

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43559
Docket No. MW-44875
19-3-NRAB-00003-170328**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

**PARTIES TO DISPUTE: (
(Connex Railroad, LLC**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier’s dismissal of Mr. C. Illescas by letter dated May 2, 2016 and thereafter amended on May 5, 2016, for alleged violation of SFRTA Operating Rules: 104.4, 704.10 and 704.13 as well as falsification of information under investigation was arbitrary, unwarranted and constituted a violation of the Agreement (System File N70185516 CNX).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall remove the discipline letter and all matters relative thereto from Claimant C. Illescas’ personnel file and make him whole for all losses suffered including vacation and retirement credits.”**

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.

The Claimant had established and maintained seniority in the Maintenance of Way Department for CSX Transportation, Inc. (CSX), where he had worked for approximately fifteen years. Thereafter, the Carrier purchased certain elements from CSX, including the territory where the Claimant was working. The Claimant then began working for the Carrier as a Pilot.

On March 12, 2015, the Carrier and the Organization signed an Implementing Agreement (“Stop Gap Agreement”). The Stop Gap Agreement expressly provided that where not otherwise stated, the collective bargaining agreement (CBA) between the Organization and CSX (CSXT Agreement) would govern the Carrier’s Maintenance of Way personnel until such time as the parties reached a new CBA.

The incident which led to the Claimant’s dismissal occurred on March 8, 2016, approximately one year after he began work for the Carrier. The Carrier charged the Claimant with failing to properly maintain track authority, by failing to ensure that equipment he was responsible for was in the clear prior to authorizing trains to enter his track authority. It removed the Claimant from service based on this belief.

On March 15, 2016, the Carrier’s General Manager Niles Blaize emailed a waiver letter to the Claimant which offered an alternative to the formal discipline process, writing, “Attached is a waiver offer. If agreed, please respond via email to confirm and I will have a hard copy to sign upon your return on Monday, March 21, 2016.” The letter reads, in part:

“After discussion between Connex Management and your union representative, this letter confirms your request to accept responsibility for the charges filed against you; in the connection with the incident at or around MP SX 1031.6 at approx. 0130 on March 8, 2016. At that time, you cleared tracks with the Dispatcher before confirming on track equipment under your protection was in fact clear. You are assessed 10 days actual suspension beginning March 11, 2016 and ending March 21, 2016....Your

signature in the space provided below will acknowledge your understanding and agreement to these conditions. The letter must be signed and returned within 48 hours or the investigation will be rescheduled...”

On March 16, 2016, the Claimant signed and dated the waiver and returned it to Supervisor Bill Dietz. The Claimant said that Dietz took a picture of the signed letter and texted it to Blaize. Thereafter, Blaize sent an email stating,

“At this time, due to the submittal of additional evidence concerning the events of March 09, 2016, (*sic*) I am receineding (*sic*) your option to sign a waiver. Accept this as notice of intent to continue with our formal investigation. You are considered removed from service pending the results of this investigation.”

General Manager Blaize testified that he was given additional evidence and information, including audiotapes, and decided that a more serious rule violation had occurred, so he rescinded the waiver offer. In a letter dated March 16, 2016, the Claimant was given formal Notice of Investigation in connection with the following charge:

“to determine the facts and place your responsibility, if any, in connection with the incident at or around MP SX 1031.6 at approx. 0130 on March 8, 2016. At that time, you cleared tracks with the Dispatcher before confirming on-track equipment under your protection was in fact clear.”

An updated charge letter dated March 17, 2016, was sent to the Claimant, stating:

“The purpose of this formal investigation is to determine the facts and place your responsibility, if any, in connection with the incident at or around MP SX 1031.6 at approx. 0130 on March 8, 2016. At that time, you cleared tracks with the Dispatcher before confirming on-track equipment under your protection was in fact clear.

Charges under investigation include:

- **Violation of SFRTA Operating Rule 704.10:** When operating within the limits of an EC-1/EC-1e line 1 authority, employee must (5) Not occupy section of track after that section has been released or reported by.
- **Violation of SFRTA Operating Rule 704.13:** When instructed by the Dispatcher to report by specific locations, make sure (1) the entire movement is clear of the location in the specified direction before reporting by the location.
- **Violation of SFRTA Operating Rule 104.4:** The following behaviors are prohibited at all times: (1) Concealment of facts under investigation. (Making false statements about matters under investigation.)
- **Colluding to cover-up and falsify evidence”**

A Formal Investigation was held on April 14, 2016, after which the Claimant received a letter dated May 2, 2016, in which he was found guilty of violation of SFRTA Operating Rules 104.4, 704.10, and 704.13, and of covering up and falsifying information “concerning the incident on April 14, 2016 (*sic*) and your violation of the above-referenced rules.” The Claimant was dismissed from the Carrier’s service.

On May 5, 2016, the Carrier sent a second Notice of Dismissal, stating, in part, that the May 2 notice was “administratively incorrect.” The second letter set the start of the “30-day appeal period” as May 5 and provided the name and address of the next highest officer of the Carrier, information that was not included in the May 2 notice. The remainder of the letter was identical to the May 2 notice.

On May 26, 2016, the Organization filed a claim protesting the Claimant’s dismissal. The on-property record contains no evidence of a response by the Carrier. On August 8, 2016 and October 31, 2016, the Organization sought to schedule a claims conference to discuss the claim. On November 29, 2016, the Organization wrote,

“This letter is in regards to four (4) letters requesting that the above reference claim be placed on a docket for discussion, and Appeals, per June 1, 1999 Agreement between CSX Transportation and Brotherhood of Maintenance of Way Employees. I refer to letters dates May 26, 2016, August 8, 2016, October 18, 20, and a follow up letter sent October 31,

2016 referring to phone call to your office on August 8, 19, 2016 with no return call and no response to my letters.

Pursuant to Rule 24(b) the below-reference claim are listed for discussion. We request that this claim be placed on the docket for discussion at such meeting.”

The record contains no responses from the Carrier to any of these.

The Carrier contends that a fair and impartial investigation was conducted. The Carrier contends that the Claimant understood the subject matter of the investigation, was permitted to question witnesses and make statements, and was ably represented by a representative of his choosing.

The Carrier contends that the Claimant’s failure to ensure that tracks were clear placed others in danger. Further, the Carrier contends that his continued dishonesty during the investigation demonstrates that he cannot be trusted to serve in a safety sensitive position.

The Organization contends that the Carrier failed to comply with the procedural requirements of Rule 25 of the CSX Agreement, so the dismissal should be overturned without regard to the merits of the dispute. First, the Organization contends that the Carrier failed to abide by the terms of the executed waiver agreement, which should control this dispute. The Organization contends that the waiver conclusively resolved any potential charges or discipline and prevented the Carrier from imposing further discipline on the same allegations. The Organization contends that the Carrier failed to assert during on-property handling that the waiver offer was withdrawn. The Organization contends that the Carrier has failed to show that it withdrew the waiver offer before the Claimant executed it.

The Organization further contends that the Carrier failed to issue a Notice of Discipline within twenty days of the close of the hearing. The Organization contends that the hearing was held on April 14, 2016, and while the first Notice of Discipline was dated May 2, the Carrier rescinded this Notice and reissued it on May 5, 2016, more than 20 days after the close of the hearing. As a result, the Organization contends that the claim must be sustained and the discipline must be overturned.

The Organization contends that the Carrier has failed to meet its burden of proving with substantial evidence that the Claimant is guilty and that the discipline is appropriate. The Organization contends that the Carrier relied on the statement of employees who were not called as witnesses to contradict the Claimant's testimony. Further, the Organization contends that the statements relied on by the Carrier were contradictory. The Organization also contends that it was improper for the Carrier to rely on audio recordings of conversations with dispatch when it failed to provide those to the Organization or to call the dispatcher to testify. The Organization contends that the discipline was arbitrary and unwarranted, especially when imposed on a sixteen-year employee with a clean disciplinary record.

Finally, the Organization contends that the Carrier's failure to respond to the claim during the on-property handling puts it in default, and the discipline must be dropped in accord with Rule 25 of the CSX Agreement. Furthermore, the Carrier's failure to respond or rebut any Organization's arguments means that they must be accepted as fact.

Both the 1999 CXS Agreement and the 2016 Connex Agreement provide that a charged employee may waive the investigation in writing and accept the discipline administered. The Organization argues that this option was given to the Claimant and he accepted the waiver. The Carrier does not dispute that the Claimant was offered a waiver or that after consideration, he signed and returned it. Thereafter, Blaize sent an email to the Claimant, attempting to rescind the offer of a waiver.

However, by the time that Blaize sent the email, the Claimant had already accepted the ten-day suspension. Thereafter, Blaize sent a new charge letter, based on the same events, but adding additional violations. The Claimant was then dismissed from the Carrier's service. Blaize stated that he attempted to rescind the waiver letter because he was given additional information, but this evidence was available to him before he made the offer of a waiver letter. It makes no difference that he acted hastily in imposing the ten-day suspension, without properly ascertaining the full facts. Once an employee has been disciplined, it is improper to thereafter increase the penalty based on the same underlying facts. The waiver letter was presented as final resolution of the charges arising out of the March 8 incident and the Claimant accepted the terms. The Carrier was not free to rescind the accepted offer in favor of more severe discipline arising out of the same facts. As a result, this Board finds that the second discipline of

dismissal improperly placed the Claimant in double jeopardy for the same misconduct for which the Carrier had already imposed a ten-day suspension. The dismissal must be set aside. The ten-day suspension offered by the Carrier and accepted by the Claimant will be reinstated.

In addition, the Organization has raised numerous procedural objections which this Board finds troubling. The Carrier made clear that it sought to dismiss the Claimant based on the written statement of the contractor and the audio tapes of the Claimant's communications with the dispatcher. Yet, neither of these declarants were called as witnesses during the Investigation, so neither could be cross-examined. Furthermore, the audio tapes were not entered into the record, although excerpts were played. The Organization objected to these omissions during the on-property investigation. In addition, there were numerous errors in the charges and discipline themselves. However, in light of this Board's other findings, we find it unnecessary to rule on each of these objections.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of March 2019.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 43559

(Referee Kathryn A. VanDagens)

On March 8, 2016, the Claimant failed to properly maintain track authority resulting in a near miss collision between a train and a third party contractor performing maintenance on the tracks. Had it not been for quick thinking on the part of other Carrier employees, this incident most likely would have resulted in both the death of the contractor and extreme damage to public property. While this alone should have been ample cause for his termination, it was the Claimant's actions following the incident that proved him untrustworthy to serve in a position of public safety.

Following the incident, the Claimant intentionally supplied factually incorrect information to management about the cause of and potential impact of the incident. It was based on these claims that the March 15, 2016, waiver was offered. However, following the issuance of the waiver, it was determined that said waiver was offered based on factually inaccurate information supplied by the Claimant presumably to avoid discipline for his safety violations. Accordingly, he was terminated not only for the underlying safety violations, but also for providing untruthful and intentionally inaccurate information during the initial investigation.

To require the Carrier to ignore the falsehoods presented by an employee during an investigation sets a dangerous precedent that an employee may skirt liability for his actions by lying for the purposes of receiving a waiver and that an employer may not later discipline the employee for his actions once the truth is discovered. Not only will this incentivize an employee to lie, but it will also disincentivize an employer from offering such waivers. Plainly stated, this decision creates a lose/lose scenario.

Further, the Claimant's dishonesty during the investigation proves him unfit to serve in a safety sensitive position such as the role he filled with the Carrier. If the Carrier cannot rely on its employees to provide accurate and truthful information immediately following a near miss such as the one that occurred here, they will be rendered unable to fully ensure that instances with the potential to

harm people and property will be accurately reported to allow for safety adjustments. As the Carrier depends on information received from their employees to be honest and correct in order to evaluate and guarantee safety on the track, the Claimant's actions in this case prove him to be, *at least*, unreliable in presenting information. Such unreliability may render the Carrier's efforts to maintain a safe environment for employees, contractors, and the public at large ineffective.

In spite of this, by sustaining this Claim and awarding the Claimant's requested relief, the Carrier will be required to return an individual to a public safety position despite evidence suggesting he is not qualified to fulfill such a role. Additionally, while the evidence revealed the Claimant received interim earnings, the duty to mitigate damages and actively seek employment must be recognized. Therefore, the Board must take these consequences into consideration in determining appropriate relief.

Beyond the issue of the waiver, the majority places much weight on the fact that recordings were used during the hearing as opposed to presenting the witnesses heard in the recording for cross-examination. This assertion fails for two reasons:

1. The recordings were presented to review the *Claimant's* words and actions during the events, not the thoughts or opinions of those with which he spoke. Accordingly, it was the Claimant, not any other individual involved in the recording, who was best capable of addressing and correcting any fallacies contained within them. As the Claimant and his union representative were in attendance at the hearing, he was provided the full opportunity to rebut any "claims" contained in those recordings; and
2. The recordings showed contradiction between the Claimant's original account of events and the truth which was later revealed. Accordingly, they were not considered only for the purpose of determining the actual course of events, but also to evidence that the Claimant had covered up and falsified information, an additional charge warranting termination that was not included in the waiver.

Even if the Board determines that the waiver is effective, it cannot reconcile the fact that the Claimant was terminated not only for his role in the incident, but also for his dishonesty following said incident. The majority opinion recognizes that the Claimant was found guilty of both operating rule violations AND covering up and falsifying information. However, the majority fails to address the second part of the determination beyond stating that punishments arising from the same underlying facts of an incident that occurred on the same day amount to double jeopardy. According to this assertion, it would be impossible to for an employee to be rightfully punished for two distinct violations if such violations happen to occur on the same day and have overlapping factual bases.

In issuing their determination following the hearing, the Carrier found that the Complainant had both violated the rules at issue and lied about his involvement. The mere fact that he had entered into a waiver agreement about his violation of rules in no way negates his responsibility for providing dishonest information about the incident. Further, the fact that the determination was made during the hearing that he was responsible for the rule violations in which signed the waiver in no way removes the Carrier's authority to punish him for dishonesty. Such findings and applicable punishments in do not amount to double jeopardy as claim by the majority.

In conclusion, the Carrier acted appropriately and in compliance with the collective bargaining agreement in terminating the Complainant not only for rule violations, but also for dishonesty. Allowing him to profit from his dishonesty is akin to providing an avenue for employees to "game the system." As the Carrier completed a full and fair investigation in the matter and allowed the Complainant to provide a full defense with the assistance of the Organization, I respectfully dissent to the majority opinion.

Timothy Bubenik

Timothy Bubenik

Jeanie L. Arnold

Jeanie L. Arnold

March 27, 2019