

PUBLIC LAW BOARD NO. 7104

AWARD NO. 30

CASE NO. 30

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 thirty (30) day suspension imposed upon CAT Tamper Operator Gordon Moore in connection with 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 D21711407/12(07-1071)].
2. As a consequence of the violation in Part 1 above, we request that the charge letter and all matters relative thereto be removed from Mr. Moore's personal file and he be made whole for all losses suffered as a result of the Carrier's actions."

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 operating the CAT Tamper on the morning of June 29, 2007 when it bumped into a Ballast Regulator at a slow rate of speed. The repair cost of a bent part was estimated at approximately \$100.

Before reaching the merits of the claim, however, we must deal with the procedural objections of the Organization and claimant. They assert that the Carrier's charging officer violated the discipline rule of the Agreement in two separate respects. 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.

(d) An employee who is accused of an offense shall be given reasonable prompt advance notice, in writing, of the *exact* offense of which he is accused with copy to the 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. Finally, the use of the word “exact” in subparagraph (d) requires a higher level of precision than might otherwise be required by less explicit terminology.

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. In addition, it is further undisputed that the Charging Officer did not provide claimant with a copy of his written statement after it was completed. Accordingly, it is clear that the Carrier violated both of the mandatory due process requirements of Rule 25, Section 1(c).

During cross-examination of the Charging Officer by the Organization, the following questions and answers were made in the transcript at Page 13, Lines 36 through 43:

Q: * * * Did you place the exact charges in the charge letter against Mr. Moore?

A: No.

Q: So you violated Rule 25, Section 1(d)?

A: Yes

* * *

Review of the hearing transcript shows, unquestionably, that the Organization properly, and repeatedly, objected to the Carrier’s continuance of the disciplinary process after it was clear that the Carrier had violated the foregoing procedural due process requirements. The Organization’s objection was properly preserved and advanced during the appeal process.

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.

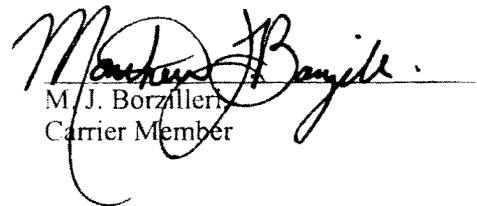
Given the foregoing discussion, we must sustain the claim.

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