

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYEES' DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated January 10, 2008, M. J. Hawkins ("the Claimant") was instructed by his Roadmaster to attend a formal Investigation on January 31, 2008, "to determine the facts and place your responsibility, if any, in connection with the hi-rail inspection required by CSXT and a yearly federally mandated hi-rail inspection on a vehicle assigned to your use as a track inspector."¹ The letter stated that the Claimant was "charged with failure to obtain a 6 month hi-rail inspection by CSXT and a yearly federally mandated hi-rail inspection on a vehicle assigned to your use as a track inspector." The Claimant's actions, according to the letter, appeared "to be in possible violation of . . . Operating Rules A, F, S, GR 2, GR 5, GR 6, Gr 16, General Safety Rule GS 7, MofW MWI GO25 and CSXT Vehicle Policy." After two postponements, the Investigation was held on February 12, 2008, in the Carrier's Palatka, Florida, offices.

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds that:

¹Rule 25 (d) of the Agreement states, ". . . The hearing shall be scheduled to begin within twenty (20) days from the date management had knowledge of the employee's involvement. . . ." According to the evidence presented at the Investigation, management had knowledge of the employee's involvement in the incident that is the subject of this Investigation on the day the incident occurred, January 2, 2008. The latest day that the hearing should have been scheduled to begin according to the Agreement, therefore, was January 22, 2008. However, there is no evidence that the Organization or the Claimant raised the issue of the limitations period for scheduling a hearing at either the hearing or otherwise. That objection has therefore been waived.

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant has worked in the railroad industry 27 years, the last ten with CSX Transportation. In 2001 he attended Track Inspector school, and on January 2, 2008, his assignment was to operate hi-rail equipped Track Inspector truck #094173 and to travel in a northbound direction to inspect track from the NAS north end of Huntington to the NAS south end of Pecan. The truck was the Claimant's assigned vehicle, and he was responsible for its use, operation, and maintenance.

According to a report of the incident prepared by the Claimant's Roadmaster, "As he [the Claimant] approached the bridge at Buffalo Bluff, [the Claimant] slowed down to inspect the bolts in the slip joint at the south end of the bridge. After stopping and proceeding north at approximately 3 mph, [the Claimant] felt the truck derail." The remainder of the Roadmaster's report stated in pertinent part:

As he looked at the truck he noticed that the driver's side front hi-rail wheel had climbed over the rail and went to the field side on the west rail, and the front passenger hi-rail wheel dropped in the gage side of the east rail. The location of PD was just off slip joints. It appeared the wheel traveled approximately 12 to 15 feet on top of rail before derailling.

[The Claimant] along with the help of Bridge Tender at Buffalo Bluff attempted to re rail the vehicle by jacking the front up. After that was unsuccessful, they tried to lift the back high rail wheels up and back the vehicle off of the bridge. When they did this, the rear hi-rail wheels derailed onto the open deck bridge ties.

After realizing that was not going to work, they phoned Roadmaster Shelor and he arrived at the location at 17:35 along with backhoe operator G.J Yow. They took wood blocking and placed under the front wheels to get the vehicle off

the guard rail and onto the heads of the ties. After that was completed, they backed the vehicle 135' south on the ties and off of the bridge and removed it from the track. The track was released to the dispatcher at 18:25.

[The Claimant] completed his pre trip inspection with no exceptions that morning after their safety stand down.

According to the attached Dolan [sic Donlen?] maintenance record, this Track Inspector vehicle 094173, a 2002 Ford F53 with 154,536 miles, had its last hi-rail inspection on November 10, 2006 after the rear high-rail wheel had come off damaging the landing gear. The record also shows that it has been in the shop for various repairs 18 times in 2007. Two of these 18 trips, 3/28/07 and 11-14-07 had high rail assembly repairs and replacement of the right rear high rail wheel when the rubber came off the wheel.

High-rail truck is being taken to River Body in Jacksonville, our Certified High-rail inspection dealer, for inspection to determine if there is a problem with the high-rails that could have caused it to derail.

...

From the entire facts gather[ed], there are no conditions in the track that should have caused the truck to climb the rail at the expansion joint. The static gage was below FRA 56", but the front wheels on the hyrail had a flange to flange measurement of 55.25. This same truck made the same hyrail trip Northbound over [this] expansion joint on Friday December 28th without any problems. We will need the inspection from the hyrail shop to determine if there were any problems with the hyrail gear that could have caused the derailment.

James F. Howell, the Engineer of Track at Wildwood Jacksonville Division, completed a Train Accident Report form regarding the derailment of the truck. On the form he gave the Primary Cause Code of the accident as H993. He explained in his testimony at the Investigation that the code means "human factor derailment." Asked why it was a human factor derailment, Howell testified, "Because the employee was operating the vehicle [and] derailed his on track equipment on a bridge that had no defects as far as track and that he had some faulty vehicle equipment evidently and according to the inspection of the Rivers Company. The hi rail equipment had some defects in it." The report noted that the accident obstructed the main track for an hour

and 45 minutes.

The Engineer testified that during the time that the vehicle was being re-railed and backed off the bridge a passenger train and a UPS train were delayed. He stated that the Claimant should have reported the accident as soon as it happened. He noted that General Rule F states, "The following conditions must be reported promptly and by the quickest means to the proper authority: Accidents" It is a policy to report accidents as soon as they happen, he testified, so as not to interfere with the safe passage of trains and reliability of trains. He expressed the opinion that had the Claimant called for help as soon as the derailment occurred, the track could have been cleared sooner.

At the Investigation the Engineer produced a CSX Vehicle Policy, which contains all of the maintenance requirements for Carrier vehicles. A copy of the Policy was introduced into evidence at the Investigation. The operator of a Carrier vehicle is responsible for keeping a copy of the Policy in the vehicle. The Policy provides as follows regarding the operator's general responsibility for maintenance of his vehicle and specifically with regard to maintenance of hirail gear:

ROUTINE SERVICE AND PREVENTIVE MAINTENANCE

Your Responsibility

As an operator of a CSX vehicle, you are directly responsible for keeping your vehicle in a safe and operable condition. You must pay careful attention to the schedule of preventive maintenance necessary to ensure your vehicle's continued good performance. Such maintenance includes timely oil changes, filter replacement, lubrication, vehicle inspection, tune-ups, etc.

. . .

Equipment Maintenance

Some vehicles have various attachments and/or mounted equipment. These attachments and items of equipment also require lubrication and care. Preventive maintenance is mandatory for prolonging use of these items.

1. Hirail Gear

Hirail equipped vehicles require preventive maintenance specific to the railgear. Refer to the hirail gear owner's manual for appropriate preventive maintenance procedures. CSX requires that hirail gear be inspected at an authorized CSX hirail repair facility every six months for light duty applications and annually for medium and heavy duty applications. A list of CSX-approved hirail shops is located on the Entshare X drive in the "Vehicle Operations" folder.

Engineer Howell testified that the Vehicle Policy required that the Track Inspector truck operated by the Claimant be inspected every six months. According to his testimony, the Track Inspector truck driven by the Claimant was a light-duty truck. The Donlen Corporation maintenance record for the Claimant's Track Inspector truck, Unit #904173, showed that the hirail gear vehicle had inspection entries for October 10 and November 10, 2006, but not after the later date. In addition to the six-month and yearly inspections, the operator, whenever he operates the vehicle, must perform a pre-trip walk-around inspection of the vehicle.

Engineer Howell identified a work order from Rivers Body Company, Inc. listing all of the work and parts needed to repair the Claimant's Track Repair vehicle after the derailment. At the bottom of the work order, followed by the signature of the parts manager, were the words, "Damage/Normal wear (Not Due To Derail.)." Engineer Howell testified that the statement meant that the damage done to the hirails was damage of normal wear and not due to the derailment. The invoice for the repairs and maintenance was more than \$8,000.

The Claimant testified that he knows and has complied with the requirement to have his Track Inspector truck inspected every six months. He acknowledged that he is responsible for Track Inspector truck #094173 although, he testified, other people drive it frequently. The territory that he inspects, he stated, is from A 634 milepost to A 698

milepost. Typically he hiraills twice a week to look for and possibly fix defects or any problem with the tracks that could cause a derailment. He does a complete and thorough inspection of his vehicle before using it, the Claimant testified, as well as a post-trip inspection. He has a daily log book that he uses to document his inspections.

On November 12, 2007, the Claimant testified, he went to Trux Service Center, Inc. to get the semiannual inspection for his vehicle and was told that the next inspection was not due until the following April. He was denied an inspection, the Claimant insisted, even though he requested it. As evidence allegedly supporting his testimony, the Claimant identified Invoice No. 105211 dated November 12, 2007, that listed two items of repair: 1. Replacement of a damaged RH-Rear Rail-Pilot Wheel; and 2. Replacement of sealed beam headlamp. After repair item 1, the following notation was entered on the invoice: "NOTE: RAILGEAR INSPECTION DUE IN APRIL, 2008."

At the Investigation the Claimant was asked by the hearing officer what he did after Trux Service Center, Inc. said that the next inspection was not due until April, 2008. He answered that "until Mr. Foster made that announcement on January 7th, on the conference call, I think probably 90 percent of Jacksonville Division did not know, or was not getting semi-annual inspections." The hearing officer then asked the Claimant, "But you knew that you were supposed to get semi-annual inspections." The Claimant replied, "Well you keep trying to get me to say that I knew. I knew when Mr. Foster made that announcement on January 7th that it was required. But on November 12th, I took it, just based on my experience and seeing that this hi-rail well on the rear was wearing, it was wearing out. It was, you know, the way it was tracking and wearing I took it upon myself to have the vehicle inspected."

In response to the foregoing testimony, the hearing officer stated that "Trux

Service Center is not affiliated with CSX and they can't know what our rules are regarding our hi-rail inspection." To that statement the Organization objected, stating, "I'm going to have to object to that because Trux Service Center is a center that CSX designated for the service of the hi-rails. And that's where they take 'em and have 'em inspected. And they work along with CSX Transportation in that service." Carrier Exhibit 13, the maintenance history of the Claimant's Track Inspector truck, for the period 10/10/2006 to 11/21/2007 has six repair jobs shown that was done by Trux Service Center on the Claimant's vehicle, including hirail inspections performed respectively on 10/10/2006 and 11/10/2006.

At the Investigation the Claimant produced a photograph of a sticker on the widow of his truck #94173 which had the truck number on it and the date APR - 07. The Claimant testified that he was given the sticker by Trux Service Center, Inc. to show that the vehicle was inspected in April, 2007. Asked why he did not take the truck in for inspection six months later, the Claimant testified that he had other duties which prevented him from taking the truck in for inspection precisely in October, but he did take it in for inspection in November as shown in invoice No. 105211 dated November 12, 2007. The Claimant testified that David Chambliss, the service manager at Trux Service Center, Inc., told him on November 12, 2007, that authorization for an inspection at that time was denied and that another inspection could not be done until April, 2008. According to the Claimant the denial by Chambliss was based on conversations between Chambliss and Donlen Fleet Management Services. The Claimant testified that as far as he recollects he mentioned to his supervisor the problem with the hirail pilot wheel on the truck and that he was denied inspection of the truck.

The Claimant gave his own version of the derailment that differed in some details

from the Roadmaster's written report of the incident. For example, he stated not only that he slowed down to inspect the bolts as he approached the bridge but that he made a complete stop. He also testified that the Roadmaster called him after he (the Claimant) reported the incident to the dispatcher rather than that he called the Roadmaster. The Claimant testified that he was not in violation of General Rule F in waiting to report the derailment because at the time he was in the process of getting himself and possibly the vehicle in the clear and away from danger. The derailment occurred at approximately 15:40 hours, he stated, and since he was still within his track authority, he did the first thing that he knew, which was to get the wheels up and possibly try to back the truck off the bridge. That took maybe 10 to 15 minutes, he testified, and when he was getting close to his track authority, that is when he called the dispatcher. Shortly after he talked to the dispatcher, the Claimant stated, the Roadmaster called him. Within 25 minutes, according to the Claimant, the Roadmaster drove out there in his personal vehicle.

The Claimant testified that he has been over the Buffalo Bluff bridge in the Palatka area maybe 200 times since 2001 and that he never had a problem on the bridge until January 2, 2008. In going north on the track at the bridge, according to the Claimant, he always stops just short of the expansion joints. There is a regular track joint that he has slow ordered at least six times between April and December, he testified, because of crossover problems. On this particular occasion, on January 2nd, the Claimant stated, "you can see where the ballast has been disturbed, and there was some type of track related work activity in that particular area."

The Claimant testified that he personally did not previously have any trouble with his truck derailing, but that it is a 2002 vehicle that previously derailed. According to the Claimant another employee, whom he named, derailed the vehicle in December, 2006, or

January, 2007, causing extensive damage to the vehicle. While that employee was driving at low speed, the Claimant testified, the vehicle climbed up over the rail.

He started his employment with the railroad with Conrail in 1977, the Claimant testified, and during his entire career with Conrail and CSX, he has never had an injury claim. He has never been charged, counseled, or disciplined, according to the Claimant, for neglecting or abusing the railroad's equipment. It was appalling, he stated, to be subjected to an Investigation for a 5 mph derailment with no track damage, no injuries, and no damage to the truck attributed to the derailment. He has absolutely never willfully neglected his duties since he began working for CSX, the Claimant testified, and he goes "over and above the normal call of duty."

The hearing officer asked the Claimant, "If you followed every CSX procedure, can you explain how this hi-rail derailment occurred if all procedures were followed?" He answered, "In my opinion . . . it was caused by perhaps a tight gauge in that particular area. I rode over that bridge a hundred times, never had a problem. It's not due to a truck inspection, not due to my daily inspections, had nothing to do with the weather. It was possibly tight gauge and while I was on vacation during December there was bridge work done, there was track work done. , , , [I]n my honest opinion I don't know what caused it. . . . I didn't cause the derailment."

The Claimant was asked if he entered on his daily inspection sheet that the truck had not received a six-month suspension, and he testified that he did not note that on the daily vehicle inspection form.

In a closing statement the Claimant expressed his feelings that it was unfair that another Track Inspector, whom he named, had a derailment approximately a year before the Claimant's, with extensive damage to the vehicle, but was not made the subject of an

Investigation, while he (the Claimant) was investigated, although his derailment caused no damage or injuries. He also indicated that he felt it unfair that he was summoned to a hearing when the operator of another Track Inspector truck that he identified by number was not given a hearing even though that operator's truck did not receive a six-month inspection.

By letter dated March 3, 2008, the Carrier issued its decision on the charges, stating as follows:

. . . Testimony brought out in the investigation revealed that you in fact failed to follow rules A, F, S and regulations GR-2 (5) for failure to notify your supervisor of the hi-rail derailment as soon as it occurred and thereby delaying trains longer than necessary. You also failed to comply with MWI G025 by not noting on your daily inspection records that your vehicle and [sic had?] not been hi-rail certified and obtaining a supervisor signature to validate this and by not obtaining the hi-rail inspection with-in the time frame required. There were some questions raised as to whether an inspection was ever done in April 2007. There is no clear documentation either way to support that it was done, we gave you the benefit of doubt that it had been inspected as you say, however an inspection was not done in October to comply with G025.

The decision letter stated, "According to the IDPAP policy of a three year rolling time frame and your Personnel Record with a Time Out held on July 10, 2007 for failure to correct vehicle defects it has been determined to assess discipline of twenty actual days of suspension. The next step in following IDPAP for the same offenses will be up to dismissal."

Rule 25 (d) of the Agreement between the parties states, "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. . . ." The "exact offense" of which the Claimant was accused appears in the sentence of the charge letter dated January 10, 2008, which states, "In connection with the above, you are charged with failure to obtain a 6 month hi-rail inspection required by CSXT and a yearly

federally mandated hi-rail inspection on a vehicle assigned to your use as a track inspector.” That is the only accusation of an offense stated in the letter.

It is true that the letter notes that the purpose of the investigation “is to determine the facts and place [the Claimant’s] responsibility, if any, in connection with the hi-rail vehicle 94173 derailment that occurred on January 2, 2008 at approximately 16:30 hours at Buffalo Bluff, FL and the information gathered in connection with the investigation of this incident.” That sentence, however, does not accuse the Claimant of any offense. The only sentence in the charge letter that accuses the Claimant of an offense is the sentence quoted above which contains the words “you are charged.”

Nor does the sentence “Your actions appear to be in possible violation of . . . Operating Rules A, F, S, GR2, GR5, GR6, GR16, General Safety Rule GS7, MofW MWI G025 and CSXT Vehicle Policy” provide reasonable notice of any additional offense of which the Claimant is accused. First, the first two words of the sentence, “Your actions,” read fairly and naturally, relate back to the immediately preceding sentence. In other words, the sentence, read in a normal manner, states that the Claimant’s failure to obtain a 6-month hi-rail inspection was in possible violation of the various rules and policies listed. At best, the sentence is ambiguous and did not provide the Claimant with reasonable notice of the precise offense of which he was accused, other than that he failed to obtain a 6-month hi-rail inspection required by CSXT.

The decision letter, however, found the Claimant guilty of offenses other than failure to obtain a 6-month hi-rail inspection. It found him culpable “for failure to notify your supervisor of the hi-rail derailment as soon as it occurred and thereby delaying trains longer than necessary.” Just as the decision letter stated in plain language that the Claimant failed to notify his supervisor of the derailment as soon as it occurred, thereby

delaying trains longer than necessary, nothing prevented the Carrier from charging him with that exact offense. The facts regarding the alleged delay were known to Carrier management prior to the hearing, as the questioning at the Investigation disclosed. By failure to charge the Claimant with that “exact offense,” as required by Rule 25 (d) of the Agreement, the Carrier waived the right to discipline the Claimant for the offense.

The decision letter also found the Claimant guilty of not noting on his daily inspection records that his vehicle had not been hirail certified and of not obtaining a supervisor signature to validate the notation. Here again, just as the Carrier was able to articulate that alleged violation in the decision letter, it was well able to charge the Claimant with that “exact offense” in the charge letter. Its failure to do so waived any discipline of the Claimant for that alleged offense.

The third offense of which the decision letter notified the Claimant that he had been found guilty was stated with exactness in the charge letter, namely, not obtaining a hi-rail inspection for his Track Inspector truck within the time frame required. The CSXT Vehicle Policy (not the G 025 document as stated in the decision letter) requires that hirail gear be inspected at an authorized CSX hirail repair facility every six months for light-duty applications.²

²The decision letter states that “an inspection was not done in October to comply with G025.” An earlier sentence in the same letter asserts that the Claimant “failed to comply with MWI G025 . . . by not obtaining the hi-rail inspection with-in the time frame required.” The Board has carefully perused G 025. The document has a section on Vehicle Inspection that covers daily pre-operation or pre-trip and post-trip inspections. The Board has found no specific reference in G 025 to semiannual or annual inspection of hirail equipment. The only document introduced into evidence covering such inspections is the CSXT Vehicle Policy. Since, however, the Vehicle Policy was not only listed in the charge letter but, more importantly, was introduced into evidence at the hearing and specifically relied on in support of the charge, there is a valid basis in the record for the Carrier to find the Claimant guilty of not obtaining a hirail inspection in the time period required, provided that his vehicle was of the kind required by the Vehicle Policy to be inspected semiannually and that the Claimant was effectively notified of the requirement. The fact that the decision letter erroneously listed G 025 instead of the CSXT

The Board accepts the Carrier's position that there is a requirement that the hirail gear on Track Inspector trucks of the kind operated by the Claimant be inspected every six months as part of a prescribed course of preventive maintenance for such vehicles. However, except for matters that are self-evident, such as, for example, the prohibition against theft, to sustain discipline for violation of a rule or other requirement, an employer has the burden of showing that the rule or requirement was effectively communicated to the employee to be disciplined.

The only two documents introduced into evidence pertaining to inspection of vehicles were the G 025 Vehicle Inspection and Driving Safety rules and the CSXT Vehicle Policy. G 025 deals with daily inspections and is silent about semiannual and annual inspections.

The Vehicle Policy is ambiguous. In the section on the maintenance of hirail gear the Policy states that "CSX requires that hirail gear be inspected at an authorized CSX hirail repair facility every six months for light duty applications and annually for medium and heavy duty applications." The Policy does not define the term "light duty applications" or "medium and heavy duty applications." However, the Policy defines "light-duty vehicles" as "1-ton and smaller." The Claimant's vehicle is a 5-ton vehicle (10,000 GVW). Carrier Exhibit 11, which contains the specifications of the Claimant's vehicle, at page 1, under the heading CHASSIS, includes the specification "4-Speed Heavy Duty Automatic Transmission with Overdrive."

Engineer Howell testified that under G 025 and the CSXT Vehicle Policy only light-duty trucks must be inspected every 6 months. (Tr. 31). He did not explain why, in

Vehicle Policy as the rule violated is not fatal to the Carrier's case.

light of his testimony, the Claimant's 5-ton truck with a heavy duty automatic transmission, which vehicle did not meet the Vehicle Policy's definition of a light-duty vehicle, had to be inspected every 6 months. This Board is of the opinion that since the Vehicle Policy requires inspections of hirail gear every 6 months only for light-duty applications and the Claimant's vehicle did not meet the Policy's definition of light-duty vehicles, the section in the Vehicle Policy headed Hirail Gear did not reasonably notify the Claimant that the hirail gear on his truck had to be inspected every 6 months. In this connection the Board notes that Engineer Howell testified that only light-duty trucks have to be inspected every six months under the Vehicle Policy, thereby indicating that he understood the term "light duty applications" in the Policy to mean light-duty vehicles.

The fact, moreover, that, judging by its Invoice #105211 dated November 12, 2007, Trux Service Center, Inc., an authorized CSX hirail repair facility, appeared to be unaware of a requirement to inspect Track Repair vehicles such as the Claimant's on a semiannual basis, raises doubt that the Carrier had effectively communicated such a requirement to that company. If the service facility that does the inspections was not aware of the semiannual inspection requirement, it makes the Claimant's testimony that he was not aware of the requirement until Engineer Foster announced it in a conference call on January 7, 2008, after the derailment, all the more credible. Taking into account all of the evidence on the issue, the Board finds that the Carrier has failed to establish by a preponderance of the evidence that it effectively communicated to the Claimant prior to the derailment that he was required to have the hirail gear on his vehicle inspected every six months. Having failed to effectively inform the Claimant of the 6-month inspection requirement, the Carrier lacked proper cause to discipline the Claimant for his omission to have his vehicle inspected six months after the prior inspection.

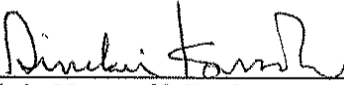
In sum, two of the three offenses of which the Carrier found the Claimant guilty were not alleged in the charge letter with the required specificity and exactness required by Rule 25 (d) of the Agreement to put him on notice that he was accused of those offenses. They therefore do not support the discipline assessed against the Claimant. With regard to the third offense, failure to obtain a 6-month hirail inspection, the evidence does not establish that the Carrier effectively communicated to employees prior to the derailment that 5-ton Track Inspector vehicles had to have their hirail gear inspected every six months. For these reasons the discipline against the Claimant cannot be sustained and he is entitled to have any record of the discipline expunged from his employment record and to be made whole for any wage or benefit losses suffered as a result of the discipline.

A W A R D

Claim sustained.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
July 16, 2008