

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
AWARD NO. 5, (Case No. 5)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE
(Organization File: D70808112)**

vs

**CSX TRANSPORTATION, INC.
(Carrier File: 2012-122407)**

William R. Miller, Referee and Neutral Member
P. E. Kennedy, Employee Member
R. Paszta, Carrier Member

QUESTION AT ISSUE:

Did the Carrier comply with Rule 25 of the Agreement when it charged T. H. Hackler with falsification of an injury and making false statements concerning a matter under investigation as well as possible violation of Operating Rules - General Rule A and General Regulations GR-2 and was substantial evidence adduced at the Investigation on March 14, 2012, to prove the charges; and was the discipline assessed in the form of permanent dismissal warranted?

FINDINGS:

Public Law Board No. 7529 finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the discipline.

The Board has thoroughly reviewed the record and will first address the Organization's procedural arguments. It argued that the Claimant was denied a "fair and impartial" Investigation because the Carrier failed to call all witnesses with relevant information regarding the incident under review and it was denied the right of discovery. With respect to the first assertion there was no showing as to how the Claimant was prejudiced by the Carrier's alleged failure to make arrangements for witness's to be notified to appear as a defense witness. Regarding the second allegation we reiterate our determination set forth in Award No. 1 of this Board, that the Collective Bargaining Agreement between the parties has been interpreted to mean that the Organization does not have a demand right to review all investigative material prior to the Hearing (See P.L.B. 7008, Award Nos. 11, 18 and 21). It is determined that the Carrier complied with Rule 25 of the Agreement and Claimant was afforded all of his "due process" Agreement rights.

On February 17, 2012, Claimant was directed to attend a formal Investigation on February 28, 2012, which was mutually postponed until March 14, 2012, concerning in pertinent part the following charge:

"...to determine the facts and place your responsibility, if any, in connection with information contained in an investigative report issued by Employee Services on January 30, 2012. This report concerns the P11A that you filed late afternoon on Tuesday, December 27, 2011, as a result of your contacting Division Engineer R. E. Moore at approximately 1449 hours on Tuesday, December 27, 2011, while in the carrier's offices in Clinton, South Carolina. In this report, you allege that you were injured at 0745 hours when Roadmaster Stevens "...grabbed my shoulder...", and you additionally assert that, "The Roadmaster Gerald Stevens has assaulted me in the past..."

In connection with the above, you are charged with failure to properly perform the responsibilities of your position, conduct unbecoming an employee of the carrier, possible falsification of an injury, and making false statements concerning a matter under investigation, and possible violations of, but not limited to, CSX Transportation Operating Rules - General Rule A; and General Regulations GR-2."

On April 3, 2012, Claimant was notified that he had been found guilty as charged and was assessed discipline in the form of permanent dismissal. On April 16, 2012, the Claimant requested expedited handling of his case as provided for in Appendix (N) Expedited Discipline Agreement of June 1, 1999 BMW/CSXT Agreement.

The facts indicate that on December 27, 2011, an incident occurred between the Claimant and Roadmaster Stevens that resulted in the Claimant filing an on-duty injury report. The record further reveals that the Claimant and Stevens had not always had the best working relationship.

On the aforementioned date Claimant was working as a Assistant Track Foreman on an Atlanta/Waycross Seniority District Section Team number 5FC5. At approximately 7:45 a.m. the alleged incident occurred wherein the Claimant asserted that he was having a discussion with Roadmaster Stevens concerning his payroll. The Claimant stated that while he was in the office, Stevens "sat" his hand on the Claimant's shoulder causing him to flinch and he then felt a "pop" in his shoulder. Later, the Claimant suggested that Stevens caused his injury by pulling him back while he was walking away from Stevens.

Roadmaster Stevens version of the incident differed from that of the Claimant as he testified he had no physical contact with the Claimant. Employees Duckett, Gross and Jones were also at the Clinton office at the time of the incident, but all wrote in their statements that they were not inside the office and did not observe any interaction between the Claimant and Stevens. After the alleged incident, Claimant testified that he left with his co-workers to perform his job duties despite the fact that he was injured and in pain. At 2:45 p.m. the Claimant left a phone message for Stevens and then reported the injury to B. Moore, Division Engineer. When questioned in the Investigation as to why he did not immediately report his injury Claimant stated he was unclear of what to do or who to contact and eventually contacted the Employee Assistance Program (EAP), his Organization, and then Officers Stevens and Moore. When further questioned as to his understanding of reporting procedures he stated he believed he was permitted to report an injury by the end of the workday or before he left the work location.

At 2:49 p.m. Division Engineer Moore spoke to the Claimant who advised him of the alleged injury caused by Roadmaster Stevens. Stevens also called Moore and told him that the Claimant had left a phone message. Moore testified at the Hearing that Claimant informed him that he and Stevens were standing at the computer when Stevens touched him on his shoulder startling him, causing him to jerk his shoulder after which he felt a pop. Moore instructed Manager McWhite to transport Claimant to a hospital for medical attention. On page 60 of the transcript Division Engineer Moore was questioned about Claimant's responsibility to report the incident as follows:

"Griffith: Now would it be reasonable that Mr. Hackler made sure that he reported the injury of the incident, and filled out the PI-1A report that day before he left?

Moore: That's correct.

Griffith: Would it be improper that if he left that day and come back the next day, he would be charged with late filing of an injury report, correct?

Moore: They're supposed to, we're, they're supposed to notify us at the time of an injury.

Griffith: Okay and before he leaves...


Moore: Leaves property." (Underlining Board's emphasis)

Moore testified Claimant should have reported his injury immediately, but did give the Claimant some credit for reporting the incident before he left work. Moore further testified that after Claimant's medical appointment the Claimant revised his story wherein he suggested that Roadmaster Steven grabbed and pulled his shoulder as he was leaving the office. Statements provided by Claimant to Moore were inconsistent and unclear as to what transpired on December 27th, however, it is clear that Division Engineer Moore's recollection of the incident was not effectively refuted. It is determined that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty of a violation of GR-2 as to how his injury occurred, but we are not persuaded that he submitted a falsification of an injury as there was no proof that he was not injured.

The only issue remaining is whether the discipline was appropriate. The Claimant committed a serious infraction and the Board does not excuse his behavior, but finds and holds that the discipline was excessive and is reduced to a lengthy suspension. The Claimant is to be reinstated to service with seniority intact and all other rights unimpaired with no back-pay. The Claimant is also forewarned that upon reinstatement he should be careful to adhere to all Carrier Rules.

AWARD

Appeal partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Referee

Dated: August 17, 2012