

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

STATEMENT OF CHARGE:

By letter dated July 1, 2008, W. D. Lupis, Manager System Production Teams, notified J. P. Wood ("the Claimant") to attend a formal Investigation on July 12, 2008, in the Roadmaster's Office in Glassport, Pennsylvania, "to ascertain the facts and determine your responsibility, if any, in connection with an incident that occurred on the 5XC5 Curve Patch Team, at approximately 0904 hours, on June 12, 2008, in Connellsville Yard, Connellsville, PA. I was informed by Mike Aquilina (Manager of Work Equipment)," Manager Lupis continued, "that he observed you not performing the required daily inspection of RTC 200102 that you are assigned to operator [sic operate?]." The letter continued that in connection with the foregoing the Claimant was "charged with failure to properly and safely perform the responsibilities of your assignment, failure to follow instruction and possible insubordination" and added that "there may have been a violation [of] CSX Operating Rules, Safety Rules, and Procedures." By mutual agreement the Investigation was rescheduled to July 21, 2008.

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.

Claimant Wood has been employed by the Carrier since April 1, 1975. At the times relevant hereto he held the position of Machine Operator and was assigned to operate the rubber-tired crane on System Production Gang 5XC5-67H. Approximately 0715 hours on June 12, 2008, Manager System Production Teams Lupis instructed the team to inspect their machines. Around 0904 hours Manager of Work Equipment Mike Aquilina told Manager Lupis that he had observed Claimant Wood and that Mr. Wood did not do a complete inspection on his machine before leaving. Manager Aquilina told Manager Lupis that he had Foreman Black stop Claimant Wood as he was leaving the hole and do a complete inspection on his machine before leaving.

Manager Lupis cited a number of rules that he believed were violated by Claimant Wood on June 12, 2008: General Regulations GR-2, which, among other things, states that employees must not be insubordinate, careless, or incompetent, and must not willfully neglect their duty; Engineering Department Safety Rule E-15, which requires an equipment operator to inspect the equipment to see that it has a properly maintained back-up alarm, a top mounted flashing amber light, a fire extinguisher, and a first aid kit; On-

Track Worker Rules 712, dealing with the inspection of on-track equipment and on-track roadway maintenance machines or hi-rail vehicles; Federal Railroad Administration regulation §214.527, requiring the operator of an on-track roadway maintenance machine to check the machine components for compliance with the Federal Railroad Administration subpart requirements prior to using the machine; and MWI 1804-02, requiring the operator of a roadway maintenance machine to inspect his machine at the beginning of each shift “for safety requirements, defects, and properly filling out the logbook.” Manager Lupis testified that not inspecting one’s machine can have serious consequences if brakes or some other part of the machine should fail and put other people in danger.

Michael A. Aquilina testified that he has been Manager of Work Equipment for 12 years. On June 12, 2008, he arrived at the C5 site, he stated, at 0615 hours. He went with the C5 mechanics to the tie-up point where the equipment had been stored at the Connellsville Yard, he stated, and no one was present at the equipment. The mechanics were there prior to the team arrival, he testified, and were trouble shooting a piece of equipment that had been running hot. The team arrived at approximately 0625 hours, according to Manager Aquilina, and Manager Lupis conducted a job briefing from approximately 0630 hours to 0700 hours.

Manager Aquilina testified that Claimant Wood wandered around the area and around parked vehicles until 0815 hours, at which time he returned to his machine and

placed a bag of ice in the cooler that was on a cart attached to his road crane. Claimant Wood, according to Manager Aquilina, then climbed into the cab, signed off the daily inspection sheet or logbook, and exited the machine. Next, Manager Aquilina testified, Claimant Wood walked around the area until 8:50 hours, at which time he checked the oil in his crane, removed the portable rails off in the storage box, filled the cell with fuel, and placed it on the front of the crane. At 0904 hours, Manager Aquilina stated, the Claimant started the crane, placed it in a hi-rail configuration, and began to tram out. At that point Manager Aquilina stopped Foreman Black and directed him to have the Claimant do a proper inspection on the crane. The Claimant then performed the inspection in conjunction with Foreman Black.

In response to questions by the Organization Representative, Manager Aquilina testified that he saw Claimant Wood climb into his cab, fill the logbook out, put it back in a bag, and then climb back out of the cab. In response to the hearing officer's questions, Manager Aquilina testified that prior to the Claimant's filling out the logbook, he (Mr. Aquilina) did not see the Claimant inspect any of the items listed in the logbook such windshield, lights, mirrors, wipers, and the seat. He filled the logbook out at 0815 hours, Manager Aquilina repeated.

Manager Aquilina testified that he was parked in front of three machines, Claimant Wood's crane, a Plumber machine, and a Cribiladger. The other two operators, he stated, were inspecting their machines and doing maintenance, but Claimant Wood wandered

around the machinery, around parked vehicles, and around the rest of the team. There were 30 people on the team, according to Manager Aquilina. Asked by the Organization Representative whether he made it a habit to observe the machinery and the operators, Manager Aquilina answered, "Yes."

Claimant John Paul Wood testified as follows. He is Crane Operator on the C5 gang and has held that position for seven years. He worked as Crane Operator on June 12, 2008. The only employee who accompanied him on June 12th when he performed work was Foreman Gaylord Black when he was told to stop the Claimant. Foreman Black walked around the machine with the Claimant. He (the Claimant) inspected his machine prior to being stopped. He filled out the logbook before 6:30, before the job briefing. He was present on the job at 6:00 o'clock in the morning. He did not ride the bus. He drove his truck because he lives close, and ever since they have been at the Collensville Branch, since April, he has driven to the job. Therefore he is very early. He is usually the first one there on the assigned space every morning.

He thinks [Claimant Wood's testimony continued] that Manager Aquilina pulled into the job site at 6:30. He did not have two mechanics with him that date. He must have gotten his dates wrong. They were having trouble with the Adjer for two or three days. Thursday [June 12, 2008] was their day for going home. He confirmed with the mechanics that they were at the site earlier in the week and not on Thursday. He did not request the mechanics to attend the hearing in his behalf although he did request Foreman

Black and another employee to attend.

The Claimant described how he performed the inspection of his machine. He stated that some Trackmen were in the area but no members of the C5 team. No roadway mechanics were present, he testified. He was not on the clock when he inspected his machine, he stated. Asked whether he informed Manager Lupis that he had already inspected his machine when Mr. Lupis instructed the team to perform their inspections, the Claimant answered, "No." He testified that he told Foreman Black that he had already done the inspection and that the foreman said that "they wanted us to do it because they can observe you doing it." The Claimant testified that most people on the machines do their inspections by themselves.

Manager Aquilina testified that on two prior occasions in crane school in LaGrange, Georgia, he briefed the team, including Claimant Wood, on the inspection of equipment and the procedures for filling out the logbook according to FRA Regulations Part 214. Asked by the hearing officer whether he previously did any inspections with Claimant Wood, Manager Aquilina testified, "We trained as a group in crane school and were available to answer any questions they had; and Mr. Woods [sic] has inspected his crane prior, on other occasions, successfully."

Following the close of the hearing, by letter dated August 8, 2008, L. E. Houser, Assistant Chief Engineer System Production, notified the Claimant that review of the transcript and exhibits demonstrated that he was guilty of the infractions of which he was

charged and that his actions violated applicable CSX Transportation Operating Rules and Regulations, Safe Way Safety Rules, and Engineering Department Rules and Instructions. The letter stated that because of the serious nature of the offenses the Claimant was being assessed “discipline consisting of a 60 day actual suspension starting August 15, 2008 up to and including October 7, 2008, additionally you will be disqualified from as machine operator and removed from all applicable rosters.”

It is the position of the Carrier that the Claimant was provided a fair and impartial Investigation, that it produced substantial evidence of his guilt, and that the discipline assessed was fully justified. The Carrier disputes the Organization’s contention made at the hearing that the charges as stated in the charge letter were not precise. Nor, the Carrier maintains, was the Claimant deprived of a fair and impartial investigation because specific rules were not identified in the charge letter.

The Carrier contends that the testimonies of Managers Lupis and Aquilina established that the Claimant ignored an instruction to inspect his machine and that he walked around the area for over an hour and failed to perform an inspection of his assigned machine. In support of its position that the Claimant did not do an inspection, the Carrier notes that he did not indicate to his managers that he had already performed an inspection. In addition, the Carrier argues, “It was clear the hearing officer chose to find the testimony presented by the Carrier officials to be more credible than Claimant Wood’s.”

The Carrier contends that the quantum of discipline, a 60-day suspension and disqualification as a Machine Operator, was neither harsh nor capricious. In support of that position the Carrier notes that the Claimant accepted a waiver for a 30-day suspension for an incident that occurred on September 17, 2007, wherein he stored flammables and combustibles together on his crane. Since “this was a similar incident,” the Carrier argues, it “complied with its policy in the assessment of discipline.” It cites Award No. 11 of Public Law Board No. 7008, which it contends was a similar case where a suspension and disqualification were upheld.

The Board believes that the charge letter was sufficiently precise to satisfy the requirements of Rule 25, Section 1(d) of the Agreement. The charge letter specifically informed the Claimant that the purpose of the formal Investigation was to ascertain the facts and determine his responsibility in connection with the allegation that he did not perform the required inspection of the machine he was assigned to operate. The entire hearing focused on that allegation. All of the rules introduced into evidence pertained to the requirement that an operator inspect his machine before using it. In this Board’s opinion the Claimant was told in the charge letter precisely what would be investigated in the hearing, and there were no surprises in the hearing. As required by Rule 25, Section 1(d), the Claimant was informed of the exact offense of which he was accused. The Board finds no merit to the Organization’s contention that the charge letter was not sufficiently precise to inform the Claimant of the offense of which he was accused.

Nor is there merit to the Organization's contention that the Carrier was required to cite specific rules in the charge letter if it wished to rely on them as a basis for finding the Claimant guilty of an offense. See Third Division Award No. 31299, which held that a carrier need not cite a specific rule violation relied on in advance of the hearing, but may wait to do so at the hearing and base discipline on that rule violation. The Organization has cited no precedent in support of its position.

The Board believes that there is substantial evidence in the record to support the allegation that the Claimant did not perform the required daily inspection of the crane of which he was the assigned operator. Manager Aquilina testified that at 0815 hours he saw the Claimant climb into the cab of his machine, fill out his inspection logbook, and then climb out of the machine. He did not see the Claimant perform any inspection of the machine before filling out the inspection log.

The Claimant testified that he performed the inspection of the machine and filled out the inspection log before hours and before any other team member or a manager was on the premises. The Board finds it highly improbable that Manager Aquilina would make up a story, or be mistaken, about seeing the Claimant filling out the inspection log at 0815 hours. Mr. Aquilina gave the details of what he saw, namely, that the Claimant first placed a bag of ice in the cooler that was on the cart attached to his road crane, then proceeded to climb into the cab, fill the logbook out, put it back in a bag, and then climb back out. He further testified that he was watching the Claimant and the other operators

in accordance with his customary practice. When Manager Lupis instructed the operators to inspect their machines before leaving the hole, the Claimant did not speak up and say that he had already performed his inspection.

It is clear that the decision-maker in this case credited Manager Aquilina's testimony over that of the Claimant. The Board finds that there was substantial evidence to support the Carrier's determination that the Claimant did not perform an inspection of his machine on his own on June 12, 2008. Had he not been stopped at Manager Aquilina's direction, he would have trammed out of the hole to perform his regular duties without inspecting his machine as required. His conduct violated the various rules and regulations cited by Manager Lupis at the hearing that require an operator to inspect his machine before operating the equipment.

With regard to the 60-day suspension, it comes after a ten-day actual suspension, by waiver, and a 30-day actual suspension, both of which were administered within approximately nine months of the 60-day suspension. It is not clear from the Document Search Report in evidence what the nature of the offense was that resulted in the ten-day suspension. However, the Document Search Report states that the 30-day suspension was for "flammables & combustibles stored together." Considering that the Claimant's last two violations involved safety infractions and that this was the Claimant's third offense within approximately nine months, the Board cannot say that a 60-day suspension was unreasonable. The Board will not disturb the 60-day suspension.

With regard to the disqualification, however, the Board is of the opinion that the Carrier has not established by substantial evidence that there were grounds for disqualification of the Claimant and removal of him from all applicable rosters. According to the undisputed evidence the Claimant has operated the rubber-tired crane for seven years. No evidence was presented that the Claimant has ever shown incompetency in respect to the performance of any aspect of operating that equipment. There is no evidence that there were ever safety concerns regarding his actual operation of the machine. Aside from the two most recent incidents, neither of which involved the actual operation of the equipment, there is no evidence that any coworker or supervisor ever complained that he was an unsafe operator.

Nor is there any evidence that the Claimant has ever failed to maintain his equipment properly. For example, no instance was cited of a breakdown of or damage to any equipment that he was operating because of failure to oil or lubricate it properly. Even on the date in question, June 12, 2008, as Manager Aquilina testified, the Claimant checked the oil in his crane. (Tr. 14).

Pertaining to the inspection issue, Manager Aquilina himself testified that "Mr. Woods [sic] has inspected his crane prior, on other occasions, successfully." (Tr. 16). There is no basis in the record for thinking that the inspection incident herein was other than an isolated case. Nor is the failure to inspect of the same nature as the storage of flammables and combustibles together on the crane so as to infer that there is a pattern

here. Although safety was a consideration in both offenses, they were sufficiently different in kind that one is not justified in concluding that there is a pattern here of unsafe operation. It is that fact which clearly distinguishes this case from Public Law Board No. 7008, Award No. 11, relied on by the Carrier in its submission. In that case not only had the claimant, who was disqualified as a Track Inspector, failed to note five distinct track defects, but on two separate prior occasions he had also been disciplined for exactly the same kind of infraction. There was plainly a pattern in that case which provided substantial evidence of the claimant's incompetency as a Track Inspector. No such pattern is present in this case.

The Board further notes that the Carrier permitted the Claimant to continue performing all of his duties as a Machine Operator for more than two months from the date of the incident, June 12, 2008, until the effective date of his disqualification, August 15, 2008. That is inconsistent with any claim that he was an incompetent operator or that he posed a safety risk.

The Board finds that there is not substantial evidence to support the disqualification of the Claimant as a Machine Operator and his removal from all applicable rosters. The disqualification shall be voided and the Claimant restored to the rosters from which he was removed. He shall be made whole for any wages lost as a result of his disqualification and removal from the rosters. Because of the length of time that has elapsed since the date of his disqualification, he shall be afforded any refresher

training that is appropriate.

A W A R D

Claim sustained in accordance with the findings.

O R D E R

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
June 4, 2009