PUBLIC LAW BOARD NO. 7008

PARTIES TO THE DISPUTE:

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES

and -

CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM:

In accordance with the provisions of Rule 25, Section 3, of the CSXT/BMWE Agreement, dated June1, 1999, the following will serve as our appeal of the discipline of 15 actual days starting on May 7, 2007 and ending on May 21, 2007, contained in the L. E. Houser, Acting Assistant Chief Engineer System Production Teams letter dated April 20, 2007, received in this office on April 24, 2007, addressed to M. M. Dawson, ID#*****.

Due to the fact that Mr. Dawson is considered a 'disciplined employee' and according to Mr. Houser's letter dated April 20, 2007, the justification of discipline is based upon Mr. Dawson's 'prior record', even so, would have nothing to do with anything in regard to Mr. Dawson, and or the crane turning over, we emphasize, once again, that Mr. Dawson be exonerated. The charge letter dated March 6, 2006 should be stricken from Mr. Dawson's record and Mr. Dawson should be paid any and all loss of straight time and overtime he would be paid had he not been disciplined by the Carrier and all if any fringe benefits will be reinstated.

OPINION OF BOARD:

Machine Operator M. Dawson ("Claimant" or "Dawson") was hired by Carrier on August 26, 2002. At all times relevant to this issue, the Claimant was assigned to System Production Gang (SPG) Machine Operator position 5XC7-67H.

On February 28, 2006 Claimant, and his fellow SPG team members, were working near milepost 0ZA 281.80, in Evansville, IN resurfacing portions of track and replacing the old rail. For his part, the Claimant was operating a crane, threading the new rail into the track. As the Claimant began threading the rail, it began to "bunch and kick" resulting in an "unsafe operation". Claimant's supervisor, Foreman R. D. Price, observed the buckling rail and instructed the Claimant to "stop" until a second crane arrived to "help" relieve the kinks. However, instead of responding to the directive, the Claimant replied: "I think I can get it" and continued moving forward, causing the crane to tip on its side.

Shortly after the occurrence, Manager System Production Gangs K. Robertson arrived to investigate the incident. It is not disputed that when Mr. Robertson asked Dawson if he had been "hurt" when the crane tipped on its side, the Claimant stated, unequivocally, that he "was not injured" and "did not require medical attention". In that connection, the record reveals that following the incident, the Claimant completed his assigned shift and worked, without complaint, for two (2) days following the incident.

At some point during the March 2, 2006 workday, the Claimant approached Foreman Price and Assistant Foreman/Time Keeper Hayes ("Mr. Hayes") alleging that he had "a little soreness in his back" and was going to "go home". Of note, following that announcement, the Claimant opined that the soreness was "not serious" and that "nothing will come of it". Regardless of Dawson's protestations, Foreman Price also spoke to the Claimant, reminding Mr. Dawson that if he had "any problems" relating to the accident, specifically the "soreness" in his back, he was to contact him "immediately".

Approximately two (2) days later, the Claimant called Mr. Hayes, who in turn called Foreman Price, to report that he "got worse over the weekend" and had "gone to see a doctor". The Claimant did not mention if the doctor was able to diagnose the recently manifested "soreness in his back", but Dawson did tell Mr. Hayes that he intended to report for work, as scheduled, the following day (Monday), despite his alleged injury. Prior to ending the phone conversation, Mr. Hayes directed Mr. Dawson to "contact Foreman Price immediately" to report the recent development (s). However, Claimant Dawson did not call Foreman Price until sometime during the March 5 workday, at which time he informed his foreman that his "injury" became "worse" overnight, and he would not, for an unspecified period of time, be reporting for work.

In a March 6, 2006 letter, the Claimant was instructed to attend a March 21, 2006 formal investigation for his "failure to follow Carrier regulations when seeking medical attention". After one (1) mutually agreed upon postponement , the hearing convened and was completed on April 10, 2007, with both the Claimant and his representative in attendance. Thereafter, in a letter dated April 20, 2007, Carrier informed the Claimant that he had been found guilty as charged, resulting in a

fifteen (15) day actual suspension.

Organization Vice Chairman Griffith appealed the discipline in a letter dated May 3, 2006. At the outset, the Vice Chairman averred that the Carrier failed to apprise the Claimant of a "definite and explicit" charge. Specifically, Mr. Griffith stated: "*...a definite and certain charge is part of due process to be accorded to Mr. Dawson in order for him to prepare a defense prior to the investigation being conducted. A definite charge is fundamental to a fair and impartial hearing*". Since the Carrier "failed to comply with its contractual obligations", the hearing was "procedurally flawed" and the discipline should be set aside on that basis, according to Mr. Griffith.

Regarding the merits of the claim, the Vice Chairman argued: "*On Friday, March 3, 2006, Mr. Dawson sought medical attention and was prescribed medicine after an unsuccessful attempt was made to contact Manager Robertson, he did contact Assistant Foreman Hayes, who in turn told the Claimant that he would contact Manager Robertson....*". Consequently, Mr. Griffith maintained that Claimant Dawson had complied with the "regulations specified by the Carrier", therefore, "*the Claimant should be paid for all lost time and all mention of the incident immediately removed from his record*".

Carrier Director J. Amidon confirmed the parties' August 28, 2007 conference and issued the Carrier's written declination in a letter dated September 27, 2007. In response to the Organization's procedural allegation, Director Amidon noted: "*The 'exact offense' was clearly outlined in the charge letter. Mr. Dawson sought medical attention and did not immediately inform his supervisor. The Carrier is not contractually bound to list specific rules that were violated as the purpose of the investigation is to produce evidence to judge if a specific rule was violated. Therefore, the charge letter provided to the Claimant was in accordance with the language of the Agreement*".

Regarding the merits of the dispute, Carrier maintains that the evidence "clearly established" that the Claimant was guilty as charged, and given the "severity of the proven offense", the discipline of fifteen (15) days actual suspension, "in light of Claimant's personal record" was "fully justified".

In subsequent correspondence, Mr. Griffith again argued that: "*he did make attempts to contact supervisor Robertson and Assistant Foreman Hayes on their cell phones to no avail. Due to the fact that Mr. Dawson is well aware of the remote locations where cell phones may or may not work, and due to the fact that he was under the influence of prescribed medication, he did not continue to call. This is not unreasonable conduct on the part of Mr. Dawson...*".

When the Parties were unable to resolve the dispute in the usual and customary manner established on the property, the issue was listed before the Board for adjudication.

The record evidence demonstrates that the Claimant's due process rights, as provided for under Rule 25 (Discipline), were fully protected. The Organization asserted that the Carrier committed a fatal procedural flaw when it did not specify the precise rule with which Claimant was being charged, however, we do not concur on that point. It is well settled in this industry that the hearing notice must provide the accused employee with sufficient information concerning the Carrier's allegation(s) in order that a defense can be prepared. However, there is no Agreement rule which mandates the specificity which the Organization seeks in this case.

Turning to the merits of the issue, the record evidence clearly demonstrates that Claimant Dawson was guilty of the Rule violation(s) with which he was charged. At the outset, we note that the Claimant was asked, no fewer than three (3) times, whether he had been injured as a result of the February 28, 2006 crane accident. Each time he was asked, the Claimant replied in the negative. Even when Mr. Dawson reported "some soreness" in his back prior to leaving work two days after the incident occurred, he maintained that it was "nothing serious" and he didn't think "anything would come of it....". Soon after uttering those words, the Claimant's "sore back" became worse, resulting in a doctor's visit. Although he had been instructed otherwise, the Claimant did not timely report the visit to the doctor, and did so only in a belated late night phone call to Assistant Time Keeper Hayes. Further, although he was directed to call Foreman Price "immediately" after speaking to Mr. Hayes, the Claimant ignored the Assistant Time Keeper's directive and did not contact Foreman Price that evening, instead reporting his visit to the doctor to Manager Robertson several hours later.

For his part, the Claimant asserts that although he didn't try to contact his supervisor, Foreman Price, he did attempt to contact both Mr. Hayes and Manager Roberts, but was not successful in doing so. Specifically, the Claimant contended that after he sought medical attention on Friday, March 3, 2006 he "immediately" tried to call Assistant Foreman Hayes on his cell phone, but was "unable to talk or leave a message" for Mr. Hayes. The Claimant went on to assert that he also tried to contact Manager Robertson's cell phone, but was unable to speak with him, or leave a message, due to "apparent cell phone reception problems in the area". In his own defense, the Claimant noted that he "successfully" phoned Mr. Hayes at 11:00 p.m., Sunday evening, and reported "the matter". With regard to Mr. Hayes testimony that he had instructed the Claimant to contact Foreman Price "immediately", the Claimant contends that Mr. Hayes "informed me that he would take care of it and contact Manager Robertson" on his behalf.

In the circumstances, the Claimant's self serving testimony regarding his attempt(s) to contact Messrs Hayes and Robertson immediately, sans explanation as to why he never attempted to contact his immediate supervisor, Foreman Price, is simply not credible. The Claimant was asked, on at least three (3) occasions, if he was hurt when, on February 28, 2006, the crane he was operating tipped over. Each time he was asked, Dawson replied in the negative. During each of the three (3) interchanges, the Claimant was also instructed, in no uncertain terms, to contact the Carrier "immediately" if the "soreness in his back" worsened, or he sought medical help. The record clearly demonstrates that the Claimant did not follow those directives, thereby violating the Agreement Rules with which he was charged. Therefore, this claim must be denied.

AWARD NO. 38
NMB CASE NO. 38
UNION CASE NO. D21894807
COMPANY CASE NO. 12(07-0703)

AWARD

Claim denied.

Nancy Fairdloth Eischen, Chair

Union Member 2-23-09

Company Member 2-23-09