

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated May 7, 2010, the Manager System Production Teams instructed J. L. Sanders ("the Claimant") to attend a formal Investigation to be held on May 17, 2010, in Columbus, Ohio, "to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 1400 hours on Monday, April 26, 2010, at Decatur Yard in Decatur, Illinois, when while working as Assistant Foreman of the System Production Team 5XT8, the 6700 Tamper (MT 200605) that was working under your area of responsibility was struck by an engine, (Y19126) when the tamper operator was instructed by you to back up on the track he was occupying and fouled the same track the engine had been cleared to work on."

"More specifically," the Manager's letter continued, "based on the initial investigation of this incident you did not have a Job Briefing with the 5XT8 Foreman or the Employee in Charge of your On Track Protection before instructing the Operator of the Ballast Regulator [sic] to back his machine up. Also," the letter proceeded, "it came to my attention through the initial investigation of this incident that you gave false information to me that was related to the collision."

In connection with the incident, the Claimant was informed, he was "charged with failure to properly and safely perform the responsibilities of your position, carelessness, incompetence, endangerment, failure to comply with Roadway Worker Protection, falsifying matters under investigation, and possible violations of, but not limited to, CSX

Transportation Operating Rules - General Rule A, General Regulations GR-2, GR-14 and GR-16; CSX Safe Way Rules - General Safety Rules GS-1, GS-3 as well as, GS-10.” By agreement of the parties the Investigation was postponed and rescheduled for June 10, 2010, in Kendallville, Indiana.

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.

The Claimant, whose service date is May 23, 1978, held the position of Assistant Production Foreman with the T-8 tie team at the times here relevant. On April 26, 2010, he was working in the Decatur yard in Decatur, Illinois, as assistant foreman on the surfacing unit for T-8. It was on that date that a remotely controlled train consisting of two engines and four cars collided with a tamper machine under the Claimant's area of responsibility.

The Manager System Production Team (“Manager SPT” or “Manager”) testified as follows. The tie team had a job briefing at 7:00 a.m. on April 26, 2010, and after the briefing the tie team was unloading on the north side of the main line to make a move east for the tie team to continue work in Gates lead track. In the job briefing it was stated that the tamper would get towed by the regulator to the pit track for repair of a

damaged transmission on the tamper. After the transmission repair, the tamper would also require an oil change. At 1355 hours Employee in Charge ("EIC") Gary Gulley informed Foreman Weaver that there was going to be a westerly move by engine Y19126 from the main line to the west end crossover to switch cars. The tie team at the time was working in the Gates lead track, which was not near the main line. But the tie team did have two regulators working in the No. 1 track next to the main line.

Foreman Weaver [Manager SPT's testimony continued] informed the regulators on No. 1 track that there would be a westerly move by the Y19126 engine and that they needed to be clear. The regulators acknowledged the transmission and said that they would be in the clear. Foreman Weaver then proceeded to talk with the tie team and let them know that there would be a move on the main line to the west and through the west end crossovers. The team all acknowledged receiving the transmission. Foreman Weaver then told EIC Gulley that he could clear the Y19126 engine.

At 1400 hours [Manager SPT's testimony proceeded] James Marr, the operator of the tamper, notified Claimant that the transmission had been fixed and the oil change done. The tamper was ready for use. The Claimant told Mr. Marr that he could come out of the pit track. The Claimant lined the Gates lead pit track switch for the tamper to proceed west past the switch. There was a backhoe dumping rock near the switch, and Mr. Marr asked the Claimant for a job briefing about the situation. The Claimant went onto the tamper for the job briefing, and the Claimant instructed Mr. Marr to tamp a low spot before the Gates lead pit track switch. After the job briefing the Claimant dismounted the tamper and headed towards the backhoe operator to instruct him regarding his assignment. Shortly after the Claimant got off the tamper the Y19126 engine proceeded through the crossover track and struck the tamper on its north side.

The Manager SPT investigated the collision. He had phone or face-to-face interviews with Foreman Weaver, the Claimant, Operator James Marr, Timekeeper E.B. Free, and Assistant Foreman Morrow. As a result of his investigation he determined that the Claimant failed to safely perform the responsibilities of his position, with resulting property damage and exposure to bodily harm. The Claimant, the Manager SPT testified, failed to make sure that there was proper protection in place and also falsified matters under investigation. The falsification, he stated, was answering "No" when he asked the Claimant if the tamper operator was on the machine at the time of the collision. The Manager SPT testified that the Claimant violated General Rule A, General Regulation GR-2, General Rules GR-12 and GR-16, General Safety Rules GS-1 and GS-3, and GS-10.

The Manager SPT testified that the Claimant's protection was established in the job briefing at 0700 hours. Once the tamper was towed to the pit track, the Manager SPT stated, it was locked in and protected in the pit track while the transmission repair and oil change were being done. It was not known, he testified, how long the work would take. After the work was completed, the Manager SPT stated, the lock was taken off the switch and the move made that resulted in the machine collision.

The Manager testified that the only job briefing that occurred before the tamper left the pit area after the transmission repair and the oil change was between the Claimant and the operator, James Marr. The Claimant gave Mr. Marr permission to take the tamper out of the pit track, the Manager stated, "to resume up there with the team and the job tasks that they were going to." The next morning after completing his investigation the Manager removed the Claimant from service.

On cross-examination the Manager SPT gave the following testimony.

Timekeeper E. B. Free filled out the form for the job briefing that the Claimant attended the morning of the incident. The job briefing gives the areas of responsibility and the areas of protection for employees as of that time. On the portion of the job briefing form that asked, "Will train control employees be involved?" the form was left blank. Train movements are identified through the day through radio communications. "It's a type of updated job briefing through radio communication that is relayed throughout the whole team. A train movement cannot be made until the whole team acknowledges of the train movement." It is the responsibility of the foreman and the assistant foreman to determine if the entire gang has acknowledged that there is train movement about to take place.

The EIC, the SPT Manager testified, identifies the movements of the trains. It is his responsibility to know that everyone has reported that he is in the clear so that the train is safe for passage. The Manager SPT was asked if the Claimant was notified of the train movement here involved. He answered, "There was no radio communication made. The radio transmission was not picked up by Mr. Sanders." He was then asked if the train movement should have been made knowing that all employees were not contacted to inform them of the movement. He answered:

Per the job briefing he was still established in his protection in the Pit Track and was not coming out to do any kind of work until he further had a job briefing with the EIC or the foreman to further come out and do work. So therefore, the radio communications all day long had not gone through Mr. Sanders because of the previous job briefing we had at 7:00 that they would be down and he would notify them when they're ready to come up. (Tr. 26).

The Manager SPT was then asked, "Would the safest route have been to notify Mr. Sanders if there was being a movement in his limits?" The Manager answered, "There was a radio communication towards Mr. Sanders and Mr. Sanders notified me that he might not have his radio on." The Manager was asked whether the tamper operator, Mr.

Marr, acknowledged hearing a communication about train movement. He answered that he did not, that his radio does not work when his machine is locked out. The Claimant, the Manager testified, "has a hand-held radio and that's where he gets his communications through." The Manager SPT was asked, "So the employee in charge, nor the foreman acknowledged to you that they directly contacted Mr. Sanders and told him that there was train movement within his area?" He answered, "That's correct."

Regarding the engine that collided with the tamper, the Manager SPT testified that a foreman, Mr. Waltz, operated the engine and that he was assisted by a switchman, Mr. Grafton. The engine was operated by remote control. They made sure, the Manager stated, that the way was clear before the engine was moved. The Manager was asked "how they did not see the tamper that was sitting [in] close proximity to the track they were getting ready to operate on?" He answered as follows:

The way was seen to be clear and the employee through his statement went on the other side of the track after the way was seen to be clear, and the movement was started almost at a simultaneous time. There was only a two minute gap in between when the tamper moved and the engine struck it. (Tr. 28)

The Manager acknowledged that Foreman Waltz did not maintain observation of the track in front of the engine while the engine was moving. Asked whether the train was moving about three miles per hour, the Manager stated, "Yes, it was a slow move, yes."

Questioned whether employees are required to be able to stop half the range of vision short of any type of obstruction, the Manager answered, "From my knowledge."

Edward Brian Free is Assistant Foreman/Timekeeper for the T-8 team. He reports directly to his supervisor, the Manager SPT, and Foreman Tom Weaver. He testified that shortly before the collision the tamper moved out of the pit track to get into lineup to start working. He saw the backhoe spreading rock just ahead of the tamper and over the radio

heard the tamper operator holler at the Claimant that they needed an updated job briefing. He then heard the backhoe operator holler at the tamper operator to exit the tamper. He could see the tamper and the backhoe, Mr. Free testified, and when he heard someone holler for the tamper operator to jump off he looked up and could see the tamper start leaning from the impact of the engine. He saw James Marr jump out of the tamper.

Roadmaster Ben Crossman conducted the initial investigation of the incident, Mr. Free testified. Free took pictures and talked with people, he stated, but did no formal interviews. He was present at the initial morning job briefing, and the Claimant was also present, Mr. Free testified. According to Mr. Free discussion of where the repair of the tamper was going to take place probably occurred after the initial job briefing. "I don't recall the initial job briefing saying that they were going to put the tamper in a particular track," he stated. He did not hear any communication between the EIC and Foreman Weaver in regard to train movements or clearing for train movements, Mr. Free testified, and he did not hear any communication from the Claimant, Foreman Weaver, or EIC Gulley that day.

In the initial morning job briefing, Mr. Free testified, they were told that they were operating in a remote control zone. Later, according to Mr. Free, they found out that it wasn't actually a remote control zone but, instead, a zone where remote control engines operated. Mr. Free explained that in a remote control zone engines are allowed to move freely with no one on the engine. In order to work in a remote control zone, you must have permission from the remote control foreman. Where engines are operated by remote control outside a remote control zone, Mr. Free stated, the operator must be able to stop within half the range of vision.

Mr. Free testified that an updated job briefing must be had as often as tasks change

throughout the day and that there could easily be 50 changes. Everyone that the change involves, Mr. Free stated, is responsible to conduct a job briefing. In the present case, according to Mr. Free, 707 authority was used to provide protection for the main track because the team was working close to that track and was unloading on the opposite side of the main track from where the work was being performed. The employees therefore had to cross the main track. The 707 authority, Mr. Free explained, is issued to the Employee in Charge who is required to talk to the dispatcher to make sure that it is in place. He is then required to put up signs and to provide movements through the 707.

Mr. Free testified that if a locomotive, high rail truck, or piece of track equipment wishes to move through the 707, the practice is to notify the EIC, who, in turn, will contact the lead foreman, Tom Weaver. Mr. Weaver's responsibility after being contacted, Mr. Free stated, is to contact all employees on the track to make sure that they are in the clear. He then must let the crew know that the move may be made. The hearing officer asked Mr. Free, "If members of the T-8 are not affected by the move, are not notified, is that standard practice?" He answered, "Yes."

On cross-examination Mr. Free testified that there was no one on the engine that collided with the tamper. He was not aware of where the remote control operator was, Mr. Free stated. Based on his knowledge, Mr. Free testified, the operator of the engine should have been able to determine whether the engine was safe for movement.

Mr. Free reiterated on cross-examination that every employee should be made aware of a train movement that may actually come into contact with the train. He stated that for the backhoe operator to have fouled the track where the train was going to move would have required the backhoe operator to go outside the area of his protection. Asked on cross-examination if the safe course of action would have been to contact Claimant

Sanders and let him know that the remote engine was coming, Mr. Free answered, "The safe course, yes, if he'd known Mr. Sanders had moved his tamper out of where they were at would have been to contact him too."

At the time of the incident, Mr. Free testified, the backhoe operator was working in front of the tamper because he was putting down rock at a mud spot that the tamper was going to start surfacing. On redirect examination Mr. Free testified that the backhoe was dumping stone approximately 150 feet from tracks that did not have protection. There was no danger, Mr. Free stated, that the backhoe would foul the track that was 150 feet away. If the backhoe operator was instructed just to dump rock in that mud spot, Mr. Free testified, there would be no reason to expect him to go as far as the tracks that did not have protection.

Thomas B. Weaver testified that he has been foreman of the T-8 team since January, 2010, and a foreman for CSX Transportation for 32 years. Claimant Sanders, he stated, was a member of his work force assigned to work for him on April 26, 2010. Asked to state briefly the facts regarding the incident that led to the charges against the Claimant, Foreman Weaver testified as follows:

We had a tie and surface team working in the yard in a remote area. There was a remote switcher working on the end of the yard where the tamper was located. The crew on the train had permission and had cleared to the team that was actively working on the track to make a move to the end of the yard to the top of the switching lead with a cut of cars. The conductor and I had talked to each other, we had briefed each other on what he was going to do and the EIC and myself had made sure that the people in the track that were affected had been notified and after the conversation and being informed by the EIC, the conductor checked his track and saw the way to be clear and made his move. During the move I turned away from him to look back to the team and somebody hollered on the radio that we had emergency, and when I looked back I could see the tamper and the engine together.

Foreman Weaver testified that in the morning job briefing on April 26th, there was

discussion that the tamper was being put into the pit for repairs and of the protection for the tamper during the repairs. The protection, he stated, consisted of derails and engineering locks on the appropriate tracks. If the EIC notifies him of a train move that will affect the working part of the team, Foreman Weaver testified, "we will notify everybody in that area and get a response from em, that they understand that there's a move being made in every direction and what track. And once everybody has been notified of the move," Foreman Weaver continued, "we'll call the EIC and tell him that they've been notified and we understand the move to be made and he can make the move."

In the present case, Foreman Weaver testified, after the EIC called him about the train movement to be made, he notified all affected employees. Asked whether he notified Claimant Sanders, he stated, "No, I did not." Asked why not, he testified, "He was not in the field at the time that he had cleared the train." In the last conversation that he had had with Claimant Sanders or the tamper operator, Foreman Weaver stated, he was told that the repairs had been made but that there was some other maintenance that had to be performed before they could come out on the track. Asked how the tamper got to the location where it was struck by the remotely operated locomotive, Foreman Weaver testified, "I have no knowledge of how it got out there."

Foreman Weaver testified that a job briefing is required anytime that there is a change in the work or in the location of the work or if another member or piece of equipment enters the work group. The job briefing, he stated, includes on-track protection.

On cross-examination Foreman Weaver testified that the operator of the engine was to the rear of the cut of cars and that there was another man with him who was at the

head end of the front engine. Mr. Weaver was asked, "Would he [the employee at the front end] not be able to see if there was a tamper sitting there if he positioned himself at the head end of the engine?" Foreman Weaver answered, "I can't tell you that because I don't know where he was positioned at."

Foreman Weaver stated that the remote control operator had permission from the EIC to occupy the track, and "he had stepped away from the cut of cars to look up this lead to know that the way was clear before he walked back to make his move." Asked how much time elapsed from the time he made the observation to the time he began his movement, Foreman Weaver testified "Less than a minute." Questioned if he was saying that the tamper was moving back at the same time that the train was coming through, Foreman Weaver stated, "I can't tell you when or how that tamper got there. I had my back to those people. I was looking down the track to my people and looking at that engine going by." Asked if it was possible that the tamper was sitting there all along and the operator of the engine did not realize how close he was to the tamper, Foreman Weaver testified, "I can't answer that, not honestly."

James Marr testified that he is the 6700 tamper operator on the T-8 team. He has held the position since January, 2010. On the date of the incident after the tamper's transmission was repaired and it had an oil change, he radioed Claimant Sanders and received permission to back out and start working. The Claimant lined the switches for Mr. Marr to be able to back out down the pit track and switch onto another track called the Gates Johnson track. Mr. Marr stopped his tamper with the back of the machine close to the Gates lead pit track switch on No. 1 track.

The backhoe was in front of the tamper on the same track, and the backhoe operator was dumping rock in a mud hole near a switch at that location. Mr. Marr asked

Claimant Sanders to give him a job briefing. The Claimant, Mr. Marr testified, jumped up in the tamper and gave him a job briefing. In the job briefing, according to Mr. Marr, the Claimant explained to him that the Roadmaster asked that they fill a switch that was sitting in a mud hole where the backhoe operator was dumping rock. The Claimant, Mr. Marr testified, told him that "we're gonna start right here," referring to the place where the tamper was stopped on the track. Mr. Marr stated that the Claimant then got out of the tamper and that a couple of minutes later a train came through the crossover and hit the tamper on the side.

Mr. Marr testified that he was in the cab of the tamper when the collision took place. He did not see the train coming, he stated, because it was in a blind spot. After the collision, Mr. Marr stated, he at first thought that he was bumped by the backhoe, but then he saw the front of the engine in the side window, and he jumped out. He estimated that he jumped from a height of about four feet. The train was barely moving, Mr. Marr stated, so it wasn't a solid impact, but rather a sideswipe.

Mr. Marr testified that he passed Mr. Weaver when he was backing down the track. He was walking past the tamper, Mr. Marr stated, when he (Marr) was backing out. Questioned by the hearing officer as to whether, before backing up, he asked Claimant Sanders what his protection was, Mr. Marr stated that he did not. Mr. Marr testified that in the morning job briefing he was not satisfied he would have positive protection while the tamper was being repaired on the pit track. He therefore told Foreman Weaver, he stated, that they needed more derails, and this was done.

At that time, Mr. Marr testified, "[M]e and Mr. Weaver and the EIC went over exactly what the protection was after we got the derails up and to my understanding we had protection past the cross-over switch, that's what my understanding was with the EIC,

because he pointed at the switch that we had and it was beyond the cross-over switch, so to my understanding that he was touching that switch.” (Tr. 66). Mr. Marr testified that he is the safety chairman; that other employees come to him about their protection, and he explains to them exactly what their protection is.

The hearing officer asked Mr. Marr, “When was that job briefing where he told you, he being the employee in charge told you you had protection beyond the cross-over?” Mr. Marr answered, “It was early that morning when the team was first starting to work in there.” The hearing officer responded, “As the team was working into those tracks?” Mr. Marr replied, “Yeah.” (Tr. 68).

On cross-examination Mr. Marr testified that the protection he had as directed by the EIC was west of where the tamper was stopped on the track when it was hit by the engine. If he felt that he did not have the protection, Mr. Marr stated, he would not have made a move until they received protection.

Mr. Marr was asked by the Organization representative if he felt that before a train made the movement that occurred in this case, someone should have contacted him or Claimant Sanders to let them know that the movement was being made. He answered, “Yeah, yeah, we’re supposed to clear the whole team any time there’s any kind of train movement that’s going to affect the team.”

Mr. Marr estimated that his tamper sat on the track where it was hit by the engine for approximately five minutes before the collision occurred. The job briefing took a minute or two, he stated; then the Claimant got out of the tamper; and maybe a couple of minutes later the tamper got struck.

The Claimant asked Mr. Marr whether after they had the job briefing, he told the Claimant that he was going to use the rest room. Mr. Marr answered that he did say that

to the Claimant. In response to additional questions from the hearing officer, Mr. Marr explained that at the end of the job briefing he told Claimant Sanders that he was going into the building to use the rest room, but that, after the Claimant exited from the tamper he debated in his mind whether to set up the machine first, since he was stopped in the spot from which he was going to start tamping, or go to the rest room first. It was while he was debating this in his mind, he testified, that the tamper was hit.

Josh Morrow is an assistant foreman and, at the time of the incident, had held that position for about four months. On April 26, 2010, he was operating the regulator. Claimant Sanders, he stated, was not working with him that day, but was with the surfacing team. He (Morrow) was on the front end regulator. Asked to state any facts that he knew about the incident, Mr. Morrow stated that he did not know what happened "back there," that he was cleared for a train and that the next thing he knew the tamper got hit. Shown a map of Decatur Yard, Mr. Morrow identified the track that he was working on as No. 1 yard track. It is adjacent to the main track, he testified.

The protection he had on the main track, Mr. Morrow stated, was a 707. On the No. 1 track the protection was inaccessible tracks. He explained: "[T]he gang was mostly in the Gates track and me and the other regulator was in the #1, so we had the whole yard locked out on each end of this thing to protect us, and derails established because of some engines and some cars sitting in some of the yard tracks."

He was cleared for the train movement by Foreman Tom Weaver, Mr. Morrow testified. He heard the radio communication between the EIC and Foreman Weaver. The EIC, Mr. Morrow stated, hollered at Foreman Weaver and said that he was going to move the train that was sitting on the main track. Then, Mr. Morrow testified, Foreman Weaver hollered at Morrow, who was on the lead regulator, and Mr. Bell, who was on the second

one, that the train was going to move and that they needed to clear up. They were the only two machines on No. 1 track, Mr. Morrow stated, and the only two employees called about the train movement. Asked by the hearing officer if it was normal practice that only the two of them were called, Mr. Morrow testified, "As far as I know, me and Mr. Bell was the only ones affected from the trains moving on the main track. Everyone else was supposed to be in the Gates Track, which is not adjacent to the main. So yes, it would have been per standard procedure to just contact us two, that is affected."

On cross-examination the Organization representative asked Mr. Morrow if he agreed with Mr. Marr's testimony that there was protection provided from the Gates lead at the west end of No. 1 track [identified as the yellow marking on the Decatur Yard track diagram, Exh. 2, p. 6] "back east leading to the Gates Johnson track. . . ." (Tr. 77). Mr. Morrow agreed. He was asked if the team had work equipment going in and out of that location prior to the collision. He answered that they had machines that they "had actually backed past the yellow to get everybody worked into that Gates Track, because we unloaded" in the area north of the main track. (Tr. 78). The following colloquy then occurred between the Organization representative and Mr. Morrow:

- Q. You say it's a common practice not to notify all members of the gang for movement of train?
- A. When it only affects, if you got machines cut out and it's only affecting them that's usually who we clear.
- Q. If there were movement as you stated earlier back west of the notations in yellow as referred to in exhibit 25 [sic], why would the employee in charge not notify all employees that there was movement just on the pretense that there may be somebody back in that area?

- A. Well, because as I recall when I was cleared for the train I was told it was moving down the main. If I look at this yellow on this map, that yellow is not on the main track, that yellow is on the yard lead. And I was never told the train was coming off the main, I was just told it was moving down the main because it was parked beside me.
- Q. So you had no knowledge at the time that the remote control train that was moving actually was going to go across and by the Gates Johnson Track, is that correct?
- A. That is correct. I had no knowledge that it would take the crossover and go on the yard lead. I was told it was just moving on the main.
- Q. So, now knowing in fact that remote control train did cross the Gates Crossing Track, and proceeded to the location west of the Gates Crossing Track probably the course would be the employee in charge now to, would be to inform all employees exactly where it was going?
- A. He, I don't remember the employee in charge telling us it was gonna take a different route other than the main. Yes, I do believe he should have told everybody it was coming across the crossover switch there, but Mr. Weaver could have been standing there with him and told me it moved, I have no idea what their job briefing was about. All I know is that he told me it was moving on the main.
- Q. But clearly it was your testimony as well as Mr. Marr's that your equipment had been operating over the Gates lead and the switch were on 2-6, at the green tamper's position, exhibit 2, page 6.
- A. Yes, yes, we'd been operating on that. (Tr. 78-79).

In response to questions from the hearing officer, Mr. Morrow testified that as assistant foreman on the T-8, he often has to assist in clearing trains. He is familiar with the proper procedures and requirements for clearing trains and assuring that his team is in the clear, he stated.

Claimant Sanders testified that he has held the position of Assistant Foreman with the T-8 tie team on and off since 2001. On April 26, 2010, he stated, James Marr, the 6700 tamper operator, worked directly with him. During the time the machine was being repaired he had T-8 mechanics with him. The Claimant testified as to the facts of the incident substantially as described in the testimony of James Marr, the tamper operator. After the repair and maintenance were done on the tamper, the Claimant stated, the tamper backed out of the pit track, the Claimant threw a switch, and put the tamper on the lead to the track where the team was working at. At that time the tamper operator, James Marr, requested a job briefing. In the job briefing, according to the Claimant, he explained to Mr. Marr that Roadmaster Crossman had asked the Claimant to help him out by pulling the switch out of the hole.

Asked by the hearing officer whom he spoke with or got permission from to open the switch before he made the move with the tamper, the Claimant testified that he did not get permission because he thought that the switch that he came out of was under their protection. He stated that there was a spiker on the switch that he asked to move before he brought the tamper through the switch. In the morning, the Claimant testified, he had a job briefing with the EIC about where to put the tamper and what was going to be done with it. The only job briefing he had with Foreman Weaver, the Claimant stated, was about the protection that James Marr would have in the pit track. "Other than that," the Claimant testified, "I had no other job briefing with him prior to coming out."

Questioned by the hearing officer whether the collision could have been avoided had he not been attempting to tamp the section of track near the switch, the Claimant stated that it could definitely have been avoided because he would have had the tamper go further down into the track where the tie team had already started installing ties and the tamper definitely would have been in the clear. He backed the tamper up as far as he did, the Claimant testified, only to get the low spot. Before he left the tamper following the job briefing, the Claimant testified, Mr. Marr told him that he was going to use the restroom. He was not called and told that a train was going to be released, the Claimant stated.

The Claimant, in his testimony, denied that he violated any of the rules that the Manager SPT testified that he violated. He felt that he was within his work limits, the Claimant testified, when he instructed the tamper operator to perform his backward movement. At no time, he asserted, did anyone tell him that he was not within his work limits and that he could not make that movement. He did not make any false statement to the Manager SPT, the Claimant testified. He told the Manager that nobody was on the tamper, he explained, because the operator, Mr. Marr, told him that he was going to use the restroom.

Following the close of the hearing, by letter dated June 29, 2010, the Assistant Chief Engineer System Production Teams notified the Claimant that "Based on evidence and testimony from the witnesses during the course of this hearing, sufficient proof exists to demonstrate that you were guilty as charged and were in violation of the cited rules with the exception of falsify matters under investigation as review of the transcript reveals you didn't know the operator['s] location at the time of the incident." The letter stated that the Claimant's personnel record reflected that this was his third major incident

within two years. The discipline assessed was immediate dismissal of the Claimant in all capacities from CSX Transportation.

It is the position of the Carrier that the Claimant was provided a fair and impartial investigation in accordance with Rule 25 of the Agreement; that the Carrier rightfully determined that he was guilty as charged; and that the discipline of dismissal was fully justified. Although Claimant Sanders stated that he was not to blame, the Carrier contends, it is apparent that the hearing officer chose to credit the testimony of the Carrier witnesses over the self-serving testimony of the Claimant. Absent significant error, not here present, the Carrier argues, it is the hearing officer's credibility determinations that are accepted at the appellate level. Dismissal was fully warranted, the Carrier asserts, in light of the Claimant's personnel record.

In a closing statement in his own behalf, the Claimant said that he felt that on the day the incident occurred he was trying to perform his job to the best of his ability in the safest way he possibly could, not intending to put any employee in harm's way or causing damage to any of the Carrier's equipment. "I have always come to work and tried to do a good job for whoever I worked for," the Claimant declared, "and always have tried to do a safe job." He reiterated that he never intended to put anybody or anything in harm's way.

In its closing statement on behalf of the Claimant, the Organization notes that the Claimant has worked for the Carrier for over 30 years. He felt that he was in compliance with the operating and safety rules, the Organization asserts, and would not otherwise have made the movement. Actually, the Organization remarks, he was trying to do even more than an adequate job as per instructions of the Roadmaster to help out in areas where his force was not assigned work to perform. Based on the testimony presented, the

Organization argues, the Claimant was in compliance with all rules and did not make any false statements.

The charge letter to Claimant Sanders alleges that the 6700 tamper that was working under his area of responsibility "was struck by an engine, (Y19126) when the tamper operator was instructed by you to back up on the track he was occupying and fouled the same track the engine had been cleared to work on." That allegation is contradicted by the written statement of Foreman Thomas B. Weaver made on the date of the incident. Foreman Weaver's handwritten statement dated April 26, 2010, states the following:

On this date, at around 1400 hrs., I gave permission for the yard switcher to occupy the Decatur Main at Decatur yard for a switching move. Prior to giving my permission to the Flag man G. E. Gulley and the train crew, I instructed all affected employees not to foul the main track. (emphases added).

* * *

When the engine got to the West End with the cars, they came in contact with the Jackson 6700 Tamper which without my knowledge, had fouled the main track.

The Jackson Tamper had been locked/tagged out most of this day for repairs and neither I or Mr. Gulley had any knowledge of their being back in service.

The Engine and the Jackson Tamper collided at the switch off the main which was lined and locked for the main track as positive Protection on the West End Working Lead for the Tie Team's Protection. This information was given to All employees at the morning Safety Briefing and reviewed by myself and James Marr, Safety Chmn. to insure proper protection was in place. (emphases added).

It is clear from his statement that Foreman Weaver instructed all affected

employees not to foul the main track and that he did not say anything about not fouling the No. 1 track. Contrary to Foreman Weaver's written statement, the engine and the tamper collided at the switch off of No. 1 track and not the main track. Foreman Weaver's understanding of the clearance that he gave, as expressed in his handwritten statement, was corroborated by the testimony of Assistant Foreman Morrow who testified, "And I was never told the train was coming off the main, I was just told it was moving down the main because it was parked beside me." (Tr. 78). Mr. Morrow expanded on his testimony: "I had no knowledge that it would take the crossover and go down the yard lead. I was told it was just moving on the main."

Employee in Charge Gary Gulley was not called as a witness and did not attend the hearing. His written statement regarding the incident was made part of the record as an exhibit, but it is silent regarding anything that he or Foreman Weaver said to affected employees concerning train movement or the fouling of any track. Foreman Weaver testified at the hearing but did not state that there was anything erroneous in his handwritten statement.

There are two additional written statements in the record, one each from the two-man crew that operated the remote control engine and attached cars. Neither of them attended or testified at the hearing. In addition, what they wrote in their statements concerning EIC Gulley's alleged statements over the radio to the affected employees was contradicted by the testimony of Assistant Foreman Morrow regarding what he heard Mr. Gulley say over the radio. Mr. Morrow testified that "the employee in charge hollered at Tom [Weaver] and asked him, or told him he was gonna move the train that was sitting on the main and then Tom hollered at me." (Tr. 76). He further testified, "I don't remember the employee in charge telling us it was gonna take a different route other than

the main.” (Tr. 78).

The track fouled by the tamper where the collision occurred was the No. 1 track, not the main track. The record does not contain substantial evidence that the engine had been cleared to work on the No. 1 track. The only firsthand evidence in the record about which track the engine had been cleared to work on was Assistant Foreman Morrow’s testimony that it was the main track. Foreman Weaver’s handwritten statement made on the date of the incident agreed that the engine had been cleared to work on the main track. Since Foreman Weaver is the individual who actually gave the instructions to employees which track not to foul, and he also testified at the hearing, where his written statement could be challenged, his written statement is entitled to significant weight. The Board finds that the record in this case does not contain substantial evidence that the Claimant instructed the tamper operator to back up his machine and foul the same track that the engine had been cleared to work on. The Carrier has failed to prove that allegation in the charge letter.

Independent of the allegation that the tamper under the Claimant’s authority was struck by an engine on the same track that the engine was cleared to work on, (an allegation that was not proved), the charge letter also alleges that the Claimant did not have a job briefing with the T-8 foreman or employee in charge before instructing the tamper operator to back his machine up. That allegation has been proved. General Safety Rule GS-3 Job Briefing lists “When to Conduct a Job Briefing.” One of the examples listed is “When work activity or work conditions change.”

It is true that the Claimant conducted a job briefing with the tamper operator after the transmission repair and oil change were completed on the tamper. However, he did not conduct a job briefing with either EIC Gulley or Foreman Weaver, who were

responsible for the protection of the tamper operator and his machine. That was a serious oversight on the part of the Claimant. It probably contributed to the failure of Foreman Weaver to give notice to the Claimant and the tamper operator of the movement of the engine that collided with the tamper.

There is, however, a strong element of mitigation in this case. The Manager SPT himself testified that train movements are “relayed throughout the whole team” and that “[a] train movement cannot be made until the whole team acknowledges the train movement.” (Tr. 25). The Manager SPT explained why the Claimant was not notified of the train movement (Tr. 26), but he did not testify that it was proper not to notify him. When asked if the safest route would have been to notify Claimant Sanders that there was going to be train movement within his limits, the Manager SPT stated, “There was a radio communication towards Mr. Sanders and Mr. Sanders notified me that he might not have his radio on.” It is not clear what radio communication the Manager was referring to, but it is not disputed in the record that Foreman Weaver never attempted to inform Claimant Sanders of any train movement on the date in question.

Foreman Weaver’s failure to inform the Claimant of the train movement in the present case was a violation of the rule or practice stated by the Manager SPT that a train movement cannot be made until the whole team acknowledges the train movement.¹

¹That the standard practice is to give notice to all employees on a team of train movement within their protected limits is supported by the following mistaken testimony of the Manager SPT on direct examination: “. . . Foreman Weaver proceeded to talk to the tie team and let them know that there would be a move on the mainline to the west and through the west end crossovers. Tie team all acknowledged that the transmission was made. . . .” (emphasis added). (Tr. 5). The Board is not suggesting that the Manager did not testify in good faith. On the contrary, the Board was impressed that the Manager SPT was making a positive effort to be fully forthcoming and accurate in his testimony. In the Board’s opinion, however, the cited testimony reflected the Manager’s understanding of the normal way in which notice of train movements would be done.

Had the required notice been given it is reasonable to assume that the Claimant would not have permitted the tamper operator to foul any track on which the engine had been cleared to move.

The Manager SPT referred to radio communication through the day of train movements to all team members as a type of "updated job briefing." (Tr. 25) In this Board's opinion Foreman Weaver's failure to provide an updated job briefing to Claimant Sanders about the train movement was no less serious a departure from proper practice than Claimant Sanders's failure to provide Foreman Weaver or EIC Gulley with an updated job briefing regarding the completion of the repairs and maintenance on the tamper machine. Train movement through a protected area is clearly a change in work conditions for which General Safety Rule GS-3 requires that a job briefing take place. A job briefing either by Claimant Sanders or Foreman Weaver would have prevented the collision that occurred here. Yet the Claimant was discharged for his failure, and there is no evidence that the foreman received discipline of any kind.

Doing things in a safe way is a cardinal principle that governs operations in the railroad industry. Where members of a team have been given protection within defined limits, it must be assumed that any member of the team may be anywhere within those limits at a given time. If the employee in charge of protection is informed that there will be train movement within those limits, then the only safe thing to do is to notify all members of the team with permission to work within the limits of the planned movement and the necessity to remain clear of the track where the movement will take place.

The Board is not satisfied that the fact that Claimant Sanders had not notified Foreman Weaver of the completion of the oil change on the tamper was a sufficient reason for Mr. Weaver not to give notice of the train movement to the Claimant.

Foreman Weaver acknowledged that he had been informed that the repairs had been completed on the tamper (Tr. 53). All that remained to be done was the oil change. Under those circumstances, even aside from the general rule that train movements are communicated to the whole team, careful practice would have anticipated the possibility that the tamper might be moved without a prior job briefing with the foreman or the EIC, as in fact happened in this case.

The Board further notes that one of the bases relied on for dismissal in the Carrier's June 29, 2010, letter to the Claimant was that "a review of your personnel record reflect[s] this to be your third major incident within two years." It is true that the Individual Development & Personal Accountability Policy provides a progression of "Up to dismissal" for a third serious offense within a three year rolling period. The IDPAP defines "Serious Offenses" as "All rule infractions that result in a derailment, or damages to equipment, or a personal injury" and certain serious "At-fault vehicle accidents." The definition also lists a number of Operating Rules.

The Employee History document introduced into evidence regarding the Claimant indicates that the second of the three incidents (the third incident being the present one) occurred on December 3, 2009, when the Claimant showed very poor judgment in a certain remark that he made to a fellow employee. However, one has to go back almost ten years to December, 2000, to find another example of conduct unbecoming an employee on the Claimant's record. That would indicate that the Claimant is not an habitual offender in terms of interpersonal relationships.

The December 3, 2009, incident did not fall within the definitions of "Serious Offenses" in the IDPAP. Nor, in the Board's opinion, was it the kind of personal misconduct of the type specifically listed in the IDPAP as a Major Offense, namely,

Dishonesty, Insubordination, Theft. It was conduct that should not be permitted in the workplace, but it is not the kind of conduct that should be combined with operational offenses to dismiss a 32-year employee who has had no other discipline for unbecoming conduct in the preceding nine years.

For the reasons discussed the Board finds that dismissal was an excessive and unwarranted penalty in the present case. Nevertheless the Claimant did commit a violation by failing to hold a job briefing with the foreman or the EIC when the repair and oil change were completed on the tamper machine. The violation, moreover, contributed to the collision that occurred between the engine and the tamper. Discipline is therefore warranted.

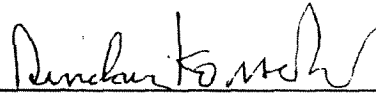
Considering the Claimant's personnel record, the fact that his most recent discipline was a 30-day suspension, and the seriousness of the incident the Board has determined that discipline of up to 60 days would have been justified for the violation that here occurred. The 60-day period shall commence from the date of hearing. The Claimant shall be made whole for all loss of wages and benefits in excess of the foregoing. See Third Division Awards Nos. 30757, 29781, and 23556, upholding the right of the Board to reduce the level of discipline assessed by a carrier. Under the particular circumstances of this case, the Board has determined that no back pay shall be awarded for the period of time that the Claimant was removed from service prior to the date of the formal Investigation and hearing in this case.

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 date the signed Award is transmitted to the parties.

A handwritten signature in dark ink, appearing to read "Sinclair Kossoff", is written over a horizontal line.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
November 10, 2010