

PUBLIC LAW BOARD NO. 7104

AWARD NO. 29

CASE NO. 29

PARTIES TO
THE DISPUTE:

Brotherhood of Maintenance of Way Employees
Division - IBT Rail Conference

vs.

CSX Transportation, Inc.

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained.

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The discipline, thirty (30) day suspension [fifteen (15) day actual and fifteen (15) day overhead for one year] and conversion of a previous thirty (30) day overhead suspension to actual suspension imposed upon Foreman Charles J. Brinson in connection with an alleged failure to properly perform his duties in connection with a machine collision on June 29, 2007 is based on unproven charges, unjust, unwarranted and in violation of the Agreement [System File B15805307/12(07-1070)].
2. As a consequence of the violation in Part 1 above, Mr. Brinson will be exonerated from these charges against him and all matter relative thereof, be returned to service with his seniority rights and the pay period lost wages due to the charges placed against him."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees 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, and that the parties were given due notice of the hearing.

It is undisputed that claimant was responsible for supervising the operation of two track machines on the morning of June 29, 2007 when they bumped together at a slow rate of speed. The repair cost of a bent part on one machine was estimated at approximately \$100.

Before reaching the merits of the claim, however, we must deal with a procedural objection

as a threshold matter. The Organization and claimant contend that the Carrier violated the discipline rule of the Agreement in two ways. Rule 25 reads, in pertinent part, as follows:

RULE 25 - DISCIPLINE, HEARINGS, AND APPEALS

Section 1 - Hearings

* * *

(c) An employee who is required to attend an investigation and or make a statement prior to a hearing in connection with any matter which may eventuate in the application of discipline to any employee *shall* be offered the opportunity to contact his accredited union representative is reduced in writing. A copy of the statement, if reduced in writing, *shall* be furnished him and his union representative.

* * *

(Italics supplied)

As written, the use of the word “shall” in subparagraph (c) imposes mandatory procedural due process requirements upon the Carrier in two separate respects: First, a Carrier official who requires a written statement from an employee must affirmatively inform the employee of the right to obtain union representation before the employee submits a written statement. Second, the Carrier official must immediately provide the employee and the union representative with a copy of the written statement upon its completion.

It is undisputed in the transcript of the investigation hearing that the Carrier’s Charging Officer did not affirmatively offer the claimant the opportunity to contact an accredited union representative. He admitted he was not aware of the rule. In addition, the hearing transcript shows that claimant and his accredited representative were not provided with a copy of claimant’s written statement until the hearing was in progress. Accordingly, it is clear that the Carrier violated both of the mandatory due process requirements of Rule 25, Section 1(c).

Review of the hearing transcript shows that the Organization objected to the Carrier’s due process violations. The Organization actually read the text of Rule 25, Section 1(c) into the transcript. The Conducting Officer acknowledged, at Page 4, Lines 9 through 11, knowing that the claimant was entitled to a copy of his statement before the hearing.

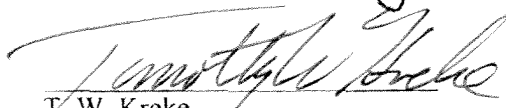
Where, as here, the parties have agreed upon explicit and mandatory procedural due process obligations in their Agreement, perfection and preservation of the right to impose discipline requires compliance with the obligations. When those obligations are not fulfilled, the Carrier effectively waives and/or forfeits its ability to impose discipline.

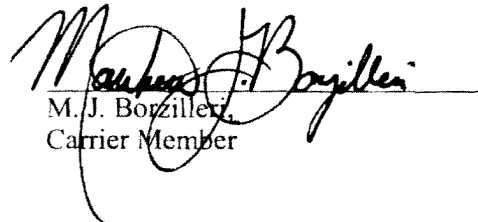
Given the foregoing discussion, we must sustain the claim.

AWARD:

The Claim is sustained. The Carrier is directed to make claimant whole for all losses resulting from the improperly imposed discipline. Further, the Carrier must expunge all of the claimant's employment records of the improperly imposed discipline. The Carrier is directed to comply with this Award within thirty (30) days of the date shown below.


Gerald E. Wallin, Esq., Chairman


T. W. Kreke,
Organization Member


M. J. Borzilleri,
Carrier Member

Date: May 28, 2010