

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 36963  
Docket No. CL-36889  
04-3-01-3-431**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**PARTIES TO DISPUTE:** (Transportation Communications International Union  
(CSX/Intermodal Terminals, Inc. (former CSX/Sea Land  
( Terminals, Inc. - Fruit Growers Express Company)

**STATEMENT OF CLAIM:**

**"Claim of the System Committee of the Organization (GL-12756)  
that:**

- (a) The Carrier acted in an arbitrary and capricious manner when it unjustly assessed discipline of 30 days suspension on Mr. James White on October 29, 1998.**
- (b) Claimant's record be cleared of the charges brought against him on September 17, 1998.**
- (c) Claimant be compensated for wage loss sustained in accordance with the provisions of Rule 38(b)."**

**FINDINGS:**

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

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.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

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

As a result of charges dated September 17, Hearing held on October 1 and by letter dated October 29, 1998, the Claimant - an Intermodal Service Representative employed by the Carrier since June 28, 1993 - was suspended for 30 days for conduct inimical to the Carrier's interest, in violation of standing instructions and conduct unbecoming an employee.

The Carrier asserts that on September 11, 1998, at approximately 10:20 P.M., the Claimant turned away drivers of customers at the gate of the Carrier's terminal in Cincinnati, Ohio, and acted in an otherwise inappropriate manner, which included not allowing the drivers to use the Carrier's phone. The basis for these charges came from complaints made by the customers to the Carrier that their drivers were not allowed to enter. At the time, the terminal's hours were 5:30 A.M. to 10:30 P.M.

Terminal Manager S. Longoria, Operations Manager M. Plendat and Fleet Manager J. Jones testified that there have been standing verbal instructions that employees are to extend the gate hours as long as customers are present and, if that happened, overtime would be paid. Specifically, according to Plendat:

**"Q.** What is the standing instructions of CSX Intermodal to your knowledge, if your shift is up, being the second shift and you are closing at 10:30, if you have an ISR on duty and customers at the gate. What is the Company's policy on that?

**A.** We would let the customer in the gate, check them in and once the gate is clear, we go ahead and lock up.

\* \* \*

Everyone was told. It is common knowledge at the terminal. We don't turn customers away when it is time to close the gate. Go ahead and let them come in.

\* \* \*

... So it was common practice even prior to going to the 10:30 close, we never turned customers away just because it was time to close the gate. ..."

After Longoria learned of the incident, he spoke with the Claimant on September 16, 1998. According to Longoria:

"A ... Jim [the Claimant]'s position that was that he had doubled and that he was going on the law. I explained that he was not regulated by any agency and that I would confirm for his own piece of mind. I also explained that there is never a good reason to turn away a good driver or to be rude in any manner. I asked Jim if he was aware that I made it clear to everyone that we are to extend the gate hours as long as we had a customer and that I would pay the overtime. Jim responded that he understood but the issue was he ran out of hours. ..."

The Claimant worked a double shift on September 11, 1998 from 6:30 A.M. to 10:30 P.M. With respect to the incident, according to the Claimant:

"Q. Could you tell us what happened please?

A. That evening I double-shifted. I worked from 6:30 a.m. to 2:30 p.m. and then doubled over on the gate from 2:30 p.m. to 10:30 p.m. The gate is supposed to close at 10:30 p.m. Instructions are if somebody has come in prior to closing, we are to take them in. At twenty-five minutes after 10:00 by that clock out there I left the office to check to make sure nobody was on the property to get locked in because that has happened. During that time, I made the rounds of the lot. ... So I got back to the

office and there was two drivers. One from Consolidated Freightways and the other one bobtailed Roadway driver. I came in by this time it was twenty until . . . 11:00. It was past closing time. Nobody was here when I left the office and I saw nobody else on the lot until I returned to the office. Now, I come back and the Consolidated driver wanted to drop his load off, I don't know if he wanted to pick one up or not, usually they take out an empty. I said, 'I am sorry but we are closing, the peer is already down and I am locking the gate.' He asked me to use the phone. I said the phone is on the corner of the building and I am not going to wait for you to use it. There is one at Gold Star Chilli across the street. So he left and pulled around the building. . . . Next one up was the Roadway. He comes up to the window and says, 'I am here to pick up. . . .' I said, 'No you're not, we are closing. We close at 10:30. I am getting ready to close the gates now. . . .' He asked to use the phone. I said, 'The telephone is on the corner of the building, but I am not going to wait on you, because I am closing the gates. The phone is across the street at Gold Star Chilli if you need to use it.'

\* \* \*

I did the right thing as far as I was concerned. Now I know, like I said, we have standing orders that if they come in prior to closing, we are to take them in. If I had only worked eight hours, that's straight time, and he was there before 10:30, yes, I would have checked them in and maybe stayed over five minutes or so for them to get off the lot, but at the time I was on sixteen hours, the agreement says you can't make overtime on overtime, you don't stand for overtime after sixteen straight hours, the notices are you close at 10:30 p.m. ... My idea of closing the gates at 10:30 p.m. means I have to be on the other side of the gate to lock it. . . ."

Substantial evidence supports the Carrier's determination that the Claimant engaged in misconduct. The Terminal Manager, the Operations Manager and the

Fleet Manager all testified that there are standing verbal instructions that employees are to extend the gate hours if customers are at the gate at closing time. Longoria testified that during his meeting with the Claimant on September 16, 1998, the Claimant "responded that he understood" those instructions. Indeed, in the Claimant's version of the event, the Claimant testified, "... we have standing orders that if they come in prior to closing, we are to take them in." Thus, there was an instruction known to the Claimant that if customers are at the gate at closing time, the gate hours are to be extended to accommodate those customers.

The Claimant states that he left the office at 10:25 P.M. to do rounds before closing and at that time there was no one at the gate. According to the Claimant, when he returned to the office at 10:40 P.M., there were two drivers at the gate and he turned them away and would not even allow them to use the Carrier's phone. Therefore (and only considering the Claimant's testimony and not the hearsay evidence offered by the Carrier - the communications from the customers) it is possible that the drivers appeared shortly before or shortly after 10:30 P.M. But the precise time the drivers appeared - whether a few minutes before or after 10:30 P.M. - is really irrelevant. According to the Claimant, if he checked those customers in, it would have taken him an additional "five minutes or so for them to get off the lot." The Claimant then testified that the only reason he did not stay to check the customers in was "I was on sixteen hours, the agreement says you can't make overtime on overtime, you don't stand for overtime after sixteen straight hours, the notices are you close at 10:30 p.m." But, by the Claimant's own testimony, his reliance on how he interpreted the Agreement was irrelevant because he was already past the 16 hours when he returned to the office at 10:40 P.M. when he states he first saw the drivers. The Claimant's reasons for turning the drivers away therefore do not stand up.

The bottom line is that substantial evidence shows that the Claimant was aware of the Rule that he was to extend the hours at the gate if drivers appeared at closing; the drivers appeared right at closing time (either a few minutes before or after); the Claimant had not yet closed down the facility; the Claimant turned those drivers away and would not even allow them to use the Carrier's phone, thereby causing substantial inconvenience to the drivers and the customers which obviously adversely reflected upon the Carrier; from the Claimant's testimony, all of this could have been avoided if he simply allowed the drivers in for an additional "five

minutes or so for them to get off the lot;" and there was no logical reason for the Claimant to have turned those drivers away. Accommodating those drivers and the Carrier's customers would not have caused the Claimant to remain for a lengthy period of time. It would have, in the Claimant's words, only been "five minutes or so" more. Common sense was simply lacking on the Claimant's part. That lack of common sense by the Claimant reflected poorly upon the Carrier. Substantial evidence supports the Carrier's determination that the Claimant engaged in misconduct.

With respect to the amount of discipline - and particularly given how the Claimant's conduct adversely reflected upon the Carrier and because the Claimant's record shows other discipline (a suspension) for the Claimant's dealings with customers - we find that a 30-day suspension for this kind of misconduct was not arbitrary.

**AWARD**

Claim denied.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of Third Division**

Dated at Chicago, Illinois, this 21st day of April 2004.