therefore, the Carrier concludes, the claim should be denied.

The Organization asserts that the instant dispute involved the improper disqualification of Claimant as a spike driver. The Organization notes that the instant dispute is not a simple matter of disqualification of an employee attempting to establish seniority as a spike driver operator in accordance with Rule 3 of the Agreement, as Claimant had previously established seniority as an equipment operator dating from 1979 and has worked as a spike driver operator since 1981. The Carrier's decision to disqualify him from this position he had worked for 16 years, the Organization states, is nothing more than discipline.

The Organization further contends that the Carrier failed to present any evidence to support its decision to disqualify Claimant. The Carrier's decision, the Organization points out, is based upon nothing more than the opinion of Manager of System Tie Teams Rhodes, who merely observed the machine's operation and Claimant's performance of service or maintenance on a small number of occasions. The Organization also points out that although Mr. Rhodes alluded to Claimant's supposed failure to properly observe safety procedures, the record contains no evidence as to what those procedures might have been. In addition, the Organization notes, Claimant was charged with no rules violations. The Organization states that where, as in this case, the disqualification is tantamount to discipline, the Carrier bears the burden of proof and may not rely upon such speculation or conjecture.

The Organization also points out that as the hearing officer did not render the disqualification decision, it is clear that no credibility determinations were involved in the Carrier's decision. The Organization states that in the absence of such determinations the record does not support Claimant's disqualification. In particular, the Organization points out, Mr. Rhodes and Foreman Powell spent very little time observing Claimant, whereas Claimant worked under the direct supervision of Assistant Foreman Combs, who observed him throughout the workday, and testified that he saw no reason for Claimant's disqualification. For all of these reasons, the Organization concludes that the claim should be sustained.

The Board has carefully reviewed the record in its entirety. It is well settled that the Carrier has the right to determine employee qualifications, and such determinations should not be disturbed by the Board unless they were made in an arbitrary manner. There is no such showing here.

During the hearing, Claimant's supervisors clearly described the proper lock out tag out procedure required for employee safety, and all three testified that they had observed Claimant fail to observe the procedure and had brought it to his attention on numerous occasions, all acknowledged by Claimant. Claimant also admitted that he had indicated, during an employee meeting where Mr. Rhodes stressed that it was critical that


the employees observe the procedure, that he might well "forget" to do so. Claimant did not contradict Mr. Rhodes' testimony that Claimant failed to follow the procedure the very day of the meeting where Mr. Rhodes instructed the employees that such failures would not be tolerated.

There is no dispute that the procedure has been implemented to ensure employee safety, as Claimant acknowledged, and that employees have suffered serious injury as a result of failing to adhere to the proper procedure, as Claimant also acknowledged. As has been held in prior awards, the Carrier cannot reasonably be expected to overlook unsafe work habits and run the risk of employee injury. The safety concerns at issue here were sufficient justification for Carrier to disqualify Claimant and we cannot say that, in doing so, its exercise of its managerial discretion was unreasonable.

**AWARD**

**Claim denied.**

  
JACALYN J. ZIMMERMAN  
Neutral Member

  
MATTHEW BORZILLERI  
Carrier Member

Dated this 10<sup>th</sup> day of October, 2008.

  
TIMOTHY KREKE  
Organization Member

Oct 10, 2008