

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

N. A. Weber, Manager SPT Teams, by letter dated March 17, 2008, notified J. D. Morris, 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 Foreman of the timbering portion of the T-3 T&S team. The timbering team's equipment was parked for a period of time on the Charleston subdivision in Savannah, Georgia, preparatory to moving ahead on the main line on the Jacksonville division. When the operator went to restart the paint gauge buggy it would not start. The operator called for help, and the Claimant and the Assistant Foreman, Carl Bauer, drove in the Foreman's truck to the place where the paint buggy was parked to see if they could get it started.

The Claimant 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 to help. The mechanic soon left, however, when he saw, and the Claimant confirmed, that he (the Claimant) had successfully started the paint buggy. A short while later the mechanic returned after he received a call on his radio from the Claimant stating that the Claimant was stuck in the mud and needed help to get out. Using a chain, the mechanic was able to extricate the Claimant's vehicle from the mud.

The Claimant drove his truck down the road next to the track to exit the site. As he passed a switch on the track, he saw that the switch did not look right. He stopped his vehicle and went to examine the switch. He saw that the rod was bent down and that the corner of the switch stand box was broken. The Claimant called the mechanic to come look at the switch and asked him if he had hit it. The mechanic, according to the Claimant's written statement, said that he did not think so.

In inspecting the switch the Claimant determined that it did not pose a danger for train traffic. Nevertheless, according to his written statement, he knew that the switch had to be attended to. He therefore drove to the Employee-in-Charge and reported the

damaged switch to him. He asked the Employee-in-Charge if there was something that he (the Claimant) could do. The Employee-in-Charge told the Claimant that he would call a signal maintenance person and would get back to the Claimant.

The Claimant's immediate supervisor was Pete Crutchfield. Mr. Crutchfield was traveling on February 26, 2008, and Nick Weber was the Claimant's acting supervisor for that day. The Claimant did not notify Mr. Weber about the damaged switch. The Claimant was asked if there was any reason why he did not call Mr. Weber to the scene so that he could investigate it. The Claimant replied that he wanted to get the traffic stopped if need be and the correct people to get there to take care of the situation. The fastest way to do that, he stated, was through the Employee-in-Charge.

The Claimant testified that he did not strike the switch; nor did he observe anyone else strike the switch. He feels, he stated, that once he discovered that the switch was damaged he contacted the proper authority, namely, the Employee-in-Charge. The Employee-in-Charge, the Claimant testified, has the phone numbers of the immediate supervisor whose territory included the switch. He did not even know who the dispatcher for that immediate area was, the Claimant stated. "We had no way to get a hold of them," the Claimant testified. He feels that he did the safest thing for CSX, the Claimant asserted, and did not violate any rules.

The Claimant acknowledged that if one of his pieces of equipment possibly struck a switch, he would be in charge of investigating the incident. He was asked why then he did not notify Mr. Weber about the switch since he did not know who hit it. He answered, "Because wasn't none of my machines there." He was reminded that he and the roadway mechanic were in the area with their trucks. He stated that his truck did not hit the switch and that he is not in charge of the roadway mechanic. The Claimant

acknowledged that the mechanic is a member of the T-3 team and that the latter's truck had been in the general area of the switch.

The Claimant stated that he took no initial steps toward starting an investigation. For example, he made no notes on the track chart that he found a damaged switch. He did not note the location of the switch on the track chart. The Claimant testified that an outside party could also have caused the damage.

On February 26, 2008, Donald E. Crews, Road Crossing Foreman, was the Employee-in-Charge running the 707 work authority on the Savannah subdivision. A 707 work authority, he explained, is a segment of track between points A and B that is being worked on. "[T]rains have to talk to us before they enter the work limits," Mr. Crews stated.

Around 11:30 or 11:45 a.m. on February 26th, Mr. Crews stated, the Claimant drove up to him and said that he (Crews) needed to go to the south end of the passenger station and look at a switch rod that was bent. Mr. Crews went to the site and saw that the switch point rod was bent over. There were fresh tire marks and some dirt marks at the head of the tie next to the bent rod on the switch machine. The road next to the tracks, Mr. Crews testified, is used for CSX access, but he has seen the public pull down in there and turn around and go back out in the opposite direction.

Mr. Crews stated that the first thing he did was call the signal technician on his cell phone, who said that he would be there in 5 or 10 minutes. The signal technician was in Roadmaster Hendricks's office at the time, and he informed the Roadmaster of Mr. Crews's call. "Once George [the signal technician] got to where I was," Mr. Crews testified, "we both then went back to the office because he needed to call his supervisor and I reported it to the Roadmaster which he already knew of it."

Nelson A. Weber, Manager of System Production Teams work equipment, testified that on February 26, 2008, the Claimant was working for him as Foreman for the timbering portion to the T-3 T&S team. Between 5:00 and 6:00 o'clock that evening Pete Crutchfield, who was changing planes in Atlanta, called Mr. Weber and said that there had been some type of incident with a switch earlier in the day and that Weber had to go around there and see what was going on. Mr. Weber then arranged for the Claimant and Bryan Thomason, the mechanic, to meet him at the switch at around 6:00 o'clock. Roadmaster Hendricks also showed up for the meeting.

When Mr. Weber arrived at the site he saw that a rod on the switch had been struck and that the housing was cracked. Earlier in the day there had been a heavy rain which washed away any tracks that were on the ground. Mr. Weber looked at the tires on the mechanic's truck and on the Claimant's truck but did not see anything unusual. Mr. Weber could not determine how the switch was damaged. He asked Roadmaster Hendricks if he saw anything that would enable him to determine what happened, and the Roadmaster said no.

Mr. Weber left the site to attend a safety meeting. That night he got phone calls and more questions about the damaged switch. He then went to the Claimant's hotel and took pictures of the tires on the latter's truck. The next morning he took written statements from the Claimant, the Assistant Foreman, the mechanic, and Mr. Crews. He also took pictures of the switch and the area near the switch. The log of the switch machine was pulled, and it showed that the switch went out of correspondence at 10:42:12 on 02/26/2008. Mr. Weber testified that the Claimant, Assistant Foreman Bauer, and the mechanic, Mr. Thomason, were all in the area when the switch went out of correspondence at 10:42 a.m. He is not aware of any other employees or outside parties

in the area at the time, Mr. Weber stated.

Mr. Weber testified that in order to gain access to the paint gauge buggy the Claimant drove his truck alongside the switch point and approximately 325 feet past the switch to where the paint buggy was situated. He also went past the switch on the way out. The Claimant did not notify him that he found a switch damaged, Mr. Weber stated. If he had found out about the damage earlier in the day, Mr. Weber testified, he would have gone around and inspected the area prior to the rain storm and, he believes, would have been able to develop more facts. The Employee-in-Charge, Mr. Crews, is not a company official, Mr. Weber stated, but is a contract employee on the Jacksonville division.

The Claimant asked Mr. Weber at the hearing if he found the Claimant to be an honest person. Mr. Weber stated, "Yes, sir, I do." The Claimant asked, "Then why am I here." Mr. Weber stated that because he really believed that if he had been notified by the Claimant he might have been able to come to a better conclusion as to how the switch was damaged. Mr. Weber went through each of the rules cited in the charge letter and explained why, in his opinion, the Claimant violated that rule.

Following the hearing, by letter dated April 16, 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

brought to a conclusion and the charges against the Claimant be removed from his record 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 was not provided a copy of the Claimant's statement prior to the hearing.

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.

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.

The facts of this case are substantially identical to the facts in Award No. 9 before this Board. As in Award No. 9 it was, or should have been, apparent to the Claimant that there was a good chance that either his or mechanic Thomason's truck damaged the switch on the track going into the Savannah passenger station. First, the Claimant did not see any other vehicle in the vicinity of the switch while he was in the general area. Second, both the Claimant and the mechanic backed up their trucks on the road alongside the track where the switch machine was located. The reasonable possibility existed that one of them inadvertently struck the switch while backing up. Indeed the fact that the Claimant called over mechanic Thomason and asked him if he (the mechanic) had hit the switch shows that the Claimant was aware of the possibility that either his or the mechanic's truck had hit and damaged the switch.

Mr. Crews testified that on inspecting the switch after the Claimant told him that it was damaged he saw that there were fresh tire marks leading right up to the bent rod on the switch machine. There is little doubt that when the Claimant examined the switch, he also saw those same tire marks and was aware of their significance in terms of how the damage was caused and who was responsible.

In Award No. 9, involving the very same incident as the present case, Foreman Morris (the Claimant herein) testified that had he personally done damage or seen someone on his gang do damage, he would have notified Mr. Weber. As the Foreman of his team, the Claimant had the primary responsibility to report any damage that he

personally, or any member of his team, caused to company equipment. On February 26, 2008, for the reasons discussed above, it should have been apparent to the Claimant that there was a reasonable likelihood that either his truck or mechanic Thomason's truck ran into the switch and damaged it. As the only Foreman on the scene, the Claimant had the primary responsibility to report the incident to Mr. Weber, his acting supervisor that day.

The Claimant testified that the Employee-in-Charge was the appropriate person to notify about the damage to the switch and that he notified the Employee-in-Charge, Mr. Crews. The Board agrees that it made sense to notify the Employee-in-Charge of damage to the switch on track that was under his 707 authority. The Employee-in-Charge was someone who could take the necessary steps to have the switch machine repaired. In fact the Employee-in-Charge did arrange for a signal technician to make the repairs.

But notifying the Employee-in-Charge did not relieve the Claimant of his responsibility also to notify his supervisor. The Employee-in-Charge had no authority to institute an investigation of how the switch was damaged. That, as the Claimant well knew, was within the purview of his supervisor's authority. The Claimant's failure to notify his supervisor of the damage to the switch so that an appropriate investigation could be started was a violation of accepted procedure at the Carrier.

Not only was it the recognized procedure to report such incidents to the supervisor 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 knew, there was a distinct possibility that he or the mechanic 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 the Claimant'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. Taking into consideration that the Claimant is a Foreman who had the primary responsibility to report the incident in question, the Board finds that 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.

A W A R D

Claim denied.

ORDER

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

A handwritten signature in cursive script, appearing to read "Sinclair Kossoff", written over a horizontal line.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
August 25, 2008