PUBLIC LAW BOARD NO. 7288

AWARD NO. 7
CASE NO. 7

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference

vs.

CSX Transportation, Inc.

ARBITRATOR: Janice K. Frankman

DECISION: Claim partially sustained

STATEMENT OF CLAIM:

Claimant J.L. Storozuk appeals 60 Day Actual Suspension imposed effective April 1, 2009, through May 30, 2009, for violation of CSX Operating and Safe Way Rules in connection with injury allegedly resulting from fall from Carrier truck on February 10, 2009, while working in the vicinity of mile post SP-760, and allegedly first reported by notice to Division Engineer R.E. Johnson on February 13, 2009; and also, based upon information on investigation of incident, for failing to follow established procedure while mounting and/or dismounting the rear of CSXT Vehicle No. 306063.

FINDINGS:

The Board, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employes 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 April 14, 2008, and holds seniority rights in the Engineering Department in the position Machine Operator. On Tuesday, February 10, 2009, he was working from Greenville, FL Depot on section team changing Sperry rails and working with welders. A.D. Warburton, Roadmaster, was his manager who reported to R. E. Johnson, Division Engineer, Charging Officer. Claimant slipped while climbing rear of Carrier truck to get water resulting in injury for which he was first treated the same day. By Notice dated February 27, 2009, he was "charged with failure to perform the responsibilities of (his) position, failure to timely report an alleged injury, failure to maintain three points of contact wile (sic) mounting and/or dismounting a vehicle, and possible violations of, but not limited to, CSX Transportation Operating Rules – General Rule A; General Regulation GR-2; CSX Safe Way General Safety Rule GS-5 and GS-12, Engineering Department Safety Rules ES-5 and ES-17. Claimant has had no prior discipline.

Following Investigation on March 10 and 11, 2009, Claimant received Notice of Discipline dated March 31, 2009, from J.T. Echler, Assistant Chief Engineer, which concluded that all charges had been substantiated and that ".. . a review of all testimony gathered during this hearing shows that you failed abide (sic) by the requirements of CSX to immediately notify your supervisor at the time of an incident or, when you decided to seek medical attention, and that you admitted to not using proper 3-point contact while attempting to gain access to the back of the Section truck." Mr. Echler cited boldfaced portions of the Rules and Regulations which he concluded Claimant violated:

General Rules

A. Employees must know and obey rules and special instructions that relate to their duties.

General Regulations

GR-2. All employees must behave in a civil and courteous manner when dealing with customers, fellow employees and the public. Employees must not:

- **Be . . . . . incompetent,**
- **Willfully neglect their duty,**

CSX Safe Way – General Rules

GS-5. Reporting Injuries or Incidents

A. On Duty Injuries – Any employee experiencing an on-duty injury must report the injury to a supervisor at the time of the occurrence prior to leaving the property on the day of the occurrence so that prompt medical treatment may be provided.

B. Medical Attention – Employees must immediately notify their supervisor of the decision to seek medical attention as a result of any on-duty injury.

D. Information Concerning Injuries – Employees with knowledge or information concerning an injury or accident to themselves, another or non-employee must report the information to their supervisor at the time of the occurrence so that emergency assistance and proper medical care can be promptly provided.

GS-12. Getting On or Off Equipment

A. Getting on or off equipment

- **Maintain three points of contact (two hands and one foot or one hand and two feet).**

CSX Safe Way – Engineering Department Safety Rules

ES-5. Ladder, Scaffolds, and Platforms

e. Face the ladder at all times and maintain three points of contact when ascending and descending.

ES-17. Getting On and Off, and Riding Equipment and Locomotives

d. Always face cars, equipment, and locomotives and maintain at least 3 points of contact while mounting or dismounting.

Mr. Etchler concluded that the seriousness of the proven charges supported a 60 day suspension.

Claimant led co-workers Bonds and Bruckerhoff from Greenville Depot to their worksite on date of incident. He drove his own vehicle which he had done on several occasions. He did not have an assigned Company vehicle. His work assignment was 0700-1730. Between 1530 and 1600, he slipped as he was climbing up into the Company truck for water. At investigation he admitted that he did not have three point contact as he pulled himself up to reach for contact

with his left hand. He explained that the truck was uneven, set afoul of the tracks and that he had not pulled out a step which he had not been using since it had only recently been repaired. Co-worker Bonds had gone up on the lower side of the truck and was coming down when he heard Claimant exclaim. He turned to see him holding on to a handrail with his right hand with his back against the bumper. Claimant had turned 180 degrees, slid down the corner of the truck and landed on the ground. Claimant responded to Bonds that he was all right. When he felt something under his shirt, he lifted it and showed Bonds and Bruckerhoff a laceration on his back. Bruckerhoff commented he could get some Superglue to take care of the wound. Claimant approached Manager Warburton as he was getting ready to leave the site by highrail. Claimant believed Bonds was close enough to hear him tell Warburton that he "had fallen on (his) ass" and wanted to have medical help. Warburton told him to remind him about it in the morning, which Claimant reported was a common response from Warburton. Bonds denied hearing Claimant talk with Warburton.

Claimant stopped at his fiancee's place of work on the way home. He told her about the fall, showed her his back and agreed to seek medical help. He went by his home, picked up his youngest son and was seen at Madison County Hospital at 1835. His laceration was stapled with 20 staples. He did not provide medical insurance information since he reported he had been injured at work and Carrier would be paying the bills. He discussed the fall with the physician's assistant who treated him and was sent home with instructions to avoid infection and to go to Hospital in Valdosta if he had further problems. He had reported that he had hit his head, and he had some scratches on his face and a red mark at his temple.

While Claimant was gone, his fiancée arrived at his home. She took a call from Mr. Warburton who asked for Claimant. She told him he was at the Hospital being treated for his injury, and he asked her to have him call. Claimant was dizzy and nauseated after he arrived home about 2000. His fiancée reported at investigation that his eyes were crossing when he spoke to her. She drove him to Valdosta where he was given a CAT scan and sent home with instructions for addressing concussion. Valdosta is a 35 mile drive from Claimant's home. They returned home about 0300. Claimant overslept and called Mr. Warburton from Greenville Depot at 0927 to tell him why he had been late for work. Mr. Warburton directed Claimant to stay there, and that he would come to talk with him.

Mr. Warburton reported Claimant's injury to J. H. Knight, Engineer of Track. They both drove to Greenville, Mr. Knight arriving well before Mr. Warburton. Claimant reported that before Mr. Warburton arrived, Mr. Knight discussed the merits of having an off-duty incident with him, referring to possible discipline and loss of bonuses for maintaining a good safety record. When Mr. Warburton arrived, the three of them discussed how the fall would be reported. Mr. Warburton and Mr. Knight denied having the discussion.

Mr. Warburton called R.E. Johnson, Division Engineer to report Claimant had fallen from a truck the day before and had also been injured at home the night before. Mr. Bonds and Mr. Bruckerhoff were directed to come to Greenville after Mr. Johnson directed Mr. Warburton to re-enact the fall from the truck. When Bonds and Bruckerhoff arrived, the five of them discussed re-enactment of the fall from the truck at Greenville Depot, not Milepost 760 where the incident occurred, as an off-duty incident which occurred as Claimant and others were getting ice for the truck. Written statements were provided by Claimant, Bonds and Bruckerhoff who were sent back to work.

Shortly after they left, Mr. Warburton became concerned that there would still need to be FRA reporting because they were on CSX property even if they said they were off-duty. It was

agreed that Claimant would provide a statement that he had been injured at home. He and Mr. Warburton sat down and fashioned the written statement which is Carrier Exhibit B which was then sent by fax to Mr. Johnson. It reported injury at home the evening of February 10, while fixing a fence and addressed apparent confusion by Mr. Warburton that he mistakenly understood Claimant had been injured on the job. Claimant testified that Mr. Knight verified that he would be able to testify to that detail if asked. The three men then went for lunch at a local restaurant where four welders who had been working at Milepost 760 the day before were eating. Claimant spoke with at least one of them to express his concern and ask advice about the handling of the accident.

Mr. Warburton spoke with Claimant on February 12, asking him to work the following day. He told him he could work light duty but Claimant told him he was not feeling well and had been given days off by the doctor. It is unclear whether Mr. Johnson spoke with Claimant on both February 12 and 13 or only on the 13th after learning that Claimant was saying he had been injured at work. Claimant returned Mr. Johnson's call and told him that the statement he had written on February 11, was false. He told him that he had reported the injury to Mr.Warburton on February 10, along with other detail. Mr. Johnson informed him that there would be investigation of the matter, and asked him to meet with him on February 18, to complete a Form P1-1A injury report.

Mr. Warburton requested new statements from Bonds and Bruckerhoff on February 13. He faxed them to Mr. Johnson along with a statement signed by four welders, "On Feb. 10, 2009 I did not see any injury causing accident." Carrier Exhibit J-2. Bonds testified at investigation that his second statement was the same as the first, just at a different location. The first, which was no longer available, had referred to the ice machine at Greenville Depot. He wrote, "While Jody was getting on the truck to get a bottle of water I was stepping off the truck to get down on the other end I heard a scrape and an 'omph' I looked behind me and saw Jodey sitting on the ground with his hand on the bar I asked if he was OK he said 'yeah' We laughed he got up and dusted himself off I asked if he was OK again he said 'yeah man' then walked out of sight toward his personal veichael (sic)." Bruckerhoff's second statement reported "On, 2/10/09 I, Lyndon Bruckerhoff 232190, saw nothing. I was informed on 2/11/09 of what had happened." Carrier Exhibit J-3

On February 13, Claimant went with fiancée to Jacksonville OBGYN clinic for an emergency appointment. She did not want to leave Claimant home alone. Mr. Warburton's wife is a nurse at the Clinic, and the three of them spoke. Claimant told her that he worked for the railroad, and she told them that her husband, Chip, was concerned that he had not reported an accident on Tuesday. Claimant told her that he expected that he was not happy with him and she responded that he must be Jody.

On February 18, Claimant and his fiancée met with Mr. Johnson and R.R. Roberts, General Manager of Safety at a restaurant in Madison where he completed Form P1-1A. He reported that he had been injured on February 10, at approximately 3:40 p.m. and had been treated at Madison County and Valdosta Regional Hospitals. He described the incident:

> Reached into back of truck attempting to climb into back of truck Left foot slipped off step Right hand was still holding railing on truck, foot slipped off body swung to right. Slid down side of truck along right side cutting right side of back and banging head on tool box on back of truck.

He responded to the question whether defective equipment caused incident, "Need another point of contact on truck" Carrier Exhibit D-1.

Mr. Roberts had started investigation of the matter on February 17. He testified at investigation that he was unable to corroborate the cover-up which Claimant had reported. His task was to determine where the injury occurred not whether there had been a fall. He had been told that Claimant determined where to stage the re-enactment and had told his co-workers Bonds and Bruckerhoff to say the injury occurred at Greenville, getting ice after hours, if asked. Mr. Roberts' investigation was one of two or more. An audit team conducted another investigation, the results of which were reported to Corporate only.

Because Mr. Johnson was unable to corroborate Claimant's statements relative to reporting the accident and injury on February 10, he assumed the injury at home statement, faxed to him on February 11, by Mr. Warburton was accurate, and he charged Claimant on February 27, 2009.

Investigation record includes medical records from Madison County Hospital Emergency Room; South Georgia Medical Center, Valdosta GA; Bixler Emergency Center, Tallahassee; and Four Freedoms Services, a primary care clinic where Claimant was treated February 16-23, 2009. The latter document is a CSX Form Attending Physician's Return to Work Report acknowledged by letter from T.J. Neilson, M.D., CSX Chief Medical Officer on February 27, finding Claimant medically qualified to return to work on March 2, 2009. Claimant was first seen between 1835 and 1940 on February 10, 2009, in Madison, where his laceration was stapled and he was instructed to go to Valdosta if further treatment was needed. Later that evening, he was given a CAT scan and diagnosed with "closed head injury" in Valdosta. Claimant arrived at Medical Center at 2315 and was released at 0239 on February 11, 2009. Claimant continued to experience dizziness and nausea and was given an MRI in Tallahassee on February 15, 2009. All records report a fall and injury at work on February 10.

If proven, Carrier charges constitute serious offense under Individual Development & Personal Accountability Policy (IDPAP). Serious offenses are subject to progressive discipline. Claimant has had no prior discipline. For first serious offense, IDPAP prescribes election by an employee between Options A and B to either participate in the "time out" process or for customary handling under RLA and parties' CBA. Here Charging Officer imposed 60 day suspension based upon seriousness of offenses. There is no evidence that an election opportunity was provided. Organization appealed the 60 day suspension pursuant to parties agreement for election of expedited handling. There was no request for submissions or oral hearing.

Carrier failed to provide substantial evidence of violation of all operating and safety rules cited. Claimant admitted to failure to maintain three point contact as he climbed into truck resulting in injuries. He failed to provide mitigating circumstances to support a claim that he should not be disciplined for violation of Rules and Regulations which require that he obey all general and specific operating and safety rules in that regard. His violation of General Rule A and GS-12 and CSX Safe Way Rules ES-5 and ES-17 which resulted in laceration and concussion constitute serious offense for which appropriate discipline is warranted notwithstanding the fact that Carrier failed to provide proper re-enactment of the incident.

Carrier failed to provide a full and fair hearing with regard to all charges. Its Notice of Investigation lacked specificity with regard to the breadth of the investigation which ensued over more than 17 hours in two days of hearing. It denied Organization opportunity to fully inquire with regard to relevant issues and in a manner appropriate to cross examination. Questions characterized as hypothetical or speculative were improperly excluded. Its examination of several of its witnesses was overtly leading while it objected and excluded questions propounded by Organization perceived to be leading.

Carrier's discipline appears to disregard the consistency of Claimant's testimony corroborated by witnesses called both by Organization and Carrier. It appears to disregard the documented sequence of events beginning with treatment of Claimant's injuries on the date of the incident into the early hours of the following day. Carrier failed to refute significant testimony which pieced together supports Claimant. Numerous contemporaneous conversations and comments support his assertion that Carrier knew that he had been injured shortly after the incident occurred and that he was seeking treatment. Carrier failed to provide evidence to refute Claimant's assertion that his written statement made on February 12, was false.

Safety is of paramount concern and Claimant's careless action resulted in serious injury constituting a serious offense. IDPAP anticipates professional development and "opportunity to improve and grow through a measured, open, and just process." It is appropriate to reduce discipline consistent with express terms of IDPAP and to partially sustain Claimant's Claim.

AWARD

Discipline shall be stricken from Claimant record and he shall be made whole consistent with CBA Rule 25, Section 4. Claimant shall participate in the "time out" process and the only recorded information will be a note that Claimant was referred to "time out" and 5-day overhead recorded suspension. Carrier shall comply with this Award on or before 30 days from its execution.

Janice K. Frankman, Chairperson
Neutral Member

Dated: June 10 2009