Award No. 82
Case No. 82

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 16, 2010, J. Davis, Manager System Production Teams, T2 instructed J. Thomas ("the Claimant") to attend a formal Investigation to be held on September 24, 2010, at the CSX headquarters building in Jacksonville, Florida, "to determine the facts and place your responsibility, if any, in connection with an incident that took place at approximately 1200 hours on Tuesday, September 2, 2010, when while you were working as Machine Operator on the 5XT2 System Tie Team, on the Toledo Branch Subdivision, near MP QT 30.0 I observed you sitting under a tree with you[r] back turned to the machine you had been operating. More specifically," the letter continued, "the machine was running unattended and you were talking on your cell phone when I approached you about the incident." "In connection with the above," the letter charged the Claimant "with failure to properly and safely perform the responsibilities of your position, carelessness, as well as, possible violations of, but not limited to, CSX Transportation Operating Rules - General Rule A and GR-2; as well as CSX Safe Way Safety Rules - General Safety Rules ES-15 and GS-28."

The letter noted that the Claimant "will be withheld from service pending the results of the investigation." The letter then added that the writer, after consultation with the Claimant's BMWE representative, was "willing to accept your request of a waiver to the charges stated above." It was "determined and agreed," the letter stated, "that your discipline is a Twelve (12) day actual suspension that will begin on September 3, 2010

and continue up to and include September 14, 2010 with you returning to work on Wednesday, September 15, 2010." The Claimant was requested to sign at the bottom of the letter "to verify your acceptance of responsibility and discipline for the above incident."

The Claimant did not sign the letter. At the Organization's request, the Investigation was postponed until October 7, 2010, and the hearing location changed to Birmingham, Alabama. By joint agreement the Investigation was then rescheduled to October 13, 2010, in Birmingham.

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 July 23, 2007, has been employed by the Carrier as a Machine Operator at all times relevant to this proceeding. The Charging Officer, Jeremiah Davis, was Assistant Production Manager for T2 System Tie Team for approximately three months at the time of this hearing but had been an Assistant Production Manager for about two years. On September 2, 2010, the Claimant was assigned to operate the No. 1 Rail Lift, a machine that inserts plates underneath the rail.

T2 Tie Team consists of 66 employees who operate various pieces of equipment to

install ties in surface track.

Mr. Davis described the incident that led to the charge letter against the Claimant as follows. At 1200 hours on September 2, 2010, he noticed that the No. 1 Rail Lift was stopped and still running without anyone operating the machine at milepost QT 30.0. He saw the Claimant, who was the operator of the machine, sitting under a shade tree with his back turned to the machine talking on his cell phone. He asked him why the machine was still running unattended, while the No. 2 Walking Rail Lift machine was still working. The Claimant said that he was on his lunch break and that he was told that he could be at least 100 feet from his machine. Neither Manager Davis or the foreman had given the Claimant permission for the team to take lunch. The Claimant took lunch on his own, but the team takes lunch as a group. Manager Davis told the Claimant that he was wrong, that he would get the Safe Way Manual and show him the safe way procedure for mechanized equipment. Mr. Davis then called the lead foreman, Raymond Grissom, to be a witness.

When Foreman Grissom arrived [Mr. Davis's testimony continued] he (Davis) read the BMWE contract to the Claimant about lunch periods and Engineering Department Safety Rule ES-15 g., which states, "Never leave running mechanized equipment unattended." He also reminded the Claimant about collisions that had occurred, which is the reason for the rule. System Production has had numerous machine collisions where operators were not paying attention to their duties, resulting in "tearing up equipment, and mangling employees." The Claimant then said that Manager Davis was harassing him and that he would call Jacksonville. Manager Davis told the Claimant that he was not harassing him and asked the Claimant if he was threatening him (Davis) about calling Jacksonville to get him fired. The Claimant did not reply.

Throughout their conversation [Manager Davis's testimony proceeded] the employee walked away from him while he (Davis) was talking. The Claimant got onto his machine and prepared to operate the machine while Mr. Davis was talking to him. Manager Davis asked the Claimant to shut the machine down because he was taking the Claimant to the hotel. While Manager Davis was driving the Claimant to the hotel, he (the Claimant) called his union representative and said that the manager was harassing him about being at lunch, which was not true. The problem was safety, leaving the machine unattended to talk on his cell phone. After bringing the Claimant to the hotel, Mr. Davis called his manager to discuss the situation. Manager Davis then took the Claimant out of service pending an investigation.

Manager Davis testified that he charged the Claimant with failure to properly and safely perform the responsibilities of his position and carelessness because he left his machine unattended and running while another employee was around the machine and still working. He charged him with violation of Rule GR-A, he stated, because he left the machine unattended without asking the manager if he could do so. He charged the Claimant with a GR-2 violation, Mr. Davis stated, because items 2, 4, 5, and 6 of GR-2 all pertained to the matter at hand. According to Manager Davis, the Claimant was neglectful in leaving his machine unattended while talking on his cell phone, was argumentative when he discussed the rules with him, and "continued to walk away while I was trying to handle the situation on the track." In addition, Manager Davis testified, the Claimant endangered the life of other employees working in the area by leaving his machine running and unattended. The rail lift, Mr. Davis stated is a "manmade tool, machine that has the potential of moving on its own and injuring an employee." They have had numerous machine collisions, according to Manager Davis, and there was an

incident with a ballast regulator that had an operator on it where an employee was mangled.

He charged the Claimant with violation of Engineering Department Safety Rule ES-15, Manager Davis testified, because of item g. of the rule, which states, "Never leave running mechanized equipment unattended." He charged the Claimant with violation of General Safety Rule GS-28, Use of Personal Electronic and Electrical Devices, Manager Davis stated, because he left his machine unattended with his back turned; he was talking on his cell phone; and he was not conducting company business.

The Carrier introduced into evidence a copy of General Safety Rule GS-28, effective July 1, 2010, which contained the following language regarding cell phones:

. . .

Note: Personal cellular phones may be used in case of emergencies or for communication redundancy if radio or other communication failure (Operating Rules 408 and 409).

The Organization introduced into evidence a copy of the prior General Safety Rule GS-28, effective January 1, 2009, which contained the following additional language that was removed with the July 1, 2010, version of the rule:

Personal cellular phones may be used for minimal personal voice communication purposes:

- When train or locomotive or on-track equipment is stopped.
- When not engages [sic] in any switching operation or riding equipment.
- When employees are in a place of safety not closer than 25 feet from nearest rail.

- When it will not interfere or distract from safety or performance of duties.

Manager Davis testified that he did not issue the Claimant a new General Safety Rule GS-28 effective July 1, 2010. The Safety Rules for 2010, he stated, were issued to employees at start up. He did not know, he stated, whether the Claimant had been given a copy of the new GS-28 safety rule. According to Manager Davis, lunch is to be taken when the foreman notifies the assistant foremen that it is lunchtime. On September 2, 2010, prior to the incident with the Claimant, Mr. Davis stated, he did not notify the foreman to have the team take lunch.

On cross-examination Manager Davis testified as follows. The contract provides for lunch to be taken between the fourth and the sixth hour. Most of the time the whole team takes lunch at the same time. But if the time permitted on the track does not allow it, the front end, if it is ahead, will take lunch first as a unit so that the back end can catch up. Once the back end catches up, they will be allowed to take lunch. If the employees have to work through lunch, they get paid overtime.

Manager Davis testified on cross-examination that the Claimant operated a riding rail lift. The machine was unattended, he stated, because it was left running with only the parking brake on while the Claimant was off the machine sitting under a shade tree with his back to the machine. The parking brake can stop the machine from rolling, Manager Davis stated, but the Claimant left the machine unattended while he was well over 100 feet away with his back to the machine. He measured the distance, Mr. Davis stated, with a roller that he keeps in the back of his truck to measure track. He was not aware of any battery problem with the truck, Mr. Davis testified.

Manager Davis was shown some inspection reports involving the Claimant's

machine and acknowledged that he recalled a situation where the machine had been having problems cranking. Had the Claimant turned his machine off and then had a problem turning it back on, Mr. Davis stated, there was a mechanic on site in his assigned area that walks the track .

On cross-examination Manager Davis was asked why he charged the Claimant with violation of General Regulations GR-2. In answer he read aloud the introductory paragraph of the regulation and specifically items 2, 4, 5, and 6. He then stated, "Specifically for 2, the conversation that we had; the employee in a vicious tone from my perspective threatened me when he said he was going to call Jacksonville. He was going to; he can get my job and things of that nature. For that I felt that was an unsafe situation to allow an employee to get out there for 50 other employees, which I am responsible for, and the manner that he was talking, who knows what that employee is capable of whatever doing." (Tr. 18).

With regard to item 4 of GR-2, Manager Davis testified, the Claimant "was careless for leaving that machine unattended" and was "incompetent by not looking out for the well being of the employees that was in front of him, or in the rear." People were working in front of and behind the Claimant, Mr Davis testified, and if "that equipment took off, it could potentially kill those employees." The Claimant, Mr. Davis stated, willfully neglected his duty by leaving the machine running while he sat on the right of way talking on his cell phone. If anything had happened, Manager Davis testified, the Claimant was nowhere where he would be able to stop the machine from rolling and striking somebody.

The Organization representative called Manager Davis's attention to his testimony that the machine could take off and asked him if there were any safety features on the rail

lift that would keep it from moving once it was stopped and parked. He answered, "As far as to my knowledge the only thing I know about it is the parking brake on it." (Tr. 19). The Organization representative responded, "So, you're not familiar with this type of machine at all?" Mr. Davis replied, "No, we just got this machine out to the team." Mr. Davis explained that he had been with the team only "for a couple of months when this incident occurred, and I was still learning the functions of riding the rail lift." With his previous team, he stated, he "had a walking rail lift, which consisted of two guys walking and pushing the plates underneath the rail."

The Organization representative asked Manager Davis how he could state that the Claimant endangered the life or property of others by leaving the machine as he did when he (Mr. Davis) acknowledged that he was not familiar with the machine. He answered, "Like I said, to the best of my knowledge I know about the parking brake. However, it is a manmade machine, a manmade machine. . . . you know anything can happen in any given situation. That's why the rules state the employee must not leave the machine unattended; to prevent such incidents." (Tr. 19).

In response to questions from the Claimant, Manager Davis testified that even though an employee works through lunch, the employee is entitled to a 20 minute break. The Claimant asked if it would be permissible for him to get off the machine, stretch, get some water, and "do whatever in my break" under CSX rules. Mr. Davis stated, "On your break, yes."

R. L. Grissom testified as follows. He is lead foreman on T2 and has been in that position for a year and a half. He has been a lead foreman for the System Production Teams for about seven years. He was down track from the incident when it first got started on September 2nd. Mr. Davis called him over to be present while he talked to the

Claimant. Mr. Grissom asked Mr. Davis what he needed to talk to the Claimant about. Mr. Davis said that he left his machine unattended, and he needed to go over some rules with him.

Mr. Grissom [his testimony continued] went up there, and Mr. Davis got his rule books and pulled the Claimant to the side. He asked the Claimant to take the rule book and look at a particular rule. The Claimant never did grab the book. Then Mr. Davis started showing the Claimant the rules and stuff about unattended equipment.

Mr. Grissom provided Manager Davis with a written statement regarding the incident, which, in pertinent part, stated as follows:

> . . . Jeremiah [Mr. Davis] asked him [the Claimant] to explain to him why he left his equipment unattended. Thomas said he was eat [sic] lunch. Jeremiah asked who told you to eat. He said no one. Tuesday morning Dennis Rhodes addressed team and he said if we take lunch we was going to take lunch as a team. If we going to work through lunch we was going to do as a team. So we decided to work through lunch. J. Thomas said that he took lunch Monday & Thursday. I said to Jeremiah I did not know. All I can say is that Jeremiah tried to talk to J. Thomas and he wasn't listening. Also Jeremiah tried go over the Rules with him. But he was not listening. He was very argumentative.

The hearing officer, referring to Foreman Grissom's written statement, asked him, "Why do you state Mr. Thomas wasn't listening?" Mr. Grissom answered:

> Well, why I say that; every time Jeremiah tried to talk to him, he would say Jeremiah I won't listen to you and he walked away from him; and Jeremiah walked behind him. I don't know, it wasn't good. It wasn't good for him to walk away, and I don't think it was good for Jeremiah to walk behind him, but that's what took

place.

The hearing officer also asked Foreman Grissom if the Claimant was arguing with Mr. Davis over the rules. Foreman Grissom stated, "He just wasn't listening to him. He just didn't want to hear nothing he had to say." Dennis Rhodes, Mr. Grissom testified, is the supervisor of T1.

Mr. Grissom confirmed that there was a problem starting the Claimant's rail lift machine in the morning and that the machine had to be jump started. He never told the Claimant, Mr. Grissom testified, to leave the machine running throughout the day because of the issue with starting it in the morning. No mechanic ever told him that the machine had to be left running, Mr. Grissom stated. Once the rail lift was jumped in the morning, Mr. Grissom stated, it ran the rest of the day.

In response to questions by the Organization's representative, Mr. Grissom testified as follows. When they took lunch, they took it at 12:00, but they were working through lunch. On September 1 some people came up to him in the morning and asked, "When do we take lunch?" He said, "If you all want to take lunch, that's what we'll do. We'll take lunch." To prevent an argument, the supervisor stepped in and said that he would "take care of this." He told Mr. Grissom to arrange for all of the team to break together. He (the supervisor) said, "Guys, if you all want to take lunch, we'll take it. If you all want to work through lunch, we're going to work through lunch. But everything we do, we're going to do it as a team." The set time for lunch, Mr. Grissom reiterated, was 12 o'clock.

Mr. Grissom was asked by the Organization representative if he was familiar with the safety features of the rail lift operated by the Claimant. He stated that he is familiar with a lot of the features. One feature, he testified, is that if the operator gets out of his

seat, the machine will automatically cut off.

The Claimant gave the following account of the incident. On September 2nd he was doing his job as usual. It was very warm. The exhaust of the machine was blowing up on him, and he was becoming very hot. The machine always blows the exhaust back on him. Around 12:00 o'clock he had become extremely tired, and he wanted to drink some water and eat a little something to recoup and get himself back in shape to continue the day. So he sat there on the machine for awhile eating his egg and drinking some water and eating some fruit. In his pocket he felt his phone ring. It was his girlfriend. He stepped away from the track 25 feet, kneeled down on one knee; and right then he saw Jeremiah Davis come around the corner. He (Mr. Davis) put his hands up as to ask what was wrong. When he got close enough, he asked, "What's wrong? Is something wrong with the machine?" The Claimant answered, "No. Nothing is wrong with the machine. I'm taking a lunch break." Mr. Davis said, "Well, if you're taking lunch, why are you on the phone?" The Claimant replied, "CSX states that if I am 25 feet away from the track, I can use the phone."

That seemed to make Mr. Davis irate [the Claimant's testimony continued]. He just started walking up and down the track. About a minute or so later he came back and asked the Claimant why the machine was running. The Claimant told him the problem he was having with the machine; that Raymond Grissom had told him not to cut it off. The Claimant then got back on his machine and began to work. About 35 minutes later the Claimant saw Mr. Davis and Foreman Grissom approach him, and the foreman asked him what was wrong. The Claimant got off the machine and turned it off. He told Foreman Grissom that he felt that the problem was that Mr. Davis did not like that he (the Claimant) took lunch.

_____About that time [the Claimant's testimony proceeded] Mr. Davis came back with the Safe Way Book and misread some things in the book. He asked the Claimant to read it. The Claimant could not do so because he did not have his glasses with him. He told Mr. Davis that there was no point in his even looking at it because he could not see the words. Mr. Davis then started reading some of the words, misreading. The Claimant said, "You're just trying to interpret that to make you look better." Mr. Davis said something about the Claimant's back being turned. The Claimant said, "No, that's not the truth. That's a lie, Jeremiah." That seemed to infuriate him.

Mr. Davis [to continue with the Claimant's testimony] was walking behind the Claimant. He said, "I'm going to fail you on the E test." The Claimant replied, "Well, if you're going to fail me on the E test go ahead and fail me." Mr. Davis kept walking behind the Claimant and repeating that he was going to fail him on the E test. The Claimant said to him, "Jeremiah, if you're gonna fail me, go ahead, but you don't have to harass." He said that he was not harassing the Claimant. The Claimant said that he was going to call Jacksonville and tell them how Mr. Davis was acting. Mr. Davis asked the Claimant if he was threatening him. The Claimant said, no, that he was going to call Jacksonville.

The Claimant [his account proceeded] began to work. He worked for about five or 10 minutes, and then Mr. Davis came up beside him and asked him to turn the machine off, that he was taking the Claimant to the hotel. The Claimant turned his machine off and got his bag. Mr. Davis told him to get in the truck. He asked Mr. Davis if he was off the clock. Mr. Davis said, yes, he was off the clock. In the truck the Claimant called his union representative and told him what was happening. In about 30 minutes they got to the hotel. Mr. Davis and another manager came to the Claimant's hotel. Mr. Davis told

him to get his stuff and get off CSX property, that he was taking the Claimant out of service.

The Claimant testified that he applied every safety precaution he knew to the rail lift. He put it in park and took it out of the run position. He put the feet down in the chip of the track. And once you get out of the seat, he stated, it cuts everything off, but the machine will continue to run. He then went and talked to his girlfriend.

The Claimant testified that on September 1 Mr. Rhodes had instructed the whole team that they were going to take lunch together, but not on September 2nd. Previously, the Claimant stated, Foreman Grissom had stated to take lunch at 12:00. The Claimant denied that he walked away from Mr. Davis while the latter was speaking to him. He also denied that he was argumentative.

The Claimant testified that he did not violate General Rule A because he knows the rules. Regarding General Regulations GR-2, the Claimant testified that he did not enter into any altercation with Mr. Davis or any other employee on company property; that he was not disloyal, dishonest, insubordinate, immoral, quarrelsome, vicious, or careless; that he did not willfully neglect his duty; and that he did not endanger life or property. He left his machine running on the railroad track, the Claimant testified, because he was having battery problems and both the mechanic and Foreman Grissom had told him that once he got it cranked to "leave it running." Although he left it running, the Claimant stated, he applied every necessary precaution that the machine has when it is running without the operator on the machine. He was 25 feet away, he testified, which is a short distance. "The machine wasn't left unattended," the Claimant testified, "I was right there."

The Claimant testified that he did not violate General Safety Rule GS-28 because

the version of the rule that he was given was the one effective January 1, 2009, that permitted minimal use of personal cellular phones in a safe place not less than 25 feet from the nearest rail. He was given copies of the Safe Way and Safety Regulations at start up, he stated, which was in the middle of January, 2010. He did not receive a copy of the safety rule effective July 1, 2010, he testified.

In a closing statement the Claimant asserted that he felt as though he took every safety precaution he knew of to do as instructed by his foreman and the mechanic. "I really do feel as though if I had of turned the machine off and it wouldn't crank back and I held the gang up because we work in some areas where it's inaccessible by truck or something," he stated, "and a mechanic had to walk a battery pack down in there I would be here for insubordination, not following instructions because of what happened."

He further stated that he turned the machine off and that he did not walk off on Mr. Davis. He informed Mr. Davis, the Claimant asserted, that he did not agree with the statement that his (the Claimant's) back was turned. The first time he heard the claim that he was 100 feet away from his machine, the Claimant stated, was at the hearing. "[B]eing taken out of service," the Claimant asserted, "wasn't something that I even felt was going to happen until it actually happened later on that day."

After the close of the hearing, by letter dated November 2, 2010, the Assistant Chief Engineer SPT Operations notified the Claimant that "[u]pon review of the transcript, the facts support and confirm that the charges placed against you were valid and proven." The letter continued that "sufficient proof exists to demonstrate that you were guilty as charged and were in violation of the cited CSX Transportation Operating Rules – General Rule A and GR-2, as well as CSX Safe Way Rules ES-15 and GS-28." The Assistant Chief Engineer assessed discipline of a 30 calendar day suspension of

which 12 days, from September 3, 2010, through September 12, 2010, were already served. The additional 18 days of suspension designated were from November 8, through November 25, 2010.

A claimant assessed discipline by the Carrier who elects to have expedited handling of his appeal of the discipline must sign a paper that includes the following statement, "In so electing, I understand that the Neutral Member of Special Board of Adjustment 7120 will base his decision on the transcript of my hearing, my prior service record, the notice of my hearing, the notice of discipline and Rule 25 of the Maintenance of Way Agreement."

The statement is based on the Agreement dated November 19, 2007, between the parties establishing Public Law Board No. 7120, which, in section 8, requires that the "Board's disposition of the dispute shall be based solely on the material supplied under Section 7" of the Agreement. Section 7 of the Agreement provides that "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 hearing(s); (3) notice of discipline; and, (4) disciplined employee's service record."

There is no reference to Rule 25 in section 7 of the November 19, 2007, Agreement. However, in addition to providing that "[t]he Board's disposition of the dispute shall be based solely on the material supplied under Section 7," section 8 contains the following additional language:

> 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.

The Board is unaware whether the document signed by the employee electing expedited handling of his appeal is a jointly agreed-to document between the parties or the work product solely of the Organization. However, the reference to Rule 25 would appear to be appropriate in view of the requirement that the Board determine whether there was compliance with the applicable working agreement. Rule 25 of the working agreement deals with discipline, hearings, and appeals.

Rule 25, Section 1(d) provides as follows:

"(d) An employee who is accused of an offense shall be given reasonable prompt advance notice, in writing of the exact offense of which he is accused with copy to the union representative. . . . " (emphasis added)

The notice of hearing to the Claimant dated September 16, 2010, states:

> The purpose of this investigation is to determine the facts and place your responsibility, if any, in connection with an incident that took place at approximately 1200 hours on Tuesday, September 2, 2010 when while you were working as Machine Operator on the 5XT2 System Tie Team, on the Toledo Branch Subdivision, near MP QT 30.0 I observed you sitting under a tree with you[r] back turned to the machine you had been operating. More specifically the machine was running unattended and you were talking on your cell phone when I approached you about the incident.

The Board is of the opinion that the Carrier has proved by substantial evidence that the Claimant was guilty of the specific offenses with which he was charged in the notice of hearing or investigation. He did leave his machine unattended on the track with the engine running while he was some distance away off the track talking on his cell phone.

The Claimant testified that Foreman Grissom and a mechanic told him that he should let the machine run once it was started because the machine would not start without a jump in the morning. Foreman Grissom denied making such a statement to the Claimant. In addition, telling the Claimant to let the machine continue running does not mean that he has permission to leave the machine unattended. In view of a specific rule -- ES-15 g., instructing employees to "Never leave running mechanized equipment unattended" -- the Claimant should not have left his machine running unattended without express permission to do so. By leaving his machine running unattended the Claimant violated Engineering Department Safety Rule ES-15 g.

He also violated General Safety Rule GS-28, even in its version effective January 1, 2009. In addition to permitting employees to use a personal cell phone "for minimal personal voice communication" when not closer than 25 feet from the nearest rail, the same rule also required that the usage be "When it will not interfere or distract from safety or performance of duties." By leaving his machine running and unattended in order to engage in a non-emergency personal telephone conversation the Claimant committed an unsafe act and therefore violated the earlier version of General Safety Rule GS-28.

The problem for the Carrier, however, is that the violations with which the Claimant was charged and this Board has found him guilty were not major offenses that justified removal from service and a 30-day suspension of an employee, such as the Claimant, with a discipline-free record. Perusal of the claimant's disciplinary history made part of the record shows that at the time of the incident he had a little over three years of service with the Carrier and no formal discipline. There is an entry dated 01/27/2009 that states "Discipline Letter . . . Hearing Resulted as Disqualification/Welder

Sen Remove 1 YR. Etc." However, no rule violation is listed, and "Disqualification" is not listed as a disciplinary action in the Individual Development & Personal Accountability Policy ("IDPAP").

Moreover, even if the January, 2009, disqualification involved some minor offense on the Claimant's part, the IDPAP states, "Employees that work one hundred eighty days (180) without an offense will have one minor offense removed from consideration when determining the application of the policy." The incident here involved happened more than a year and a half after the disqualification. This being a discipline case, the burden was on the Carrier to bring it to this Board's attention if, in fact, there was any active discipline on the Claimant's record at the time that discipline was assessed in the present case. As noted, from the documentation provided to this Board there is no evidence of any active discipline on the Claimant's record as of the date of the present incident.

According to the IDPAP, removal from service requires that the employee commit a "major offense." The IDPAP defines the term "Major Offenses" at pages 4-5 of the document as follows:

> Major Offenses are those that warrant an employee's removal from service pending a formal hearing and possible dismissal from service for a single occurrence if proven responsible. Examples of such offenses include: occupying track without authority, failure to use "fall protection" when required, equipment collisions, altercation, dishonesty, late report of an on duty personal injury, theft, insubordination, Rule G, weapons on the property, passing stop signals without authority, blue flag violations, major accidents, other acts of blatant disregard for the rights of employees or the company, and acts that recklessly endanger the safety of employees or the public.

The Claimant was not charged with occupying track without authority, an equipment collision, altercation, dishonesty, etc. Of the items listed as major offenses in the IDPAP, the only ones that could possibly fit the offenses of leaving one's machine unattended and talking on a personal cell phone would be "other acts of blatant disregard for the rights of employees or the company, and acts that recklessly endanger the safety of employees or the public." It is necessary therefore to determine whether the Claimant's acts of leaving his rail lift unattended and engaging in a personal conversation on his cell phone constituted "other acts of blatant disregard for the rights of employees or the company" or "acts that recklessly endanger the safety of employees or the public."

One of the most commonly used rules of interpretation "is the assumption that parties who list specific items, followed by a more general or inclusive term, intend to include under the latter only things that are like the specific ones." Farnsworth, Contracts (1982) §7.11 at p. 497. Application of the rule would require that in order to constitute a "major offense" the act of blatant disregard for the rights of employees or the company involve a very dangerous or a very serious violation equivalent to occupying track without authority, dishonesty, or any of the other very serious acts of misconduct listed in the paragraph prior to the words "other acts of blatant disregard for the rights of employees or the company." In addition, aside from the rule of interpretation, it makes sense that to be called a "major offense" the violation should involve very dangerous or very serious misconduct.

The Board can conceive of situations where leaving a machine running and unattended could constitute a major offense because of the danger that it posed for other employees or the likely damage to company property. Leaving a locomotive unattended without setting the necessary brakes or a rail lift unattended with the engine running and

the machine not in park might be such a situation because of the real danger posed of injury to person or danger to property. In the present case, however, the Carrier failed to present substantial evidence that the Claimant's conduct posed any real danger of harm to person or property.

The only witness to testify of possible danger was the charging officer, Manager Davis. He admitted, however, that he was unfamiliar with a riding rail lift, that his only experience was with a walking rail lift. (Tr. 19). Foreman Grissom, a Carrier witness, testified that he is familiar with some of the safety features of the rail lift machine and that if the operator gets up out of his seat, the machine "will automatically cut off on its own." (Tr. 43). The Claimant testified without contradiction that he "applied every safety precaution" that he knew of. He put the machine in park, he stated; he "took it out of run position;" he "put the feet down in the chip of the track;" and when he got out of his seat, he testified, everything on the machine cut off except that the machine continued to run in idle. In fact, the machine did not move from its place while left unattended.

In addition, according to the evidence, the Claimant was away from the machine for no longer than a few minutes and, accepting Manager Davis's testimony that the Claimant had turned his head away from the machine while on the cell phone, the Claimant was always within approximately 100 feet of the machine and able to see it at will. So far as the evidence shows, the likelihood of the machine moving on its own on the facts of this case was remote, if it was even mechanically possible. The Carrier called no mechanic or other witness with knowledge of the rail lift machine to testify about the possibility of such a machine moving on its own. On the record in this case and for the reasons stated the Board must find that the Carrier has not presented substantial evidence to establish that the Claimant acted in "blatant disregard for the rights of employees or the

company" as those words are used in the IDPAP. For the same reasons the Board finds that the Claimant's acts did not "recklessly endanger the safety of employees or the public."

The Carrier has not cited any reported decision or any prior instance where an employee was charged with a major offense or removed from service in a situation where the employee left a machine running and unattended for a few minutes within his line of vision with the machine in park, taken out of run position, in cutoff mode, and where the machine did not move or cause any injury or damage during the brief period that it was left unattended. Nor is the Board aware of any such example. The Board finds that the evidence fails to establish that the Carrier had a valid basis for removing the Claimant from service or suspending him on the basis of the offenses with which he was charged in the notice of hearing. To the extent that Manager Davis and the Carrier relied on the Claimant's leaving his machine unattended for the short period of time that he did or his cell phone conversation as a basis for removing him from service they acted in error since those acts, singly or in combination, did not constitute a major offense.

Manager Davis, however, testified about additional reasons for charging the Claimant than the danger created by leaving his machine unattended. For example, Manager Davis testified on direct examination that he charged the Claimant with violation of General Regulations GR-2 because "he was very argumentative about the points that I was trying to make . . . and . . . continued to walk away while I was trying to handle the situation on the track." Manager Davis specifically cited item 2 of GR-2, "Enter into altercations while on duty or on company property," as having been violated by the Claimant. (Tr. 10).

Similarly, on cross-examination, Manager Davis expressly cited item 2 of GR-2 as

having been violated by the Claimant, stating, "Specifically for 2, the conversation that we had; the employee in a vicious tone from my perspective threatened me when he said he was going to call Jacksonville. He was going to; he can get my job and things of that nature. For that I felt that was an unsafe situation to allow an employee to get out there for 50 other employees, which I am responsible for, and the manner that he was talking, who knows what that employee is capable of whatever doing." (Tr. 18).

It is clear from Manager Davis's testimony that he believed that the Claimant entered into an altercation with him. Thus Mr. Davis read into the record the portion of General Regulation GR-2 that deals with altercations and testified that the Claimant was argumentative and that, in a vicious tone, he threatened to get Manager Davis's job. In addition, Manager Davis offered into evidence Foreman Grissom's written statement of the incident, which included the assertion that the Claimant "was very argumentative."

The IDPAP includes "altercation" as an example of a major offense. However, nowhere in the notice of hearing is the Claimant charged with engaging in an altercation, making a threat, or similar misconduct. The alleged altercation may have resulted from the Claimant's displeasure at being spoken to by his manager for leaving his machine running and unattended, but it was a completely different kind of violation than leaving a machine unattended or improperly using one's cell phone. It is not mentioned in the charge letter.

The same is true of the Claimant's taking lunch on his own without his foreman's or manager's permission. Manager Davis testified, "That employee [the Claimant] took lunch on his own will. That's why he's being charged with General Rule A." (Tr. 17). Even though the Claimant took his lunch at the same time as he left his machine unattended and Manager Davis testified that he charged the Claimant with a Rule A

violation for taking lunch on his own without permission, the fact is that the notice of hearing makes no mention of any violation on the Claimant's part in connection with taking lunch. The hearing officer recognized that fact when, in disapproval of questions being asked by the Claimant of a witness regarding the lunch procedure, the hearing officer declared to the Organization representative, "He [the Claimant] wasn't charged for taking lunch." (Tr. 47).

The hearing officer was correct. The fact that Manager Davis testified that he charged the Claimant with a Rule A violation because the Claimant took lunch on his own does not change the fact that the notice of investigation made no mention of the Claimant taking lunch without permission. It was too late to formulate a new violation at the hearing for the first time that was never mentioned in the notice of hearing. The same is true of the alleged altercation on the part of the Claimant. No mention was made of an altercation or argument or threat in the notice of hearing, and Manger Davis could not, consistent with Rule 25 of the Agreement, improvise such a violation in the hearing.

Nor is it permissible for the Carrier to rely on a lunch violation because General Rule A is mentioned in the notice of hearing or on an altercation violation because General Regulation GR-2 is mentioned in that document. Rule 25, Section 1(d) requires that the employee who is accused of an offense be give "reasonable prompt advance notice, in writing of the exact offense of which he is accused. . . ." The exact offense is "sitting under a tree with you[r] back turned to the machine you had been operating [or] More specifically the machine was running unattended and you were talking on your cell phone when I approached you about the incident."

The references to General Rule A and GR-2 are found in the very next sentence which states, "In connection with the above you are charged with failure to properly and

safely perform the responsibilities of your position, carelessness, as well as, possible violations of . . . General Rule A and GR-2 as well as . . . General Safety Rules ES-15 and GS-28." Clearly the rule citations relate back to the immediately preceding description of an alleged violation involving leaving one's machine unattended and talking on a cell phone. GR-2, for example, would be appropriate in the sense that Manager Davis testified that he considered leaving the machine unattended a danger to life and property (GR-2 item 6) and willful neglect of duty (GR-2 item 5). The rules, however, are not mentioned in connection with any other offense such as taking lunch without permission or engaging in an altercation, an argument, or making a threat. Nor is the Claimant required to guess what the charging officer had in mind in citing a specific rule. He is entitled by virtue of Rule 25, Section 1(d) to be informed of "the exact offense" of which he is being accused. See Public Law Board No. 7120, Award No. 57 at pages 8 and 9.

Since the Claimant was not charged with a violation involving an altercation, a threat, or being argumentative with his supervisor it was improper for the Carrier to rely on any such alleged conduct as a basis for removing him from service or otherwise disciplining him. The Board so finds.

It should be noted, however, that unlike in Award No. 57 of this Public Law Board, the Organization did not make any objection at the hearing to the testimony offered regarding matters that were outside the scope of the charge letter. See Award No. 57 at page 3. This Board has carefully considered whether the failure of the Organization to object to the testimony about alleged misconduct on the part of the Claimant outside the scope of the notice of hearing constituted a waiver of Rule 25 protection and requires that the Board consider such testimony in deciding whether the discipline assessed in this case was appropriate.

The Board has noted above that the Agreement dated November 19, 2007, between CSX Transportation, Inc. ("the Carrier") and its Employees Represented By Brotherhood of Maintenance of Way Employees ("the Organization") that established Public Law Board No. 7120 sets forth the basis on which this Board shall decide whether discipline assessed in a particular case is appropriate. The critical provisions are sections 7 and 8. Section 7, in pertinent part, requires the Carrier "to transmit to the Referee one copy of each of the following: (1) notice(s) of investigation(s); (2) transcript(s) of hearing(s); (3) notice of discipline; and (4) disciplined employee's service record." Section 8 states in full as follows:

> 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.

In this Board's opinion the failure of the Organization to object to the testimony about alleged misconduct on the part of the Claimant outside the scope of the notice of investigation did not permit the Carrier to find him guilty of offenses with which he was not charged in the notice of investigation. The Board bases that conclusion on the provision in Section 8 of the Agreement requiring the Board to determine if there was "compliance with the applicable working agreement" and "whether substantial evidence was adduced at the hearing(s) to prove the charge(s)."

Compliance with the working agreement requires the employee to be given reasonable prompt advance notice in writing of the exact offense of which he is accused.

Advance notice means prior to the Investigation. It is too late to inform the employee of charges against him once the Investigation has begun or after the contractual period for giving notice has expired. In addition, the Board must determine "whether substantial evidence was adduced at the hearing(s) to prove the charge(s)."

The term "charge(s)" must refer to the original charges since only they will have been issued in compliance with the applicable working agreement. It would not make sense to require the Board to determine "whether there was compliance with the applicable working agreement" but nevertheless permit the Carrier to charge employees by a method that did not comply with the working agreement. If such charging were permitted, then determining whether there was compliance with the applicable agreement would be a useless act. The Board finds that it is mandated by the November 19, 2007, Agreement to determine in every case the three items listed in section 8 of the Agreement for its determination unless there is a clear waiver by a party of any of those provisions. The failure of the Organization to object to the testimony in question indicated a failure to recognize that the charging officer had strayed beyond what he had charged the Claimant with in the notice of investigation, but it did not amount to a clear waiver of the requirements that the charges be made in compliance with the applicable working agreement, that such charges be proved, and that the discipline assessed be appropriate to the proved charges.

In the present case the Board has found that the actual charges made against the Claimant in writing in the notice of investigation were proved by substantial evidence. The additional charges, however, of engaging in an altercation, threatening the manager, and being argumentative were not timely or properly made in compliance with the working agreement, Rule 25. The same is true of the charge that the Claimant took his

lunch of his own volition without his manager's or foreman's permission. The improperly leveled charges are outside the scope of this proceeding and will not be ruled on by this Board.

As previously indicated the valid charges that were proved were not major offenses and did not justify removing the Claimant from service. The Board does not believe that the offenses even reached the level of Serious Offenses, which, according to the IDPAP table of such offenses, would generally involve "All rule infractions that result in a derailment, or damages to equipment, or a personal injury;" "At-fault vehicle accidents involving . . . A) Human fatality B) Bodily injury with immediate medical treatment away from the scene C) Disabling damage to any motor vehicle requiring tow away;" or any of a number of listed Operating Rules violations.

The definition which seems most fittingly to describe the Claimant's violations in this case is the one found in the IDPAP table of Minor Offenses: "All rule infractions that do not result in a derailment, or damages to equipment, or a personal injury, except as specified under Serious/Major." Having determined that the discipline assessed against the Claimant was not appropriate, the Board must now determine what discipline would be appropriate.

In determining what discipline would be appropriate the Board has taken into account the fact that the Claimant does not have any active discipline on his record. The Board, however, cannot overlook the fact that, in addition to the violations actually proven, the record shows that the Claimant did not comport himself in an appropriate manner. Even if the Claimant believed that there was some provocation on the part of his supervisor, that does not excuse the Claimant's failure to act in a respectful manner towards his supervisor and show proper deference to his manager's position. The record

shows that the Claimant displayed conduct toward his supervisor that was not appropriate for a subordinate to a superior. The Board will therefore assess discipline at the third step of the progression for Minor Offenses, namely, a Timeout with a five-day overhead record suspension, the overhead suspension to be effective for a one-year period beginning September 2, 2010. The Claimant shall be made whole for any lost wages or benefits as the result of more severe discipline imposed by the Carrier for the charges here involved.

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 date the signed Award is transmitted to the parties.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
January 10, 2011