

**PUBLIC LAW BOARD NO. 6564**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**DIVISION – IBT RAIL CONFERENCE**

**And**

**CSX TRANSPORTATION, INC.**

**Case No. 51**

\* \* \* \*

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

1. The discipline (ten (10) days' actual suspension) imposed under date of August 3, 2004 upon Mr. W. Foreman for alleged failure to perform foreman duties on May 21, 2004 in connection with alleged improperly and insufficiently repaired track structure on Signal Mountain Industry Track, Abbeville Subdivision in the vicinity of Mile Post SG 572.5, Mina, Georgia that occurred due to a train derailment on May 19, 2004, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.
2. As a consequence of the violation referred to in Part (1) above, the discipline shall now be removed from the personal record of Mr. W. Foreman and he shall be compensated for all time lost.

**Background**

Claimant Wayne Foreman, with seniority as a trackman (December 4, 2000), a track Inspector (August 16, 2001), and a welder helper (October 17, 2001), was working as a foreman on Gang 5A09 when the incident involved here occurred. On May 21, 2004,

Claimant and his two-man crew were assigned by Engineer of Track S. D. Frazier to make repairs on the Signal Mountain Industry Track, Abbeville Subdivision, in the vicinity of mile post SG 572.5, Mina, Georgia. A derailment had occurred on May 19, 2004, which created the need for the repairs in that area, as well as in several other locations that Frazier had marked for Claimant and his crew.

On May 22, 2004, another derailment occurred at the same location where Claimant and his crew had made repairs on the previous day. After investigating the second derailment, Engineer of Track Frazier determined that the repairs assigned to Claimant, particularly the gauging of track, were not properly completed.

By letter dated June 4, 2004, Claimant was charged with "failure to perform [his] duties as Foreman, failure to follow instructions and violation of CSXT, MWI, 2001-01, section 213.53, minimum safe standard for track gauge." Claimant was given the opportunity to participate in the Time Out process, which is a non-disciplinary step in the Carrier's Individual Development and Personal Accountability Policy (IDPAP), or to undergo customary handling under the Collective Bargaining Agreement. Claimant, by not timely accepting the Time Out option, accepted the latter procedure.

The investigation was initially scheduled for June 18, 2004 but was postponed and rescheduled on two occasions at the Organization's request, and eventually it was conducted on July 15, 2004. Claimant was found guilty as charged and assessed ten days' actual suspension. The discipline was appealed by the Organization, and after the Carrier denied the appeal, the parties exchanged further correspondence and addressed the matter in conference. The dispute was not resolved, however, and is therefore presented to this Board for final decision.

**Contentions of the Parties**

The Carrier contends that a fair and impartial investigation was conducted, and that Claimant was found guilty based upon a fully developed record, which demonstrated his guilt.

On the merits, the Carrier submits that Claimant was responsible for properly performing the repairs assigned to him and for overseeing the work of his crew. The investigation that was conducted following the May 22 derailment indicated that the track Claimant worked on was incorrectly gauged in violation of CSXT rules and FRA regulations, and it was Claimant's substandard work that caused the second derailment.

The Organization contends that the Carrier's case is procedurally flawed because it failed to notify Claimant of a prior hearing date and postponement and initially refused to grant the Organization's request for postponement of the hearing scheduled for July 1, 2004.

With respect to the substantive issues in dispute, the Organization argues that it was not Claimant's duty to personally make repairs to track because he was a foreman. Therefore, it was inappropriate to charge him and not others who might have been more directly responsible for the May 22 derailment.

The Organization further submits that Claimant and his crew made repairs at the specific locations marked by Mr. Frazier. While the derailment on May 22 occurred on the same track where Claimant had worked, the derailment did not occur at the same precise locations where he and his crew made repairs. Moreover, in the Organization's view, the cause of the May 22 derailment was rotten ties, not wide gauge, as alleged by CSXT. This conclusion was supported by a written statement from Transportation

Department employee J. R. Lampley, who was part of the train crew at the time of the May 22 derailment and who observed the derailment from the ground.

**Opinion**

With respect to the procedural issues raised by the Organization, the Board has carefully reviewed the Record and finds that while the Carrier's conduct was not perfect in regard to the hearing notices it sent, there was no denial of due process. The hearing was postponed several times at the Organization's request. Ultimately, Claimant attended his hearing with representation; he understood the charges and had ample opportunity to prepare a defense; he was afforded the chance to present testimony and cross-examine opposing witnesses; and the hearing itself was conducted fairly. There was no procedural defect that either abridged Claimant's fundamental rights or denied him an impartial hearing.

As to the substantive issues, it is undisputed that Engineer of Track Frazier assigned Claimant to perform track repairs, which included gauging track. The Organization's suggestion that Claimant was blameless because, as foreman, he was not obligated to make track repairs is without merit. Frazier testified persuasively that Claimant was required to maintain the track structure on the territory assigned to him, and that he was responsible for the work of the employees who reported directly to him. Claimant likewise agreed that the two employees on his crew reported directly to him and that he was responsible for their work (Car. Ex. B-27)

On May 21, 2004, Claimant was specifically assigned to make repairs to the derailment area and to gauge those joints, including "the curved closure in the switch at the foot of the hill that separates Signal Mountain from the rest of the industrial park, and

to gauge...behind the long ties off the main line switch that enters the industrial area.”  
(Car. Ex. B-13) Claimant was sufficiently trained and experienced to perform this assignment, and he knew the appropriate rules and standards to which he was subject.

The credible evidence in the Record supports the conclusion that the repairs that Claimant oversaw on Signal Mountain were made incorrectly and were below the minimum standard gauge of 56 ½. Claimant admitted that when he got his assignment on May 21, “the rail was marked to show where we needed to gauge.” (Car. Ex. B-31) While Claimant testified that in his view, he and his crew set the gauge correctly, investigation of the areas they repaired showed that the gauge “had been spiked at below the minimum set of standards.” (Car. Ex. B-15) Furthermore, Frazier testified credibly that although Claimant repaired the derailment site and some of the joints going down the hill,

...[he]failed to make repairs to the curved closure at the foot of the hill and he failed to make repairs to the gauge that was off the long ties, behind the main line switch coming in to the industry. (Car. Ex. B-39)

Frazier also explained that the physical evidence after the second derailment demonstrated that

...in that curve...the point of derailment occurred right at the location where the...gauge was substandard....It was obvious that the previous repairs had been done right at that location and measuring the gauge, the gauge at the point of derailment where the rail began to roll was under 56 inches. (Car. Ex. B-40)

The Organization argues that some other crew might have been responsible for the substandard repairs that contributed to the derailment. However, that speculation finds no support in the Record. But even assuming *arguendo* that the work Claimant and his crew did on May 21 did not directly cause the second derailment on May 22, the physical

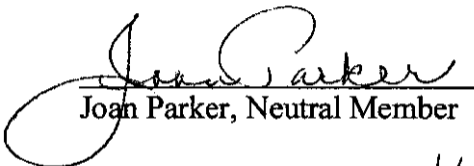
evidence showed that at the sites where Claimant and his men worked, the repairs they made were substandard and not up to required specifications.

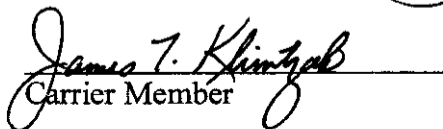
As to the Organization's submission of an undated, unauthenticated note from a conductor who did not testify, suffice it to say that the proffered evidence has no probative value. Conductor Lampley was not examined, and while he opined that the derailment resulted from rotten ties, his note did not address Claimant's assignment or reflect any knowledge of whether the repair work had been properly performed.

For all of the foregoing reasons, Claimant's suspension must stand. His investigation was fairly conducted, and the ten days actual suspension that was assessed was not excessive punishment given Claimant's failure to perform work in accordance with CSXT and federal regulations.

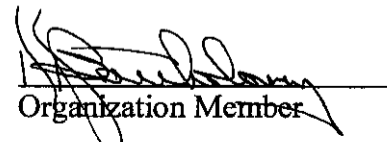
**Award**

The claim is denied.

  
Joan Parker, Neutral Member

  
Carrier Member

Dated: October 6, 2006

  
Organization Member

Dated: 10-6-06