Award 1

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:

By letter dated September 21, 2007, the Carrier instructed Kaleo E. Griffin (" the Claimant") to attend a formal hearing on October 3, 2007, "to ascertain the facts and determine your responsibility, if any, in connection with an alleged on duty personal injury that occurred on Friday, August 31, 2007 at approximately 1300 hours, at CP 431 on the Buffalo Terminal Subdivision Buffalo, NY, as reported by you at 0613 hours on Thursday, September 6, 2007." The letter continued that in connection with the incident the Claimant was charged as follows:

1. Failure to properly report an on duty personal injury in possible violation of CSX Safeway Rule GS5 (as amended by System Bulletin 001 - dated June 28, 2007, and effective 0001 hours on July 1, 2007), and CSX Operating Rules - General Rules A & S.
2. Failure to properly exit the company boom truck in possible violation of CSX Safeway Rules GS-8 and GS-12.

The letter stated that the Claimant was "being withheld from service pending the outcome of the above hearing." At the request of the Organization the hearing was postponed to October 11, 2007.

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.

At the time of the incident the Claimant was employed by the Carrier as a Machine Operator in Frontier Yard at Buffalo, New York. He began his employment with the Carrier on March 20, 2002. He testified that on August 31, 2007, at approximately 1300 hours, after he had finished lunch, he dismounted the boom truck, maintaining three point contact, and his right foot slipped and lost contact with the chain step. He maintained three point contact, he stated, but he weighs over 300 pounds, and his momentum carried him down, and his right knee was on the ground. He did not report the incident that day, August 31. It was his understanding, he testified, that lunch was over, and he was returning to work.

Joshua E. Brass, Engineer of Track, testified that on September 6, 2007, at approximately 0613 hours the Claimant called him and reported that he needed medical attention. The Engineer told the Claimant to come to work, and they would sit down and decide if he really needed medical attention. The Claimant agreed to come to work, but, because his knee was swollen and giving him pain, he immediately reconsidered and called his immediate supervisor, Roadmaster Christopher Wesley Hicks, on Hicks's cell phone to report that he was going to the doctor.

The Roadmaster testified that the Claimant left a voice mail stating that he had hurt himself dismounting the boom truck by missing the third step and hurting his knee; that his knee was swollen and was giving him pain; that it affected his walking; and that he

had to go to a doctor to make sure that everything was okay. The Roadmaster informed the Engineer of the Claimant's voice message, and the Engineer went to the hospital into the treatment room, where he gave paperwork to the Claimant that had to be filled out in connection with the injury.

The Engineer waited at the hospital for the Claimant to be treated, and the Claimant came out of the treatment room with crutches and a brace on his injured leg. The Claimant gave the Engineer a form that the doctor had filled out. In the waiting room the Engineer assisted the Claimant in filling out the form that an injured employee is required to complete.

CSX Safeway Rule GS-5 in effect at the time of the incident provided as follows:

GS-5 REPORTING OF INJURIES OR INCIDENTS

A. ON DUTY INJURIES

ANY EMPLOYEE EXPERIENCING AN ON-DUTY INJURY MUST REPORT THE INJURY TO A SUPERVISOR AT THE TIME OF THE OCCURRENCE OR PRIOR TO LEAVING THE PROPERTY ON THE DAY OF THE OCCURRENCE SO THAT PROMPT MEDICAL TREATMENT MAY BE PROVIDED. A FORM PI-1A MUST BE COMPLETED BY THE EMPLOYEE REPORTING THE INJURY. (EXCEPTION: AN EMPLOYEE DEPARTING THE PROPERTY TO OBTAIN URGENT MEDICAL ATTENTION FOR A SERIOUS INJURY MUST REPORT THE INJURY TO A SUPERVISOR AND COMPLETE THE FORM PI-1A AS SOON AS PRACTICABLE.)

B. MEDICAL ATTENTION

EMPLOYEES MUST IMMEDIATELY NOTIFY THEIR SUPERVISOR OF THE DECISION TO SEEK MEDICAL ATTENTION AS A RESULT OF AN ON-DUTY INJURY. THIS REQUIREMENT IS INTENDED TO FACILITATE WORK COVERAGE AND TIMELY REGULATORY REPORTING

* * *

D. INFORMATION CONCERNING INJURIES

EMPLOYEES WITH KNOWLEDGE OR INFORMATION CONCERNING AN INJURY OR ACCIDENT TO THEMSELVES, ANOTHER EMPLOYEE OR NON-EMPLOYEE MUST REPORT THE INFORMATION TO THEIR SUPERVISOR AT THE TIME OF THE OCCURRENCE SO THAT EMERGENCY ASSISTANCE AND PROPER MEDICAL CARE CAN BE PROMPTLY PROVIDED.

* * *

The Engineer testified that the Claimant violated Rule GS-5 because he did not report his injury on August 31, 2007, at the time of the occurrence or before leaving the property on the day of the occurrence, as provided in that rule.

The remaining rules referred to in the charge letter that the Claimant was charged with possibly violating stated as follows:

General Rules

A. Employees must know and obey rules and special instructions that relate to their duties. When in doubt as to the meaning and application of any rule or instruction, employees must ask their supervising officer for clarification.

* * *

S. In case of doubt or uncertainty, the safe course must be taken.

General Safety Rules

GS-8 Protection Against Slips, Trips, and Falls

Constant awareness and concentration are your best protection against, slip, trip, and fall hazards, both on and off the job. Always pay attention to what you are doing and where you are going.

* * *

- Do not take a step unless you have a clear view of where you intend to place your foot

* * *

- When placing your foot on any surface, do so in a defensive manner.
- Avoid placing your foot in any place or against any object that will cause you to trip.
- Avoid slippery, unstable, or uneven surfaces whenever possible; if you have to work on these surfaces, slow down and take short steps.

* * *

- Use handholds or hand rails where provided.

* * *

GS-12 Getting On or Off Equipment

A. Getting on or off equipment:

- Before getting on equipment, scan the area of the equipment you will get on to make certain that it is free of hazards.
- Before getting off equipment, stop at the bottom step or ladder rung to observe where you are going to place your feet.
- Dismount equipment in an area that provides solid footing and does not have any object or condition that would cause you to stumble or fall.
- Always face the equipment.
- Maintain three points of contact (two hands and one foot or one hand and two feet).
- Maintain a handhold until your feet are firmly positioned.
- Keep clear of adjacent tracks.

* * *

The Engineer testified that the Claimant violated General Rule A to the extent that he violated other rules, including Rule GS-5. The Claimant violated General Rule S, according to the Engineer, because on the date of the occurrence, August 31, 2007, if he "was doubtful or uncertain that he had indeed sustained an injury, he should have taken the correct and safe course, which would have been to report it to a supervisor."

Rule GS-8 was violated by the Claimant, the Engineer testified, because he "wasn't aware of where he was putting his feet. He wasn't aware of his stance on this vehicle in proportion to himself getting out of the vehicle. Had he been aware of where he was putting his feet, and where he was going to place his feet, his body weight would not have fully been engaged on his one knee." In addition, the Engineer stated, he did not place his foot on the step in a defensive manner. Had he acted defensively, according to the Engineer, he would have placed his foot on the step and made sure he had a firm step before continuing his movement out of the truck. Further, the Engineer testified, if the Claimant had three point contact he would not have had all of his body weight come

down on his right knee.

The Claimant also violated Rule GS-12, the Engineer testified, in the following ways: 1) he entered the truck although it was not free of hazards; 2) he should have stopped at the bottom step or ladder rung to observe where he was going to place his foot; 3) he failed to look where he was going to place his feet and missed a step altogether; 4) he stepped where he did not have solid footing; 5) he failed to maintain three point contact because if he had two hands and one foot in place, that would have kept him from having all of his body weight come down on his right leg; 6) he failed to maintain a handhold until he was firmly positioned.

The Engineer and the Claimant both filled out forms related to the injury on the date of the Claimant's visit to the hospital. Form PI-1, Personal Injury/Occupational Illness Report, completed by the Engineer, contained the following comments:

> Employee states while exiting truck after eating lunch he missed third step with right foot jamming his right knee.
>
> Employee states that while exiting rear of truck passenger side he missed third step, a chain linked step that @ max can swing inward 1¼ in. He missed step and jammed knee.
>
> Employee states pain started in knee Tuesday, and was swollen by Wednesday.

The Claimant filled out an Employee's Incident Report, Form PI-1A, which described the incident as follows:

> While steping [sic] out of Boom truck, I missed the final step, puting [sic] all weight on my right knee. Continued to work, all week. Knee began to swell Tues. Worked Weds. My knee began to swell even more Wed night went to St Joes hospt. Thurs morning.

The Claimant checked "Yes" to the question, "Did defective tool or equipment cause incident.?" To the question "If Yes, Describe and Specify Defect," the Claimant wrote, "Swinging third step on Boom truck."

The Engineer testified that the Claimant called him at 6:13 in the morning on September 6 and said that he wasn't doing too well, that his knee was swollen and he was going to the hospital for medical attention. According to the Engineer, he asked the Claimant what happened, and the Claimant stated that he (the Claimant) hurt his knee and that "he wasn't real sure exactly when he did it, on what day, or what time, or where."

Roadmaster Christopher Wesley Hicks testified that on both August 31, and September 6, 2007, the Claimant worked under his area of responsibility. Hicks was covering for another Roadmaster for that whole week. Roadmaster Hicks testified that he did not see or visit the Claimant on the latter's assignment on Friday, August 31st. Monday, September 3 was a holiday. On Tuesday, September 4, Roadmaster Hicks stated, the Claimant was present at the job briefing that Hicks gave. He did not recall whether he saw the Claimant on Wednesday, September 5.

Roadmaster Hicks testified that on September 6 he held back the employee who had worked with the Claimant on the day of the injury, August 31st. He also held back employees who had worked with the Claimant on September 4th and 5th. Regarding all three days, according to his testimony, the Roadmaster asked the employees who worked with the Claimant whether they noticed if he had been hurt, if he was limping, if he was able to complete his duties. They all stated, the Roadmaster testified, that they did not see him hurt himself, that he was able to complete his duties, that the Claimant had not reported being injured, that they noticed nothing out of the ordinary with the Claimant. This included the employee who worked with the Claimant on August 31.

The Claimant testified that he called the Engineer on Thursday, September 6, and told him that his knee was hurting real bad, it was swollen, that he needed medical attention, and was going to the hospital. He told the Engineer, the Claimant testified, that

it could possibly have been the result of an incident while on duty but that he was not sure. Asked by the hearing officer whether he was "sure now that the incident at approximately 1300 hours, on Friday, August 31st is what caused your knee to swell," the Claimant testified, "No, I'm not sure now that that was the actual incident that caused my knee to swell."

When he began to work on Tuesday, using a crowbar and putting pressure on his knee, the Claimant stated, is when his knee began to swell. According to the Claimant, the doctor said that the pain was from the pressure on his knee. He did not have any problem with the knee, the Claimant reiterated, until he began to work Tuesday and put pressure on his knee. In the hospital, when requested to fill out the form, the Claimant testified, the only thing that he could think of that caused his condition was that he missed the step and jammed his knee.

The Claimant was asked by the hearing officer whether he failed to properly exit the company boom truck in violation of CSX Safeway Rules GS-8 and GS-12 on Friday, August 31, 2007. He answered, "I understand I complied with all these regulations of CSX policy in exiting the boom truck." Asked to relate how he missed the step, he testified, "Just as exiting and dismounting the boom truck facing, or following all the rules. When I put my foot down the chain step swung underneath, not completely underneath, but underneath enough where my foot missing it and my momentum that I'm three hundred and thirty pounds; moving in one direction that carried me all the way, my foot all the way down to the ground."

Asked by the hearing officer if he knows the proper definition of three point contact, the claimant answered, "Yes, two hands, one foot, or two feet and one hand." Questioned if he thought that with proper three point contact he still would have gone

down to the ground, the Claimant stated, "Yes, I do."

The Claimant testified that the reason he called the Engineer on Wednesday, September 5, was to inform him where he was going, that CSX policy requires employees to inform the company if they are not coming to work. In the hospital, the Claimant stated, an x-ray was taken, and it was explained to him that he had a slight tear in the meniscus caused by the jam in his knee. They called it a knee sprain, he testified.

He explained to the Engineer, the Claimant stated, that the only incident he had with his knee was when he was dismounting the boom truck on Friday, August 31st, using proper three point contact. He wrote down that he missed the step, the Claimant testified, but in actuality his foot touched it slightly and slipped off. With his weight, the Claimant explained, he could hold himself only so long. His momentum carried him down, the Claimant stated, and his leg jammed. He continued to work, the Claimant testified, and it wasn't a problem. This was the first time he was injured on the job, the Claimant stated.

Asked at the conclusion of the hearing if he had any further comments or questions, the Claimant stated, "Yes, I do. I did not realize I had sustained an injury, nor did I believe I was injured as we dismounting [sic] the boom truck on August 31st. I believe I complied with all rules and regulations of CSX Policy, and this injury would not have happened if that chain stair or step was more secure than what it is. . . ."

By letter dated October 31, 2007, the Carrier notified the Claimant that following a thorough review of the transcript of the proceedings and the exhibits, "it was determined that substantial evidence was established to find you guilty as charged." The letter further stated:

> Based on the proven offences in this instance, it has been determined that the appropriate measure of discipline should be 30 work days actual suspension, time

out of service to apply, ending on October 15, 2007. You may return to work upon approval of CSXT Medical Dept., a copy of the required MD-3 is attached for your use. This form must be filled out by your physician and forwarded to Medical Department.

In a discipline case the burden of proof is on the Carrier both as to the guilt of a charged employee and the appropriateness of the discipline given. Although the discipline letter did not explain the Carrier's reasoning regarding the guilty findings on each of the rules cited in the charge letter, Engineer Brass testified in what way in his opinion each of the rules was violated.

The Engineer testified that the Claimant violated Rule GS-5 because the Claimant did not report his injury on August 31st, the day of the occurrence. The Board finds, however, that there is no substantial evidence that the Claimant knew that he injured his knee on that date. According to the Claimant's testimony he was not aware that when he missed the step and jammed his knee, he sustained an injury to his knee. According to his testimony, he did not perform any strenuous work on Friday, August 31, after the incident, and he had no swelling or pain in the knee until the following Tuesday.

Roadmaster Hicks's testimony supported the Claimant's testimony regarding the factual issue of whether there was evidence of an injury of the Claimant as of August 31. He testified that he questioned the employee who worked with the Claimant on August 31 if he noticed whether the Claimant had been hurt or was limping, or if he had anything out of the ordinary to report about him, and that the answer was negative to all of his questions. The Claimant testified without contradiction that he was informed at the hospital that he had a small tear of the meniscus. Although the Physician's Initial Report of Injury or Illness, introduced into evidence as a Carrier exhibit, is not the most legible

document, the word "meniscal" clearly appears on it in the section on PHYSICAL EXAMINATION. The authoritative Mayo Clinic website in an article on **Knee pain, Meniscus injuries**, states as follows:

> • **Meniscus injuries.** The meniscus is a C-shaped cartilage that curves within your knee joint. Meniscus injuries involve tears in the cartilage, which can occur in various places and configurations. For example, the cartilage may tear lengthwise or from the inside to the outside rim of the meniscus (radial tear). Although you may not notice small tears, in most cases you'll have pain and mild to moderate swelling that develops over 24 to 48 hours. Occasionally, a lengthwise tear flips into the knee joint instead of staying around the joint's edge, an injury called a bucket-handle tear. A flap of the torn cartilage can interfere with knee movement and cause your knee to lock so that you can't strengthen it completely. Meniscal injuries that cause locking of your knee should be surgically treated. Meniscal tears that don't cause locking, including those of a degenerative nature, can usually be managed nonsurgically. (emphasis added)

The Mayo article states that for small meniscal tears, in most cases, pain and mild to moderate swelling will develop over 24 to 48 hours.

The incident in question occurred at approximately 1:00 p.m., only a couple of hours before the end of the Claimant's shift. In light of the Mayo Clinic article it is not at all surprising that the Claimant would have had no symptoms at work on the day of the incident. There is no credible evidence in the record that the Claimant had any symptoms of an injury on August 31, 2007. There would therefore have been nothing to report and no violation of Rule GS-5 as of that date. Nor would there have been any violation of Rule S, "In case of doubt or uncertainty, the safe course must be taken." In the absence of evidence of symptoms of an injury, there is no basis for finding that on August 31, 2007, the Claimant was in doubt or uncertain of whether he had injured his knee.

There is also a significant element of mitigation present in the case. In the Employee's Incident Report the Claimant stated that the incident was caused by defective equipment, namely, a "swinging third step on Boom truck." No Carrier or any other

witness contradicted that assessment of the Claimant. It is undenied in the record, therefore, that the Carrier was also at fault in this case in that it provided defective equipment which contributed to the Claimant's injury. That is an important element of mitigation in this case.

A 30 workday suspension is very severe discipline. There is no general rule in the railroad industry that necessarily mandates a 30 workday, or even a 30 calendar day, suspension for late reporting of an injury even when accompanied by violations of safety and operating rules. The specific facts of each case, including such considerations as whether the injury was immediately apparent; the length of the delay in reporting the injury; the consequences of the delay; whether the employee involved misrepresented facts; whether there was suspicion of fraud; whether the employee filed a claim against the Carrier in connection with the injury and, if so, when; whether medical treatment was sought and when; and other considerations are all taken into account in assessing the degree of discipline, if any. See, for example, Third Division Award No. 3-38960 (ten working day suspension for 16 day delay in reporting injury to employee's shoulder and for violation of three operating rules and one safety rule; no evidence of mitigating circumstances).

In the present case contrary to the testimony of the Carrier's witness that by failing to report his injury on August 31, 2007, the Claimant violated several Carrier rules, including Rule GS-5 requiring the immediate reporting of injuries, there is no substantial evidence that the Claimant was aware that he had been injured on August 31, 2007, the date of the incident. The Board finds therefore that the Claimant's failure to report an on-duty injury to the Carrier on August 31, 2007, did not violate any Carrier rule.

The Claimant should have reported an injury to his knee on Tuesday, September

4th, when his knee began to swell at work. A reasonable person, the Board believes, would have associated the pain and swelling the Claimant experienced on Tuesday with the incident of the previous Friday. For this failure some discipline is warranted. Although, within 48 hours after he began to have symptoms, and before seeking any medical treatment, the Claimant did report his condition to both the Roadmaster and the Engineer, a reasonable reading of Rule GS-5 would require that an employee report an injury as soon as he is aware of it, even though he may not immediately be aware of it at the time of the occurrence.

There is a suggestion in the record that the Carrier did not believe the Claimant's story that he was injured at work on August 31. That implication is discerned by the Board in the testimony adduced by the Carrier that five employees who worked with the Claimant, including an employee who worked with him on August 31, were questioned and all stated that they saw no sign of an injury on the part of the Claimant on August 31 or on September 4 or 5. The Board finds, however, that it is consistent with the nature of the Claimant's injury that he would not have shown any symptoms of injury in the two or three additional hours that he worked on August 31 following the incident. In addition, in view of the condition of the Claimant's knee on Thursday morning, September 6, 2007, when he was given crutches and a brace at the hospital, the Board believes it very likely that had anyone examined the Claimant's knee at work on the preceding Wednesday and Thursday, he would have seen that the knee was swollen.

The Board finds no evidence of misrepresentation or fraud on the part of the Claimant or any substantial evidence that he had symptoms of an injury while at work on August 31, 2007. There is a significant element of mitigation present in this case in that the Carrier was also at fault in the injury in that it permitted the Claimant to work on a

boom truck with a defective step that contributed to the incident and the Claimant's injury. The Board believes that in view of the weight of the Claimant, even by maintaining three points of contact, once he missed the swinging, unstable step, his weight would have caused him to fall to the ground. Taking into consideration all of the circumstances of this case, the Board is of the opinion that the evidence does not support discipline of more than a five-day suspension. The Claimant shall be made whole for the difference between his lost wages and benefits as the result of the 30 working day suspension imposed on him and what his lost wages and benefits would have been for a five workday suspension.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
Dated: March 17, 2008

Carrier's Dissent to
Public Law Board No. 7120,
Award No. 1
Referee Sinclair Kossoff

The Majority's logic and decision in favor of the Petitioner in this case failed to recognize well-established practices in this industry, as well as Section 3, Second of the Railway Labor Act, when the Neutral referenced information from the Mayo Clinic Website, which was not presented on the property. The Board, in its decision, stated *"[a]lthough the Physician's Initial Report of Injury or Illness, introduced into evidence as a Carrier exhibit, is not the most legible document, the word 'meniscal' clearly appears on it in the section on PHYSICAL EXAMINATION. The authoritative Mayo Clinic website article on Knee pain and Meniscus injuries, states. . ."* The Board then detailed *"[t]he Mayo article states that for small meniscal tears, in most cases, pain to mild moderate swelling will develop over 24 to 48 hours."* Thus, the basis for reducing the discipline was influenced by the Mayo article which was never discussed by any party on the property.

The Carrier respectfully urges the Board to read Sections 7 and 8 of the November 19, 2007 Agreement establishing the Board and its functions which dictates:

> 7. *Within thirty (30) days after receipt of the discipline employee's notification of his/her desire for expedited handling of the discipline assessed, the Carrier member of the Board shall arrange to transmit to the Referee one copy of each of the following: (1) notice(s) of investigation(s); (2) transcript(s) of the hearing(s); (3) notice of discipline; and, (4) discipline employee's service record . . .*
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> ****
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> 8. *The Board's disposition of the dispute shall be based solely on the material supplied under Section 7. In deciding whether the discipline assessed should be upheld, modified or set aside, the Board shall determine (1) whether there was compliance with the applicable working agreement; and (2) whether substantial evidence was adduced at the hearing(s) to prove the charge(s); (3) whether the discipline assessed was appropriate* (emphasis applied).

Clearly, the Board's main determination was based upon evidence which clearly was not developed on the property, but introduced at the Board's own pleasure, in apparent violation of the very narrow clauses establishing its functions.

The Carrier concludes the Board's findings were patently erroneous and of no precedent-setting value in any future case and respectfully dissents.

4/9/2008
Date

James C. Amidon
James C. Amidon,
Director Labor Relations