PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

N. A. Weber, Manager SPT Teams, by letter dated March 17, 2008, notified Carl F. Bauer, the Claimant herein, to attend a formal Investigation on March 27, 2008, "to determine the facts and place your responsibility, if any, in connection with damages to a switch machine located on what is referred to as the Passenger Station Lead track near mile post 491.3 in Savannah, Georgia, that occurred prior to 10:42:12 on Wednesday, February 26, 2008." "In connection with the above matter," the letter stated, "you are charged with conduct unbecoming an employee of CSX Transportation, failure to properly and safely perform the responsibilities of your position, failure to report an incident involving damage to Company equipment, carelessness, concealing facts under investigation, and possible violations of, but not necessarily limited to, CSX Transportation Operating Rules - General Rule A and F; General Regulations GR-2, and GR-14; as well as, CSX Safe Way - General Safety Rule GS-3, and GS-5."

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.

On February 26, 2008, the Claimant was Assistant Foreman of the T-3 Tampering and Servicing team and in charge of the front part of the T & S 3 tie team. Around 10:30 in the morning a paint gauge buggy would not start, and the Claimant, together with his Foreman, Johnny D. Morris, drove in the Foreman's truck to the place where the paint buggy was parked to see if they could get it started.

The Foreman was able to get the paint buggy started with a jumper pack that he had in the back of his truck. In the meantime Bryan Thomason, a mechanic, drove up in his truck. Since the paint buggy was already started the mechanic left but was then called back by the Foreman, who was stuck in the mud.

The mechanic returned and used a chain to pull the Foreman's truck out of the mud. The mechanic started backing out of the area but saw that the Foreman, instead of following him out, had stopped before a switch on the tracks and was waving for the mechanic to come over to the switch. When the mechanic arrived, the Foreman asked him if he had hit the switch. The mechanic said, no, that he was in the center of the road and backed past it.

In a statement that he was asked to give about the incident, the mechanic wrote, "I noticed there were other tire tracks in the mud and we weren't the only ones that had been there. I then went to the truck and pulled forward on to the road between the crossing gate and the track. I did not hit the switch."

The Foreman testified that as he was driving down the road next to the tracks to leave the area he noticed that the switch did not look right. He stopped his truck, and he and the Claimant walked over to inspect the switch. The rod of the switch was bent down, and the cover of the switch stand box was broken. The Foreman testified that he

did not run over the switch. The switch machine log showed that the switch went out of correspondence at 10:42:12 a.m. The Foreman acknowledged that he, the Claimant, and the mechanic were probably in the general area of the switch around that time, but that he could not say for sure. He did not see anybody else in the area at the time, the Foreman testified.

After inspecting the damage to the switch, the Foreman and the Claimant drove in the Foreman's truck to where Donald E. Crews, the Employee-in-Charge of the work authority on the Savannah subdivision for that day, was present. The Foreman told Crews that he (Crews) had to go to the south end of the passenger station and look at a rod that was bent on the switch.

It is normal procedure, the Foreman testified, to report such things to the Employee-in-Charge. The Foreman likened the situation to seeing a broken bolt or broken wires while on the job in which case the normal response would be to report it to the Employee-in-Charge.

The Foreman was asked at the Investigation if he notified Mr. Weber, who was his immediate supervisor that day, of the bent switch rod so that Weber could start an investigation. He stated that he did not see a need for an investigation. The Foreman was asked if it looked like the damage could have been caused by vandalism. He answered, "Its possible, yeah." If he personally or someone from his gang had done the damage, the Foreman testified, and he knew that for a fact, he would have contacted Mr. Weber. He was treating the situation, the Foreman stated, as something that he observed that was not associated with work that he himself was doing.

The Claimant testified that he went to look at the machine that would not start around 10:00 a.m. It took about five minutes to get the machine started, the Claimant

stated, and they were in the area about 30 minutes or longer. There were no other vehicles in the area, he stated. He acknowledged that he, the Foreman, and the mechanic were in the area at about the time that the switch went out of correspondence. The Foreman, the Claimant testified, did not strike anything with his truck in the Claimant's presence. It was obvious, the Claimant stated, that somebody ran over the switch.

The Claimant testified that he took a look at the switch and observed a bent rod. He did not notify CSX management or Mr. Weber that there was an incident that needed to be investigated. Nor to his knowledge, he stated, did the Foreman notify management or Mr. Weber. The Foreman, the Claimant testified, notified Mr. Crews, the Employee-in-Charge. He was with the Foreman when the latter notified Mr. Crews, the Claimant stated, and he did not see any purpose in repeating what the Foreman had said.

The Claimant testified that he was asked to write a statement of the incident. He was told, he stated, that the statement was for investigation purposes–to find out what happened to the switch. In a closing statement at the Investigation the Claimant asserted, "We didn't run over the switch and I don't know what happened to it."

After his conversation with the Foreman, Mr. Crews immediately drove to the location of the switch and saw that the switch point rod was bent over. It looked to him, he stated, as if a vehicle with a rubber tire had backed into the switch and hit the switch point rod. Crews testified that the damage appeared to have been done within the last few hours because there was fresh dirt on top of the tie. Mr. Crews said that he saw one tire mark leading up to the tie that was under the switch apparatus. Crews called a Signal Technician to come to the scene to examine the switch. The Signal Technician did not have the parts with him to make the repair, but reported the damage to his supervisor, Roadmaster Hendricks. Crews went to the office and also gave the Roadmaster a report

of what he knew about the damaged switch.

Nelson A. Weber, Manager, System Teams and Work Equipment, testified that he was in charge of the Systems production team on which the Claimant and the Foreman worked and that he was not properly notified of the damaged switch. He learned of it that evening about 5:15 p.m. when he received a telephone call from Pete Crutchfield, a manager or supervisor, who told him that something had happened to a switch at the passenger station in Savannah. Nobody from the T3 team had notified Weber that there had been an incident with a switch that morning. Mr. Crutchfield, who was traveling by air at the time, had learned of the incident from a telephone message left on his cell phone by Roadmaster Hendricks.

After speaking with Mr. Crutchfield, Manager Weber called Foreman Morris and the mechanic, Mr. Thomason, and had them meet him at the Savannah passenger station. Foreman Hendricks also was present. Mr. Weber examined the switch and inspected the tires of Foreman Morris's and mechanic Thomason's vehicles. He also took pictures of the area. There had been a very strong rain in the afternoon that had washed away any tire tracks that might have been on the ground. Mr. Weber saw no damage to the tires on either vehicle.

At the formal Investigation, Mr. Weber, who on the day in question was the Claimant's and the Foreman's immediate supervisor, went through the various rules listed in the charge letter as allegedly violated by the Claimant and testified why in his opinion those rules were violated by the Claimant. Foreman Morris was charged with the same violations, but a separate hearing was held in his case.[1] According to Mr. Weber's

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[1]Foreman Morris's case is the subject of Award No. 10, decided by this same Public Law Board No. 7120. It was brought out in that case that Mr. Crutchfield was Foreman Morris's and

testimony, since he was in charge of the system production team, the employees under his charge should have notified him about the switch at the time the damage was discovered.

Following the hearing, by letter dated April 15, 2008, the Assistant Chief Engineer System Production notified the Claimant that "[a]s a result of the testimony and other evidence presented in this investigation, it has been determined that you failed to notify CSX management of an incident that occurred on February 26, 2008, which in turn hampered a proper investigation." He was assessed discipline of a 5-day actual suspension, with a 15-day overhead suspension to be in effect for one year from the date of the incident and to be removed from his record if he was discipline-free for that period.

At the outset of the hearing the Organization requested that the Investigation be concluded and the charges against the Claimant dropped because the Carrier took a written statement from the Claimant without offering him the opportunity to contact his accredited union representative. In addition, the Organization representative stated that he (the representative) was not provided a copy of the Claimant's statement.

The applicable provision of Rule 25, Section 1(c) states as follows:

> (c) An employee who is required to attend an investigation and or make a statement prior to a hearing in connection with any matter which may eventuate in the application of discipline to any employee shall be offered the opportunity to contact his accredited union representative before a statement is reduced in writing. A copy of his statement, if reduced in writing and signed by him, shall be furnished him and his union representative.

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the Claimant's immediate supervisor on the date in question, February 26, 2008. Because of Mr. Crutchfield's absence that date, Mr. Weber acted in the position of Foreman Morris's and the Claimant's immediate supervisor.

Neither party presented any prior award interpreting Rule 25, Section 1(c) that might aid this Board in applying the provision in this case. The Board will therefore make its own unaided interpretation.

By its terms the clause applies to two situations: (1) where an employee is required both to attend an investigation and make a statement prior to a hearing; or (2) where an employee is required to make a statement prior to a hearing, but not necessarily also to attend an investigation. In both examples, however, the clause states "prior to a hearing in connection with any matter which may eventuate in the application of discipline. . . ." The question which arises is whether there must actually be a hearing scheduled at the time that the employee is required to give the statement or if it is sufficient that a hearing may be ordered depending on the information contained in the statement plus any other facts that a particular investigation uncovers.

The Board notes that, with regard to discipline, the clause states, "which may eventuate in the application of discipline to any employee. . . ." There is no similar language with regard to the hearing. For example, the clause does not state "or make a statement the content of which may cause a hearing to be held" or similar language. Instead it states "or make a statement prior to a hearing. . . ." In the absence of any contrary ruling or other authority presented to this Board, the Board finds that there must be a hearing actually scheduled or in the process of being scheduled at the time that the statement is required of the employee for Section 1(c) to apply. No hearing was scheduled or in the process of being scheduled at the time the Claimant was requested to give a statement. According to the testimony, the statement was requested for investigatory purposes only. On the record before us, the Board finds that there was no requirement to offer the Claimant the opportunity to contact his accredited union

representative before he was instructed by the Carrier to give a statement.

So far as whether the Carrier was required to provide a copy of the statement to the Claimant's union representative, there was no requirement to do so before a decision was made to hold a hearing. Once a hearing was scheduled, however, then, in this Board's opinion, there was an obligation to provide a copy of the Claimant's signed statement both to the employee and his union representative. A copy of the statement was made available to the Claimant and his union representative at the hearing. That literally fulfilled the Carrier's obligation under the last sentence of paragraph (c) of Rule 25, Section 1. In the absence of bargaining history showing a broader intent or the citation of authority requiring voluntary production of the statement prior to the hearing, the Board is not prepared to require more than a literal compliance with the contractual provision.

There is no evidence that the Organization requested a copy of the statement prior to the hearing. The Board therefore does not here rule on the question of whether, upon request, the Carrier is required to make available to the Claimant and his union representative prior to a scheduled hearing any signed statement made by the employee before the hearing.

In the present case it was, or should have been, apparent to the Claimant and his Foreman that there was a good chance that either the Foreman's or mechanic Thomason's vehicle damaged the switch on the track going into the Savannah passenger station. The Claimant was present when the Foreman called over mechanic Thomason and asked him if he had hit the switch. This shows that the Foreman, and no doubt also the Claimant, were aware of the possibility that either the Foreman's or the mechanic's truck had struck and damaged the switch.

In his written statement, Mr. Crews said that on inspecting the switch after the

Foreman told him that it was damaged he saw that there were tire marks in front of the switch and upon the top of the tie that were angled toward the bent rod and the broken housing. In his testimony at the Investigation Mr. Crews stated that after inspecting the switch he concluded that something with a rubber tire had backed into the switch and hit the switch point rod. Because there was fresh dirt on top of the tie, Crews testified, it was his opinion that it had happened within the last few hours. Most probably the Foreman and the Claimant, when they examined the switch, also saw the dirt and the tire marks and were aware of their significance in terms of revealing how the switch was damaged.

Mr. Crews also said in his statement that after his visit to the switch he called Foreman Morris and told him that the signal maintenance people would have to replace the switch machine. Foreman Morris, according to Mr. Crews's statement, then commented that if it was not the mechanic's truck, it must have been his. Mr. Morris did not deny making that statement. Although Foreman Morris does not speak for the Claimant, both men were in the same place at the same time and saw the same switch on the track leading into the Savannah passenger station on the morning in question. Both men have many years of experience in the railroad industry. If the probability that either Foreman Morris's truck or mechanic Thomason's truck had done the damage to the switch was apparent to Foreman Morris, it is not likely that the same conclusion would have escaped the Claimant.

If someone on a gang does damage or sees someone else from his gang do damage, the accepted practice is to report the incident to the supervisor of the gang. Foreman Morris admitted this to be true in the Investigation. Thus he was asked at the hearing, "Now, had you personally did damage or saw someone on your gang do damage, then you would have contacted Mr. Weber, correct?" He answered, "If I know that for a fact, yes.

If I see it, yes. Or somebody comes to me and tells me, yeah, sure."

He was then asked, "But you were treating this as observing something that was not associated with what your work was actually being done? Just you visually seeing something and reporting it to the proper employee-in-charge?" He answered, "That's right."

The Foreman and the Claimant acted responsibly in reporting the damaged switch to the Employee-in-Charge. Since Mr. Crews had authority to control train movement on the stretch of track on which the switch was located, it would be reasonable for the Foreman and the Claimant to expect him to take the necessary steps to have the switch repaired. Mr. Crews, in fact, did call a Signal Technician to make the repairs.

However, this was not a situation where the gang saw a broken wire or a broken bolt in the course of laying ties under a railroad track. This was a case where it was apparent, or at least should have been apparent, to the Foreman and the Claimant that there was a good possibility that a member of their own team did the damage to the switch. As Foreman Morris testified, when he or a member of his gang does damage, the accepted procedure is to report the matter to the supervisor. That was this situation. Reporting the incident to the Employee-in-Charge did not relieve the Foreman and the Claimant of their responsibility to report the damaged switch–which their team could have caused–to their supervisor, Mr. Weber, so that he could investigate the matter. The Employee-in-Charge, as the Claimant and his Foreman knew, had no authority to conduct an investigation into the cause of the damaged switch.

The primary responsibility to report the incident was on Foreman Morris. As he testified, "I'm the senior employee. That's my job." The Claimant, who was together with the Foreman, was aware that the Foreman did not report the incident to Mr. Weber

and, so far as appeared, had no intention of doing so. In these circumstances, the Claimant should either have attempted to persuade the Foreman to notify Mr. Weber of what happened or reported it himself.

Not only was it the recognized practice to report an incident such as the present one to the supervisor or manager in charge, but there are specific rules that place an obligation on an employee to do so. General Rule F of the CSX Operating Rules, for example, states, "The following conditions must be reported promptly and by the quickest means to the proper authority: 1. Accidents. . . ." Running over the switch was certainly an accident, and, as the Claimant and the Foreman both knew, there was a distinct possibility that someone from their team had just damaged the switch by accidentally hitting it with his truck. The proper authority to report the incident to was the manager in charge of the team, Mr. Weber.

General Safety Rule GS-5. E. states:

GS-5. Reporting Injuries or Incidents

. . .

E. All incidents

Employees must immediately report to the train dispatcher or supervisor all incidents involving equipment and any other incident involving loss or damage to CSX property.

In this case, as discussed above, there was a reasonable possibility that either Foreman Morris's truck or mechanic Thomason's truck had run over the switch and damaged it. That constitutes an "incident" within the meaning of General Safety Rule GS-5. E. It was not reported either to Mr. Weber or to the train dispatcher. That was a rules violation.

The Board finds that the Carrier has established by substantial evidence that the

Claimant was guilty of failing to notify CSX management of the February 26 incident involving damage to company equipment, one of the allegations in the charge letter. The Claimant thereby violated General Rule F and General Safety Rule GS-5. E. The discipline assessed for the violations was within the range of reasonableness and will not be disturbed by the Board. The claim will be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
August 25, 2008