

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated August 2, 2011, R. L. Whitaker, Engineer Track - Indianapolis, notified J. V. Jackson ("the Claimant") to attend a formal Investigation on August 25, 2011, at the Great Lakes Division conference room in Indianapolis, Indiana, "to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 1520 hours, on July 20, 2011, on the Indianapolis Terminal Subdivision, in the vicinity of Plainfield, IN. It is alleged," the letter continued, "that you used a company fuel card to purchase fuel at Speedway Fuel Station #03338 for a non railroad vehicle." In connection with the incident, the letter proceeded, the Claimant was "charged with failure to properly perform the responsibilities of your position, and possible violations of, but not limited to, CSXT Operating Rules – General Regulations GR-2." The letter stated that the Claimant was being withheld from service pending the investigation.

FINDINGS:

Public Law Board No. 7120, 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.

The Board has jurisdiction over the dispute involved herein.

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

The Claimant, J. V. Jackson, was hired by the Carrier on March 3, 2007. At the times here relevant, he was employed by the Carrier as a Machine Operator. His date of hire was March 3, 2007.

Ralph L. Whitaker, Engineer of Track, Indianapolis, testified that Keith Bradford, Track Foreman, came to him with the following story. The credit card assigned for use in the purchase of fuel or for repair of one of the maintenance vehicles at the Avon, Indiana, yard was missing. He (Bradford) searched the vehicle and his own person but could not find the card. Bradford called ARI, the company that administers the Carrier's vehicle fleet, and ARI said that the last person to use the card was the Claimant, J. V. Jackson. Bradford then asked Jackson about the credit card, who said that he did not have it. Subsequently the card turned up back in the vehicle. Foreman Bradford thought that there may have been inappropriate use of the credit card.

The credit card is normally kept in the glove box inside the vehicle. Mr. Jackson did not have a vehicle assigned to him in his job, but if he needed a vehicle for company business, that was one of the vehicles that was available to him. Mr. Whitaker obtained a list of fuel purchases on the credit card in question. It showed four recent gas purchases by Mr. Jackson as follows: July 20, 2011, 20 gallons for \$76.03, in Plainfield, IN; July 13, 2011, 18 gallons in Plainfield, Indiana; July 11, 2011, 21 gallons for \$72.39 in Avon, Indiana; June 30, 2011, 21 gallons in Bloomington, Indiana, for \$73.37.

Engineer Track Whitaker turned over the matter to the CSX police department for investigation, and it was assigned to special agent Chris Bennett. Special Agent Bennett went to the gas station and obtained a video of the July 20 transaction. It showed an

individual using a credit card to activate a pump to dispense gasoline into a black Ford SUV vehicle that had no CSX identification on it. A copy of the video on a CD ROM was provided to Engineer Track Whitaker. Although the video was not clear enough for identification of the customer, in order to purchase gas, the personal ID number of the purchaser and the odometer reading of the vehicle had to be entered into a computer device at the pump. Whoever made the purchase entered Mr. Jackson's ID number and the odometer reading on the CSX truck to which the card was assigned. After being informed of the special agent's findings, Mr. Whitaker notified the Staff Engineer that he would be taking Mr. Jackson out of service pending investigation.

Mr. Whitaker testified that he spoke to Mr. Jackson on August 1 about the incident, and that Mr. Jackson said that there had to be some mistake, that he did not recall making the purchase in question. He was asked on cross-examination how he knew the vehicle shown in the video was Mr. Jackson's. He stated that he has seen him drive the vehicle and that there was printing on the back glass of the vehicle in the video that was similar to what was on the back glass of Mr. Jackson's black SUV.

Chris Bennett, Special Agent for the CSX police department, over the objection of the Organization, was permitted to testify by telephone. Mr. Whitaker had provided him with the ARI record of fuel transactions for the credit card in question. It showed the date, time, number of gallons, and price of each transaction. He went to the gas stations where the four gasoline purchases by Mr. Jackson had been made and from the manager at each of the stations was provided with a video of the pertinent transaction(s) for that station. Three of the purchases were for a CSX vehicle. The video for the July 20, 2011, purchase, however, showed that it was made for a black Ford SUV vehicle that had no CSX markings and was not part of the CSX fleet. Officer Bennett obtained a copy of the

video on a CD ROM and gave it to Mr. Whitaker.

On cross-examination Officer Bennett testified that he was not able to make out the license plate of the vehicle, that he could not identify whether the person who made the purchase was Mr. Jackson, and that it would be possible for one person to get another person's employee ID number.

Keith Bradford, Track Foreman on the R578 gang at Avon Yard, testified that there was a day that he went to fuel the truck here in question, but could not find the fuel card in the truck. The fuel card is normally kept in the glove compartment of the truck. He emptied everything from the glove compartment, discarded all unnecessary receipts, and the fuel card was not there. He then searched his uniform pockets to make sure it was not in his personal clothing. He looked some more and waited a couple of days, and he could not find the card. He therefore called ARI to report the card as lost or stolen.

The ARI representative informed Mr. Bradford that ARI's records showed that the card was last used by a J. Jackson on July 20, 2011. Mr. Bradford testified that he and Mr. Jackson work in the same building in different jobs, but that they both attend the same morning briefings. Mr. Jackson, Mr. Bradford stated, had access to all of the trucks. He would also have access to the credit card on each truck to purchase fuel. The normal practice is to use the card designated for each truck to purchase gas for that truck. After he obtained this information from ARI, Mr. Bradford testified, "mysteriously the card showed back up in the truck." He then went to Mr. Whitaker, Mr. Bradford testified, and said "we got a problem."

Mr. Bradford described the procedure for purchasing gas. You swipe the card, and the computer screen asks for the odometer reading. You put in the odometer reading. After a pause the computer asks for your employee ID number, and you have to enter that.

If everything is in order, the computer authorizes the purchase. At the end of the transaction, you are asked if you want a receipt. Mr. Bradford testified that he does not know Mr. Jackson's ID number. Asked if he could get Mr. Jackson's ID number, he stated that he could not unless Mr. Jackson gave it to him. On cross-examination Mr. Bradford acknowledged that employee ID numbers appear on every employee roster, and that you can get any employee's ID number from the roster.

The gas purchase in question was made at 3:23 p.m. on Wednesday, July 20, 2011. Mr. Jackson worked a four-day week, 10 hours per day, Monday - Thursday. Mr. Jackson's payroll record for the week of July 18, 2011, was introduced into evidence. It shows that he was off work on vacation days on July 18 and 19 and was paid 10 hours' each for July 20 and 21. Mr. Whitaker testified that if Mr. Jackson worked 10 hours on July 20, he should have been at work until 5:30 p.m.

Claimant Jackson testified that he was made aware of the subject matter of the present charge when on August 1 Mr. Whitaker told him that he had purchased fuel for his personal use with the company credit card. "I would never intentionally do something like that for my personal gain," Mr. Jackson stated. He testified that he did not recall making any of the four gas purchases listed on the ARI record of fuel purchases with the credit card in question. When challenged by the conducting officer about his testimony that he did not recall any of the purchases, Mr. Jackson replied, "I can't recall. I fuel a lot of vehicles, sir."

Mr. Jackson acknowledged that it is not uncommon for him to use the truck to which the credit card was assigned. The credit card is usually kept in the glove compartment, he stated. His work hours, Mr. Jackson testified, are from 6:30 a.m. to 5:00 p.m. He operates a Burro crane in Avon, he stated. He has fueled vehicles at the

Speedway gas station in Plainfield, he testified. Asked whether he owned a vehicle similar to the vehicle shown in the video, he answered, "Yes, I do." Questioned if he drives that vehicle to work, he replied, "Occasionally, yes." Asked if he knew if he drove that vehicle to work on the 20th of July, he testified, "No, I can't answer that truthfully."

He worked a full day on July 20th, Mr. Jackson testified, and did not leave early. He went for lunch, he stated, but could not recall what time or what vehicle he used. Mr. Jackson testified that Mr. Bradford mentioned that the credit card was missing and asked him if he had the credit card, and he said no, he did not. Mr. Bradford also asked him when he last used it or where he put it, and he (Jackson) told him that it should be in the truck. Subsequently, Mr. Jackson testified, Mr. Bradford looked in the glove box of the truck, and the card was in the hazardous material book.

The conducting officer asked the Claimant, "Mr. Jackson, did you purchase fuel accidentally on this credit card?" He answered, "If I did it was unintentionally." The conducting officer followed up with, "Well, if the credit card is kept in the glove box and Carrier Exhibit B [the ARI record of the fuel purchases on the credit card] shows Mr. Bradford having it prior to that use, how did that card come to be in your possession?" He stated, "I can't answer that." He has not had any issues in the past of somebody using his ID number, Mr. Jackson testified. He had no explanation whatsoever, Mr. Jackson stated, for his name showing up on the fuel purchase on July 20th at the Speedway station in Plainfield.

Mr. Jackson testified that he is aware of General Regulations GR-2, which states, ". . . Employees must not: . . . 4. Be disloyal, dishonest, insubordinate, immoral, quarrelsome, vicious, careless, or incompetent" Asked by the conducting officer, with regard to the rule, if he was disloyal and dishonest, he stated, "Not intentionally, no."

He clarified, “No, I would not intentionally lie or steal anything.” He was asked if there have been any items in the past where he accidentally may have put some charges on the credit card. He said, “No.”

Recalled by the conducting officer as a witness, Mr. Bradford was asked about the circumstances in which he found the credit card after it turned up missing. He stated that he actually did not find it; that Mr. Jackson “reached his hand in there and pulled it out. . . . I physically did not open the glove compartment and pull the card out.”

In a closing statement in his own behalf, Mr. Jackson stated that he likes his job on the railroad; that it is a career opportunity for him; that he plans on retiring from the railroad. He asserted that he would not jeopardize his job in any way such as by doing something stupid as the charges he is accused of. “These charges,” he asserted, “I am not guilty of.”

Arguing in behalf of the Claimant, the Organization asserts that the burden of proof is on the Carrier to prove the charges and that in the present case “there’s no way that it can be conceived that the Carrier proved that Mr. Jackson did what he’s charged with here.” Mr. Bradford, the Organization argues, looked at the video and could not identify Mr. Jackson as present or the vehicle at pump 6 to be Mr. Jackson’s. Nor, the Organization notes, was the police officer able to identify Mr. Jackson in the video. Further, the Organization contends, every Carrier employee has access to every other employee’s ID number from the employee roster. In addition, the Organization points out, the credit card was not locked up, and any employee had access to it.

It is very plausible, the Organization contends, that somebody took the credit card and entered Mr. Jackson’s employee ID number when purchasing the gas. For these reasons, the Organization argues, the Carrier has failed to prove its case. The

Organization requests that the charges against Mr. Jackson be dropped and that he be reinstated and paid for his lost time.

Following the close of the hearing, by letter dated September 14, 2011, the Division Engineer notified Claimant Jackson of the Carrier's determination, based on a review of the transcript and exhibits, that the hearing was conducted in accordance with his due process rights. "Based on the evidence presented at the investigation," the letter stated, "it is my decision that the discipline to be assessed is your immediate dismissal in all capacities from CSX Transportation."

Regarding the Organization's objection to permitting the CSX police officer to testify by telephone, the Carrier argues that telephonic testimony is permissible so long as there is no problem with the testimony, such as it being unintelligible, or having some procedural defect. It cites Award No. 3 of Public Law Board No. 6610 and First Division Award No. 24522 in support of its position. On the merits the Carrier contends that it brought forth substantial, probative evidence that the Claimant was guilty of using a company fuel card to purchase fuel for his personal vehicle in violation of Rule GR-2.

The circumstantial evidence that Mr. Bradford searched the glove box of the vehicle and could not find the fuel card after putting it there following a gas purchase a few days earlier; that he asked the Claimant about the card, who said that he did not have it and did not know where it was; and that shortly thereafter the Claimant came back to Mr. Bradford and said that he found the card in the glove box was very suspicious, the Carrier argues.

Thereafter, the Carrier asserts, investigation showed that on July 20, 2011, fuel was purchased with the fuel card by someone who entered Mr. Jackson's ID number at the pump, although a surveillance videotape of the transaction showed that the purchase

was made for a vehicle that did not belong to CSX and that the Claimant identified was owned by his wife. This evidence, the Carrier argues, leaves no doubt that the Claimant purchased the gas in violation of GR-2 even though his face is not clear in the video.

Further evidence of the Claimant's guilt, the Carrier argues, was his evasiveness in his testimony during the hearing. For example, the Carrier asserts, he testified that he could not answer truthfully if he drove his wife's vehicle to work on the date of the incident; and, when asked if he purchased fuel accidentally on that credit card, he said, "If I did, it was unintentionally." Dismissal, the Carrier contends, was appropriate discipline for the Claimant's dishonest conduct. The IDPAP, the Carrier points out, lists dishonesty and theft as Major Offenses for which an employee may be dismissed for a single occurrence. There are no mitigating facts, the Carrier asserts, and the claim should be denied.

With regard to the telephonic testimony of the CSX police officer, normally testimony should be given in person in the presence of the conducting officer, the Claimant, and his representative. Where, however, for good reason, a witness is unable to attend personally, it has been the practice in arbitration between the parties to permit telephonic testimony within the sound discretion of the hearing officer. In addition, the Board has found such testimony, when clear and intelligible and subject to cross-examination, and where there has been no showing of prejudice to the claimant, not to be a basis for finding that the claimant has been denied a fair hearing. See, for example, First Division Award No. 24522 (J. B. LaRocco, 1995), Public Law Board No. 6610, Award No. 3, (E. H. Goldstein, 2003), cited in the Carrier's post-hearing submission.

In the present case, the CSX police officer was unable to attend the hearing personally because of familial obligations that arose unexpectedly. His testimony was

clear, forthright, and credible. He was cross-examined by the Organization's representative. The subject matter of his testimony dealt with the circumstances under which a CD video of the gas purchase here in issue was obtained. The actual video was produced and shown at the hearing. Much of his testimony was corroborative of testimony already given in person by Engineer Track Whitaker. None of the facts given in the police officer's testimony is disputed by the Organization since he did not purport to identify who the individual was who made the gas purchase shown in the video or who was the owner of the SUV. The procedure for purchasing gas, moreover, was testified to in person by Foreman Bradford. Under these circumstances it cannot be said that permitting the police officer to testify by telephone compromised the due process rights of the Claimant or deprived him of a fair hearing. The Board so finds.

On the merits the Board finds that the Carrier has established the guilt of the Claimant by substantial evidence. He had access to the fuel card and had previously made purchases for a CSX vehicle with the same card. Whoever made the purchase would have had to know Mr. Jackson's employee ID number since in order to make the purchase one must enter the employee number into the computer at the pump. He also had access to the truck in order to be able to read the odometer reading, which, too, had to be entered at the pump when making the purchase.

The Organization argues that any other employee of the Carrier could have obtained the Claimant's ID number from the employee roster. If the only evidence against the Claimant were the fact that the correct ID number and odometer reading had been entered at the pump, the Board would agree that the Carrier's evidence fell short of what was necessary for a guilty finding. The additional evidence of the video of the vehicle involved, however, shows that it was an SUV of the same color and brand as

driven by the Claimant's wife and that he acknowledged he sometimes drove to work. Mr. Whitaker identified the vehicle as the same as the one driven by Mr. Jackson on the basis of both the type and model of the vehicle and the printing on the back glass (Tr. 16). The Claimant himself acknowledged that the vehicle was his wife's (Tr. 18, 42-43).

If the foregoing were not enough to establish the Claimant's guilt, it was the Claimant who "found" the card in the truck's glove compartment after Foreman Bradford had searched the compartment for the card without success and the Claimant had told him that he did not have the card. It is another layer of evidence implicating the Claimant in the removal of the card from the CSX truck since it is not reasonable to believe that Mr. Bradford would not have seen the card there if it were inside the glove compartment.

The evidence thus establishes that the Claimant had access to the fuel card in question and to the truck where it was kept in the glove compartment; the person who made the gas purchase entered the Claimant's correct employee ID number at the pump without which the computer would not have authorized the gas purchase; the odometer reading entered appeared to be correct based on the odometer reading used for the previous gas purchase; a video of the gasoline purchase showed that the vehicle being fueled appeared to be identical to the vehicle sometimes driven to work by the Claimant; the Claimant acknowledged that the vehicle appeared to be his wife's; when Foreman Bradford looked for the fuel card in the glove compartment where it was normally kept, he could not find it despite a careful search; Foreman Bradford asked the Claimant about the missing the fuel card, and the Claimant said that he did not have it; subsequently the Claimant handed the fuel card to Foreman Bradford, stating that it was in the glove compartment of the vehicle.

The only reasonable conclusion on the foregoing facts is that it was the Claimant

who purchased the gas in question. It would be too much of a coincidence, the Board believes, for someone to have both used the Claimant's employee ID number without the permission or knowledge of the Claimant, assuming that person was able to find out the number, and then happen to have had the exact same color, brand, and model vehicle as the Claimant's. Add to this the suspicious fact that it was the Claimant who produced the missing card, allegedly after finding it in the CSX truck's glove compartment which Foreman Bradford had previously searched without finding the card, then the only reasonable conclusion is that it was the Claimant who originally took the fuel card from the CSX vehicle and made the unauthorized gas purchase. The Board so finds.

Another piece of evidence consistent with the conclusion that it was the Claimant who made the gas purchase in question is the fact that it was purchased at a station in Plainfield, Indiana. There are 68 gas purchase transactions recorded on Carrier Exhibit B, the record of fuel purchases with the subject credit card. Only two were made in Plainfield, both by the Claimant. Plainfield is approximately six miles from Avon, Indiana, on a direct route from Avon to Ellettsville, Indiana, where the Claimant lived.

The Claimant did not outright deny making the gasoline purchase. When asked by the conducting officer, "Mr. Jackson, did you purchase fuel accidentally on this credit card?", he answered, "If I did it was unintentionally." (Tr. 45-46). The evidence shows, however, that the act was done with premeditation and not accidentally.

The CSX truck where the card was kept had been fueled up the day before, July 19th, by Mr. Bradford (Tr. 29). There is no evidence that the Claimant used the truck on July 19th or 20th after Mr. Bradford put fuel in. The Claimant was on vacation on July 19th and, according to his testimony, worked all day at the yard on July 20th. There was no reason for the Claimant to have the fuel card in his possession on July 20th since no fuel

was purchased for the truck on that date by him or anyone else. Presumably, on July 19th, after purchasing fuel, Mr. Bradford placed the fuel card back in the glove compartment of the truck, in accordance with his and the normal practice at the yard.

It is clear, however, that the Claimant had the fuel card in his possession on July 20th when he purchased gas for his private vehicle. That means that when he returned to work on July 20th after his vacation day, he went to the truck and removed the fuel card. The removal was not to purchase gas for the truck since, as noted, no gas was purchased for the truck that day. The removal was for unauthorized personal use to buy gas for the Ford SUV which he and his wife drove. In addition, he would have had to read and memorize or write down the odometer reading on the truck in order to know what number to enter at the pump when he purchased gas for the SUV. In removing the fuel card from the truck and noting the odometer reading so that he could purchase fuel for their private vehicle, Mr. Jackson would have been acting with premeditation and not accidentally.

The discipline assessed by the Carrier for the Claimant's violation is consistent with the General Guidelines of the Carrier's Individual Development & Personal Accountability Policy ("IDPAP"). The IDPAP states, "Major Offenses are those that warrant an employee's removal from service pending a formal hearing and possible dismissal from service for a single occurrence if proven responsible." The examples listed include "dishonesty" and "theft." The Claimant's conduct was dishonest and was an action of theft.

The Board has reviewed prior awards involving unauthorized use of a carrier credit card to purchase fuel for one's private use. Such an offense is generally treated quite severely by the Board. There are reported cases involving long-term employees who have been given a second chance where a single unauthorized purchase was

involved. There are also cases where there were strong extenuating circumstances to permit a conclusion that the claimant did not have a dishonest intent and where dismissal was therefore not imposed. But where the foregoing circumstances were not present, dismissal has been the rule. See, for example, Public Law Board No. 5850, Award No. 45, (dismissal upheld for a single purchase of fuel for private vehicle using carrier credit card), Third Division Award No. 25845 (dismissal upheld for two purchases of gasoline totaling \$40.96 for private vehicle with carrier credit card), Public Law Board No. 7048, Award No. 22, (dismissal upheld for unauthorized gas purchases amounting to approximately \$100, number of transactions not disclosed).

In the present case the Claimant is a relatively short-term employee. He violated General Regulations GR-2. 4., in that he was dishonest and committed theft, a Major Offense under the Carrier's IDPAP. His prior work record is not discipline-free. The evidence indicates that the violation was planned beforehand. The Board has no reasonable basis for disturbing the Carrier's action. The claim will be denied.

A W A R D

Claim denied.

O R D E R

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



Sinclair Kossoff, Referee & Neutral Member