

PUBLIC LAW BOARD NO. 7288

**AWARD NO. 5
CASE NO. 5**

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees Division - IBT Rail Conference

vs.

CSX Transportation, Inc.

ARBITRATOR: Janice K. Frankman

DECISION: Claim sustained

STATEMENT OF CLAIM:

Appeal of 30 day actual suspension imposed upon Claimant C.C. Cooper effective October 13, 2008, for failure to take any measures to provide for the safety of Trains and Highway Traffic, in connection with the incident that occurred on Wednesday, June 25, 2008, False Activation, at Arlington Rd., (DOT 503587 G) at approximately 1030 hours.

FINDINGS:

The Board, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute herein; and that the parties were given due notice of the hearing.

Claimant commenced service with Carrier on June 1, 1999, following merger with Conrail with whom he became employed on September 27, 1978. He holds seniority rights in the Engineering Department in the position Foreman which he has held since 1989. His service record with Carrier during the three years preceding the incident on June 25, 2008, reflects acceptance of 30 day suspension by waiver on March 30, 2007, with notation "1/2 WAS 3/23-4/6 '07 REST RETRAINING". He was notified of charges by certified mail dated July 2, 2008:

You are being charged with Interference with the normal Functioning of warning system without taking measures to provide for the Safety of Trains and Highway traffic. In conjunction with the aforementioned incident, you are also charged with failure to perform your duties safely and properly, use of poor judgment, and failure to take necessary precautions.

On June 25, 2008, and for several days prior, Claimant was foreman of gang removing and replacing ties at site of incident. Signal maintainer was included in briefing on June 25, and he and EIC Dan Smith were with Claimant and gang on track where work was performed. EIC had Rule 707 protection authority. EIC left Claimant's work area to visit another site and

was gone when FRA Inspector approached Claimant advising that gates were going up and down. Claimant removed two backhoes from the track at FRA direction. He contacted EIC to advise him of the gate issue. He did not contact the dispatcher. FRA left work site and went into signal maintainer office which included supervisory force. He returned approximately 30 minutes later and told Claimant gates still going up and down. He asked Claimant if they had protection. Claimant directed him to EIC who had returned to work site. Claimant believed that removal of the backhoes had been effective in addressing gate signal problem and believed issue was finally resolved when he directed FRA Inspector to EIC.

At investigation Claimant attested to his knowledge and understanding of CSXT Operating Rules, General Rule F, Rule 600 and GR-100. He had taken training earlier in 2008. He described job responsibility of EIC and his experience working with Rule 707 authority. He has had no signal training and distinguished his work responsibility and ability from the EIC and signal maintainer. He agreed that he and all employees have responsibility for safe operation to protect the public and the trains.

Current Roadmaster testified at Investigation. He was Assistant Roadmaster on the date of the incident and had no knowledge of it. He was twenty to thirty miles away when the incident occurred. His predecessor took statements from Claimant and apparently others and was aware of FRA statement. Organization requested presence for questioning at Investigation of FRA official, C/S employee responsible for the gate protection, C/S Supervisor at the scene, EIC and Support Foreman who worked with Claimant on date of incident. None of the individuals was present at Investigation. Organization representatives' inquiries at Investigation with regard to discipline imposed on others in connection with the incident were denied as irrelevant. Roadmaster expressed an understanding that EIC did not get time off and testified that he did not know what discipline EIC, his employee, had been given.

FRA Inspector Statement describes the incident as follows:

INTERFERENCE WITH NORMAL FUNCTIONING OF WARNING SYSTEM WITHOUT TAKING MEASURES TO PROVIDE FOR THE SAFETY OF TRAIN AND HIGHWAY TRAFFIC. While traveling I noticed the gates and lights activate on Arlington St. numerous times. A CSX track gang was replacing switch ties with two back hoes that were shunting the track intermittently causing the crossing to activate numerous times. Track gang did not protect crossing after I notified them of the problem and continued working and shunting the track.

Organization provided closing statement at Investigation arguing that Carrier had failed to provide a fair and impartial hearing. The two representatives referred to Organization request for presence of witnesses involved and having knowledge of incident. They argued Carrier had failed to provide evidence in support of charges against Claimant, that Claimant was an exemplary employee who had performed his work properly. They questioned what the EIC and Signal Maintainers, those responsible for protection and capable of addressing signal issues were doing at the time of the incident. They questioned the propriety of Assistant Roadmaster's role in Investigation and knowledge of the responsibility of the several employees involved including

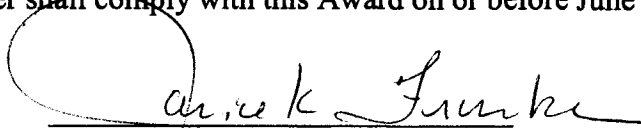
EIC who had knowledge of the gate issue while away from the site. Organization suggested FRA improperly sought accountability in Claimant.

Carrier failed to provide a full, fair and impartial Investigation. Its Notice of Investigation lacked required specificity, it failed to produce requested witnesses with direct involvement and knowledge of the incident and objected to inquiry with regard to relevant information. Carrier did not respond to Organization request. Due process requires opportunity to question accusers. Claimant was denied due process required by parties' Agreement and IDPAP.

In addition, Carrier has failed to provide substantial evidence in support of discipline. Rules were first cited and included in Investigation record. However, there has been no citation to or substantial evidence of Rule violation in support of discipline. Carrier's case rested upon the testimony of an individual with no knowledge of the incident and written statements of Claimant and FRA Inspector. Testimony of Claimant was unrefuted. Claim is properly sustained.

AWARD

Claim is sustained. Claimant shall be exonerated as provided at Rule 25, Section 4 of parties' Agreement. Carrier shall comply with this Award on or before June 1, 2009.


Janice K. Frankman, Chairperson
Neutral Member

Dated: May 8 2009