BEFORE
PUBLIC LAW BOARD NO. 7362
CASE NO.68

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN (Western Lines)	)	**PARTIES TO THE DISPUTE**
vs.	)	
CSX TRANSPORTATION, INC.	)	

STATEMENT OF CLAIM: The Organization asks that all references to this instance be removed from Engineer Tankersley's personal file and that he be paid for all lost time.

FINDINGS:
The Board, upon consideration of the entire record and evidence herein, finds that the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated November 19, 2009, (as amended) that this Board has jurisdiction over the dispute involved herein, and that the parties were provided due notice of the instant proceedings. As specified in the PLB Agreement establishing this Board, this Award shall be limited to one page and shall not establish precedent nor be referred to by the Parties in the future.

After a thorough review of the record, the Board concludes that this case involves an allegation that Engineer Tankersley delayed a train some 3 hours, in violation of the Carrier's Operating Rules GR-2, 16 and 17 on July 28, 2010. Specifically, the Carrier says that the Engineer and Conductor on the train both failed to attempt to contact anyone in authority for a 3 hour period and instead simply sat on their train awaiting instruction. After the investigation on record, 15 days actual suspension were assessed to Engineer Tankersley.

There are a number of preliminary issues. First, the Board notes that in the submissions, there is reference to (and some details of) attempts to settle this case. To the extent the record or the submissions reference discussions in the nature of settlement, as the Union stated in the investigation at p.31 (with the hearing officer apparently concurring) it is not proper to place these issues before this Board. The continued reference to settlement discussions in the investigation and subsequently in the appeal correspondence and briefs, is a violation (by both parties) of Article 30.B.2.b of the CBA and of a further public policy rationale. The public policy reason behind this is the chilling effect that would be placed on any settlement discussions if they could come back to haunt a party in a subsequent hearing. Therefore, this Board will ignore any such references in the material before it. Secondly, the Union says it did not request a postponement and objects to the hearing not proceeding as originally scheduled. The Board finds that Article 30.B.3 specifically allows reasonable postponements by either party (including for vacation) and therefore this ground of appeal is denied. Thirdly, the Union raises issues of bias of the witness for the carrier as a ground for the lack of a fair and impartial hearing. The Board finds it immaterial that a witness for either party may be, and in fact often is, biased. It is the hearing that must be fair and impartial, not the witnesses. The issue for the witness is one of credibility and on this the Board has not been asked to rule. Fourthly, the Union raises an issue of vagueness in the charge letter since no rules were specified. The Board finds that the charge letter is not vague because it specifies, *inter alia*, the date, time, location, train number and alleged delay. Fifthly, the Union argues prejudgment because the Engineer was put on Administrative Leave. The CBA specifically provides for Administrative Leave and places conditions of payment on those terms (Article 30.A). There is no prejudgment on this ground. The Board therefore dismisses each of the Union's preliminary arguments.

The issue of burden of proof raised by the Union is more problematic. There are numerous gaps in the investigation record in the questions and answers. Specifically, an electronic search of the record indicates some 127 blanks in the testimony up to Mr. Tankersley's turn. There are a further 32 blanks in his testimony. In addition, there are a total of 19 "inaudible" references, 17 of which are during Mr. Tankersley's responses. There is also evidence, from more than one witness, that there has been historical difficulties with radio transmissions and receipts in the area in question. Further, there is evidence that train traffic, blocking Engineer Tankersley's train, was considerable during the period in question. However, that is not the end of the matter. Through Conductor Luker's testimony, it was evident that after stopping the train near NS Highline, there was no further attempt to contact anyone until approximately the time the trainmaster approached the engine. Mr. Tankersley and his Union did not refute this fact. Instead, both Conductor Luker and Engineer Tankersley said that they had thought about calling. In this industry, it is critical for Engineers and Conductors, who are often unsupervised in the performance of their duties, to act in accordance with the rules, without futher outside prompting. Therefore, it is the finding of this Board that Engineer Tankersley did fail to abide by Carrier rules involving willful neglect of duty, lack of efficient operations and unnecessary delay, all as charged.

Given all of the circumstances, the Board does not see fit to disturb the assessment of 15 days actual suspension, pursuant to the Carrier's IDPAP.

AWARD
The Claim is denied.

Roger K. MacDougall
Chair and Neutral Member
At: Chicago, IL

Dated: July 5, 2011