

**PUBLIC LAW BOARD NO. 7008**

**PARTIES TO THE DISPUTE:**

CSX TRANSPORTATION, INC.

-and-

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES  
Division of the International Brotherhood of the Teamsters

**STATEMENT OF CLAIM:**

In accordance with the provisions of Rule 25, Section 3, of the June 1, 1999, Agreement the following will serve as our appeal of discipline assessed to BMWED employee W. R. Thomas ID \*\*\*\*\*, as a result of the hearing held April 11, 2007, in the Nashville Division Headquarters at 2000 Seaboard Dr. Nashville, TN.

For the reasons stated, as well as our numerous objections at the hearing, and due to the fact that Mr. Thomas is considered as a "disciplined employee" and according to Mr. Echler's letter dated May 1, 2007, the justification of discipline is based upon Mr. Thomas's "prior record", even so, would have nothing to do with anything in regards to Mr. Thomas being charged by Roadmaster Smith. We emphasize once again, that Mr. Thomas be exonerated. It is respectfully that the charge letter and all matters relative thereto be removed from Mr. Thomas's personal file, and he be made whole for all losses suffered as a result the Carrier's actions.

**OPINION OF BOARD:** Production Foreman W. R. Thomas ("Claimant") was hired by CSXT in the Track Department of the Engineering Department on November 8, 1999. At all times relevant to this case, he was assigned to Position 6L10-060: Midwest South Service Lane Production Foreman. On February 27, 2007, Force 6L10, under Claimant's supervision, was installing switch ties on the Nashville Terminal Subdivision near the A-Yard Divider Switch. At approximately 15:15 hours, Claimant Thomas physically entered into the "Red Zone" of a working backhoe without communicating his presence to the operator. As the backhoe operator positioned himself to lift a rail

in order to allow the tie plate to slide back on, Claimant stepped into the Red Zone, picked up a tie plate and used it to “sweep” rock off of the top of the tie. As the Claimant placed the tie plate on the tie, the backhoe operator maneuvered to get in a better position with his bucket against the rail so he could set then set the rail down to reposition his bucket. While he was setting the rail down and just as Claimant Thomas swept the rock off the top of the tie, the rail caught the corner edge of the tie plate, snapping it out of Claimant Thomas's hand and severely pinching the Claimant’s left index finger.

Thereafter, by a letter dated March 9, 2007, Claimant Thomas was instructed to attend a formal investigation on March 20, 2007, on the following charges:

... failure to properly and safely perform the requirements of your position and possible violations of, but not necessarily, limited to CSX Transportation Operating Rules - General Rule A, General Regulations GR-2, GR-16 and Operating Rule 727, in addition to CSX Safe Way General Safety Rules GS-1, GS 3, and GS-7.

After two (2) postponements at the request of the Organization, the hearing was convened on April 11, 2007, with Claimant Thomas and his duly authorized representative in attendance. From the evidence and testimony presented, Carrier concluded that the Claimant was culpable as charged and by letter dated May 1, 2007, the Claimant was assessed a thirty day (30) actual suspension.

Vice Chairman A. H. Shelton appealed the discipline to the former highest officer of the Carrier designated to handle such matters, Director Labor Relations J. H. Wilson, in a letter dated May 8, 2007:

Mr. Thomas who is a diligent and hard working employee and is a valuable asset to the company. We feel that the discipline of thirty (30) days actual suspension is very harsh, and that Mr. Thomas is being treated very unfairly, and therefore we request he be exonerated.

(Mr. Shelton also stated any procedural objections expressed at the hearing were thereby incorporated into the appeal).

Following a conference on August 2, 2007, Director Amidon denied the claim by letter of August 15, 2007. After asserting that Carrier had honored all of Claimant Thomas's "due process" rights as provided under Rule 25 (Discipline) of the BMW/CSXT Agreement and had produced "sufficient evidence" to demonstrate Claimant Thomas was guilty as charged. Director Amidon went on to state:

. . .it is the responsibility of the foreman to maintain the safety of his group and to practice safe working habits. He is to lead by example. He is to conduct safety briefings whenever something changes. Mr. Pewitt knew Mr. Thomas was in the red zone, and he thought he was laying the plate on the tie. Mr. Thomas failed to notify Mr. Pewitt that he was not clear. When Mr. Thomas entered into the red zone, he should have maintained contact with the backhoe operator.

By letter dated September 27, 2007, Vice Chairman Shelton rejected the Carrier's appellate declination, maintaining that Claimant was deprived of a "fair and impartial hearing" because the Carrier had not complied with his requests for pre-hearing review of Carrier's evidence; and further asserted that "the Operator was to blame for not noticing that Mr. Thomas had placed himself in the position to get his finger pinched". The Carrier responded on November 9, 2007, with numerous Board awards explaining that the right of discovery asserted in this case was not provided under Rule 24[i] (see, for example, Public Law Board No. 6564, Award No. 48, involving the same contract language). Carrier went on to maintain that Claimant Thomas, as the Foreman of the gang, was responsible for notifying Mr. Pewitt that he had entered the Red Zone.

When the Parties were unable to resolve the instant dispute on the property, it was listed before this Board for final and binding determination of the of the unadjusted claim in arbitration.

Review of the record evidence shows that the Carrier met it burden of proving, by a preponderance of probative evidence, that Claimant was guilty of violating CSXT Operating Rules General Rule A, General Regulations GR-2, GR-16, and Operating Rule 727, as well as CSX Safe

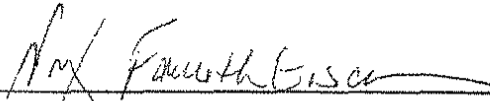
Way Rules GS-1, GS-3 on February 27, 2007. The evidence supports Carrier's charges that Foreman Thomas failed to properly and safely perform the requirements of his duties in a safe and efficient manner by failing to communicate with the backhoe operator before entering into his Red Zone; and, using a tie plate to remove ballast from the top of the tie. Backhoe Operator Pewitt testified, without contradiction, that he was trying to get a bit to raise the rail to put on the last plate when Claimant Thomas suddenly stepped over to clean off the tie so he could put the plate down. When Mr. Pewitt got the rail placed where he wanted it, he took his hand off of the levers to signal that it was clear to put the plate on.

Claimant Thomas acknowledged that he had been taught in his training classes that the shovel or the pick or the plate pusher were the proper tools to use for putting the plate on the ties. In this case, he did not do so and, therefore, when Operator Pewitt had to reposition the bucket to get better purchase, Claimant Thomas suffered the pinched finger injury. It could be said that if Operator Pewitt had not repositioned the bucket the injury might not have occurred, but that begs the question that the Claimant's own safety violations put him in harm's way in the first place.

Therefore, we find nothing in this record to warrant reversing or modifying the Carrier's assessment of a thirty (30) day actual suspension in this case.

AWARD

Claim denied.



Nancy Faircloth Eischen, Chair



Union Member

Oct. 23, 2008



Company Member

Oct. 23, 2008