

**PUBLIC LAW BOARD NO. 7104**

<b>BROTHERHOOD OF</b>	)	
<b>MAINTENANCE OF WAY EMPLOYEES</b>	)	
<b>DIVISION – IBT RAIL CONFERENCE</b>	)	
	)	<b>CASE NO. 22</b>
<b>vs.</b>	)	<b>AWARD NO. 22</b>
	)	
<b>CSX TRANSPORTATION, INC.</b>	)	

**STATEMENT OF CLAIM:**

Claim of the System Brotherhood that:

1. The dismissal of Track Inspector Carlos Arias-Mieses for alleged conduct unbecoming a CSXT employee, dishonesty, and failure to comply with On-Track Worker Rules in possible violation of the following CSX Rules; CSX Safe Way GS-1, GS-3, GS-10, ES-23 and CSX Operating Rules – General Rule A & S, General Regulations GR-2, GR-16, Section 7 On-Track Workers Rules and Qualifications – Program Responsibilities, Job Briefing and Red Zones is based on unproven charges, excessive, unjust, unwarranted and cannot stand. (Carrier’s File 12-07-0950 CSX)
2. As a consequence of the unjust dismissal, it is requested on behalf of Track Inspector Arias-Mieses, that all discipline imposed should be removed and he should be made whole for all losses sustained.

**FINDINGS:**

Public Law Board No. 7104, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant had been employed by the Carrier for approximately 6½ years. On May 31, 2007, Claimant was charged with violations of several Carrier Rules in connection with an incident on May 15, 2007 at Oak Point Yard, Bronx, New York:

1. You entered a work area without received a job briefing or permission from the employee in charge and in doing so entered a red zone endangering yourself. You also were shouting and arguing with the EIC and refused to leave the work area, disrupting the work until the EIC called Mr. Beck.

2. You reported to Assistant Roadmaster Beck and then to Roadmaster Cole that you had been punched by Mr. Carreker in the chest and wanted medical attention. When interviewed by Engineer of Track John Breen and Charley Otten you said that this was not true, and that you had never been punched and did not request any medical attention. In addition you had accused Roadmaster Beck of having instructed Mr. Carreker to punch you and you told the same to Roadmaster Cole.

Following the investigation, the Carrier found Claimant guilty of the violations alleged and, taking into consideration his personal record, dismissed him from service. Claimant's record showed several previous disciplinary incidents, including 10 and 30-day suspensions for insubordination in 2006.

Tim Carreker, Section Foreman at Carrier's Oak Point Yard, testified at the investigation that he was the employee in charge of a work area in the Receiving Yard at the time at issue. He stated that he had two employees working under his control, repairing a switch and performing surfacing. He stated he had established working limits on the track by setting portable derails on the main tracks and locking and tagging switches on the east end.

He testified that the two employees were tamping the switch points to the proper level when he noticed Claimant, a track inspector, wandering in the area. He stated that Claimant was in the work area without having requested permission, talking to the employees, and had not received a briefing. He stated that Claimant had also come into the red zone for his backhoe. He stated that he told Claimant he needed to leave and inspect elsewhere and could return when they were through.

Mr. Carreker stated that Claimant walked away but then appeared right next to the backhoe, a definite red zone violation because he could have been seriously injured if Mr. Carreker had swung the boom around. He stated Claimant was shouting that he should be there before Mr. Carreker and his employees worked. He stated that he got out of the backhoe and told Claimant he had already asked him to leave and would have the entire yard to inspect when they were done. Mr. Carreker stated that Claimant continued to shout, becoming very confrontational and picking a fight. He stated that Claimant then said that Mr. Carreker had hit him and started hollering that to the two employees. Mr. Carreker stated that he never hit Claimant. He added that Claimant told him he would not leave and would not obey Mr. Carreker's instructions to leave; someone else would have to tell him to do so. Mr. Carreker called Roadmaster Beck for assistance, but Claimant was already walking to the office building.

Claimant testified at the investigation that he stopped to talk to the two employees about a derailment in the yard. He stated that he saw Mr. Carreker calling and motioning to him, while Mr. Carreker was operating a backhoe. He stated that he approached Mr. Carreker, who told him not to talk to the employees and to let them work. He stated that

he answered that he was a track inspector, to which Mr. Carreker replied that he was his boss.

Claimant further testified that Mr. Carreker slowly backed the backhoe's digger to the end of a 14 foot timber by the frog. He stated that he realized that Mr. Carreker was attempting to provoke a reaction, so he told Mr. Carreker he should not have done it. He testified that Mr. Carreker jumped off the backhoe, punched him on the chest and pushed him with his body, although during the hearing he also stated that there had been no physical contact. The record demonstrates that following the incident Claimant gave conflicting accounts to other Carrier officers concerning whether Mr. Carreker had hit him, and also accused a Carrier officer of instructing Mr. Carreker to punch him.

Claimant testified that he "supposed" Mr. Carreker was in charge of the two employees' working limits. However, he stated, he did not know if limits had been established, so he did not make a request to enter his work area. He acknowledged the backhoe was fouling the track, and that Carrier rules require the establishment of working limits in such a situation. He also acknowledged he had not had a job briefing, and stated that he had Mr. Carreker's permission to get close to the backhoe because Mr. Carreker had called him over.

The Carrier first asserts that all of Claimant's procedural rights were fully protected and the hearing was conducted in a fair and impartial manner. On the merits, the Carrier asserts that it demonstrated, with substantial evidence, that Claimant became argumentative and insubordinate to the employee in charge of working limits he violated, and refused to follow explicit instructions to leave the area. While Claimant denied any wrongdoing, the Carrier states, it is clear the Hearing Officer chose to instead credit the overwhelming evidence presented by the Carrier's witnesses. It is well established, the Carrier points out, that such credibility determinations should not be overturned by this Board. The record clearly establishes, the Carrier concludes, that Claimant showed flagrant disregard for his own safety and that of others, in violation of several Carrier rules.

The Carrier also contends that the penalty of dismissal was fully justified. Claimant committed a very serious violation, the Carrier points out, and, in his short tenure with the Carrier, amassed a record of similar offenses. The Carrier's action, it states, cannot be deemed unfair, arbitrary or discriminatory.

The Organization states that a fair and unbiased review of the record demonstrates that Claimant was not guilty of all the charged violations. Therefore, the Organization contends, the discipline must be set aside in its entirety.

The Board has carefully reviewed the record in its entirety, and finds that the Carrier has met its burden of proving Claimant's guilt by substantial evidence. Even under Claimant's version of events, he committed serious safety infractions by violating the working limits established by Mr. Carreker and refusing to leave when asked to do so. As for the remaining violations, Mr. Carreker's testimony established Claimant's guilt by

substantial evidence. While Claimant proffered a different version of events, it is well established that credibility resolutions are not the province of this Board absent evidence that the Hearing Officer's determinations are unreasonable or lacking in record support. There is no such showing here, especially as Claimant gave inconsistent accounts of certain events at the investigation itself. Thus, Claimant's guilt has been proven by substantial evidence.

Given the violations proven and Claimant's record of similar offenses, we cannot say that the Carrier's determination that dismissal was warranted is an unfair, arbitrary or discriminatory exercise of its discretion.

**AWARD**

**Claim denied.**

  
JACALYN L. ZIMMERMAN  
Neutral Member

  
MATTHEW BORZILLERI  
Carrier Member 3/26/09

  
TIMOTHY KREKE 3-26-09  
Organization Member

Dated this 26<sup>th</sup> day of March, 2009.