BEFORE PUBLIC LAW BOARD NO. 6564

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

CSX TRANSPORTATION, INC.

Case No. 19

Statement of Claim: Claim of the System Committee of the Brotherhood that:

1. The thirty (30) day suspension assessed welder R.S. Debono for his alleged failure to maintain a three point contact when dismounting his truck and for allegedly being responsible for the unauthorized modification of a safety device on the truck was without just and sufficient cause, based on unproven charges and in violation of the Agreement [System File H45701401/12(01-0182) CSX].

2. As a consequence of the violation referred to in Part (1) above, Welder R.S. Debono shall have his record cleared of this incident and he shall be compensated for all wage loss suffered.

Background:

In January 2001, Claimant took his assigned welding truck to a vendor for repairs, including the replacement of a broken step at the left rear of the vehicle. Before accepting the truck, Claimant inspected the new step from above, and tested its strength by jumping up and down on it. He did not, however, lie down under the vehicle to inspect the quality of the welds on the step.

On Thursday morning, February 1, 2002, as Claimant was stepping down backwards from the back of the truck, with welding cables hanging from his right shoulder, the newly installed step collapsed, causing Claimant to lose his balance and fall. According to Claimant, as he put his left foot on the step, his right foot was on the tailgate, his left hand was on the rail, and he was holding the grab iron with his right hand. Thereafter, Claimant, who had injured his neck in the fall, completed his shift, rejecting an offer of immediate medical attention and telling his

supervisors that he would wait to see how he felt later in the day.

After lunch the following day, Friday, February, 2, 2001, Claimant told his immediate supervisor, Roadmaster M.A. Koelsch, that he had made an appointment with his personal physician for 3:00 p.m. regarding his neck, which continued to hurt from his fall the previous day. Koelsch immediately took Claimant to meet with Koelsch's supervisor, Regional Engineer – Track, L. E. Houser. Houser testified that, when he heard that Claimant had been injured, he was concerned that Claimant might have a reportable injury, the first one in seven months:

> In my zest not to have a reportable personal injury to the division, you know, I wanted to make sure first of all that Rich [Claimant] was okay, but second of all not to have a reportable injury to the division, since we had went about 7 months without an injury.

(Tr. at 5.)

During Houser's conversation with Claimant, he emphasized that he did not want the injury to be reportable. In that connection, he told Claimant that, instead of keeping his doctor's appointment that afternoon, he might want to consider drinking a beer or two or taking some aspirin that night to see if the pain subsided and wait until the following Monday to see if medical attention was necessary. Claimant replied that he already had tried such home remedies the previous evening, and that he still felt pain in his neck. In addition, Houser and Claimant discussed whether X-rays or electric shock treatment would render the injury reportable. When Houser asked Claimant if he would be willing "to work with him" to try to make the injury non-reportable, Claimant replied that he would. During the conversation, Houser did not direct Claimant to forego his appointment later that day and Claimant did not tell Houser that he would not keep his appointment.

Immediately after his meeting with Houser, Claimant and Roadmaster Koelsch attended a

root-cause meeting to determine the cause of Claimant's injury and analyze how to avoid such injuries in the future. During that meeting, Koelsch did not instruct Claimant not to keep his 3:00 p.m. doctor's appointment, but did tell Claimant how to reach him over the weekend if he needed medical attention. Right after the root-cause meeting, Claimant went to the doctor and learned that he had a pinched nerve in his neck, which would require further medical treatment. Immediately after meeting with his doctor, Claimant telephoned Koelsch and told him about his doctor's visit, effectively communicating that he had a reportable injury.

By letter dated February 13, 2001, Houser notified Claimant that a hearing and investigation would be held on March 1, 2001 regarding the February 1, 2001 incident and its aftermath. In the letter, Claimant was charged with: (1) failure to perform his duties safely and properly by not maintaining a three-point contact while dismounting; (2) being responsible for an unauthorized modification of a safety device on a Carrier vehicle; (3) insubordination; and (4) failure to comply with the instructions of his superiors. Following the hearing, which was postponed until March 8, 2001, the Carrier advised Claimant in a March 28, 2001 letter that he would be suspended for thirty days for having failed to maintain a three-point contact while dismounting the vehicle and for being responsible for an unauthorized modification to the vehicle. According to the letter, the Carrier had not met its burden of proving that Claimant had been insubordinate: "The charge of insubordination was not proven, although it is felt that you were intentionally deceptive about your seeking medical attention." (Car. Ex. C). In an April 5, 2001 letter, the Organization appealed the Carrier's decision.

Carrier's Position:

The Carrier asserts that Claimant was afforded a fair and impartial hearing, and that it

met its burden of producing substantial evidence of Claimant's culpability. The Carrier emphasizes that, instead of requiring the vendor to re-install an approved cable strap step, Claimant accepted the repair job with a metal strap that was poorly welded to the vehicle. In addition, the Carrier argues that Claimant fell from the back of the vehicle because he was not using both hands as he stepped down. If he had been holding on with both hands, the Carrier claims that Claimant would not have injured himself when the step broke. In addition, the Carrier contends that, if Claimant had unloaded the welding cables first, he could have dismounted the vehicle using both hands. Furthermore, the Carrier claims that Claimant was insubordinate because, contrary to a directive from Mr. Houser, he failed to notify his supervisor that he intended to seek medical treatment. The Carrier, relying on arbitral precedent, also asserts that, under the circumstances, the 30-day suspension was not arbitrary, capricious or harsh.

Organization's Position:

The Organization argues preliminarily that the Carrier failed to give notice of discipline within the 20 days required by Rule 25, Section 1(f). On the merits, the Organization asserts that the Carrier had no record support for the conclusions set forth in its disciplinary letter. In addition, the Organization contends that the root cause analysis, which allegedly concluded that Claimant had not engaged in any unsafe practices, was improperly omitted from the record despite the Organization's request that it be included.

Findings:

The Carrier asserts that Claimant improperly accepted the vendor's unauthorized

modification to the Carrier's vehicle. The Board disagrees. When Claimant picked up the vehicle, the vendor, which had been approved by the Carrier, had elected to substitute a metal step for the cable step that Claimant had supplied. Before accepting the vehicle, Claimant inspected the top of the step and jumped on it in an attempt to verify that it had been properly welded to the vehicle. It would be unreasonable to expect Claimant to crawl under the vehicle to inspect the welds, which would have been the only way he could have detected that the welds were faulty. Because Claimant took reasonable steps to ensure the strength of the step, the Carrier failed to meet its burden of proving that Claimant improperly accepted the vehicle with the newly welded metal step.

In addition, the Carrier contends that Claimant failed to maintain three-point contact as he stepped down from the back of the vehicle, creating an unsafe situation. Claimant's credible testimony, however, undermines the Carrier's position. Because there was no eye-witness to contradict Claimant's credible testimony on this issue, Claimant's testimony that he maintained three-point contact is credited.

Moreover, it is no wonder that Claimant fell from the vehicle, because the step supporting most of Claimant's weight collapsed. Thus, the preponderance of the evidence supports the conclusion that it was the defectively welded step, and not Claimant's failure to dismount the vehicle safely, that caused Claimant to fall and injure his shoulder. Accordingly, the Carrier failed to prove that Claimant unsafely dismounted the vehicle.

The Carrier also persists in its argument that Claimant was insubordinate, even though the decision below expressly cleared him of the charge of insubordination: "The charge of insubordination was not proven, although it is felt that you were intentionally deceptive about

your seeking medical attention." (Car. Ex. C). Indeed, the evidence made clear that Claimant told both his immediate supervisor, Roadmaster Koelsch, and Regional Engineer – Track, L. E. Houser, in the early afternoon of February 2, 2001 that he had a doctor's appointment at 3:00 p.m. that day. Moreover, both Houser and Koelsch testified that they did not direct Claimant to forego the appointment. Accordingly, Claimant was not insubordinate when he went to his doctor for medical treatment.

The evidence also made clear that Houser inappropriately pressured Claimant not to keep his doctor's appointment. Indeed, Houser's own testimony revealed his pressing concern that Claimant's injury not be counted as a reportable injury:

> In my zest not to have a reportable personal injury to the division, you know, I wanted to make sure first of all that Rich [Claimant] was okay, but second of all not to have a reportable injury to the division, since we had went about 7 months without an injury.

(Tr. at 5.) In addition, Claimant testified without contradiction that Houser tried to persuade him to forego his 3:00 p.m. doctor's appointment and try home remedies that night to see if the pain in his shoulder might subside. Such management pressure on an employee to avoid reporting an injury is wholly inappropriate.

Apparently, Houser believed that his pressure tactic was successful, as he felt deceived that Claimant went to his doctor as scheduled. The evidence showed, however, that Claimant only agreed to "work with" Houser in trying to avoid having a reportable injury. Houser's expectation that Claimant's agreement to "work with" him meant that he would forego medical treatment that Claimant felt was necessary reveals the extent to which Houser's judgment was clouded by his zeal to avoid having a reportable injury. Under these circumstances, the Board finds that Claimant was not "intentionally deceptive" by not making it clearer to Houser and

Koelsch that he would be keeping his doctor's appointment that afternoon.

In summary, the Carrier failed to meet its burden of proving the charges against Claimant. The Carrier is directed to make Claimant whole and to clear his record of the charges leveled against him.

Award:

The claim is granted. The Carrier shall make Claimant whole for the thirty-day suspension imposed upon him, and shall clear Claimant's record of the charges leveled against him in connection with the above-described events on February 1, 2001 and thereafter.

Joan Parker
JOAN PARKER, Neutral Member

James T. Klimtzak
CARRIER MEMBER

DATED: May 10, 2004

ORGANIZATION MEMBER

DATED: 5-10-04