

PUBLIC LAW BOARD NO. 7104

AWARD NO. 40

CASE NO. 40

PARTIES TO
THE DISPUTE:

Brotherhood of Maintenance of Way Employees
Division - IBT Rail Conference

vs.

CSX Transportation, Inc.

ARBITRATOR: Gerald E. Wallin

DECISION: Claim denied

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The dismissal of Track Inspector Christopher B. Jones for violation of CSX Transportation Operating Rules General Rule A and G, General Regulations 2 (4) and (6), General Rule 2A and General Rule 5 in connection with an incident occurring on July 4, 2007 is unjust, unwarranted, based on unproven charges and in violation of the Agreement (System File D70817608/2008-5207).
2. As a consequence of Part 1 above, we request that Mr. C. B. Jones, ID #381620, be exonerated from the charges placed against him in the letter dated July 23, 2007 by Assistant Division Engineer J. F. Castle and all matter relative thereof be removed from the record. We request Mr. Jones be compensated with all lost wages, seniority and benefits due to the Carrier's action and violations of any and all of the provisions of the June 1, 1999 CSXT/BMWE collective bargaining agreement."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Our review of the record shows that there are no procedural irregularities that require disposition by us. At the time of the incident in question, claimant had approximately five and one-half years of service. The record does not contain any evidence of previous disciplinary entries on

his work record.

The circumstances surrounding the incident are unusual. At approximately 0300 on the 4th of July, claimant was found unconscious in his company truck with the motor running, the transmission in Drive, and his foot on the brake at the traffic light controlled intersection of Assembly and Rosewood Streets in Cayce, South Carolina. Two highway patrol troopers were unable to arouse him and summoned paramedics in case a medical incident, such as suspected diabetic reaction, caused his failure to respond to tapping on the truck windows. He eventually responded and was cleared of any medical reason for his status. The troopers detected the odor of alcohol and arrested him for DUI. Claimant was transported to police headquarters for breath alcohol testing. His company truck was impounded and towed from the scene.

According to the written report of a Carrier special agent who spoke with the arresting officers after the fact, claimant was uncooperative during the testing; he kept biting the end of the mouthpiece. After three attempts to obtain a breath alcohol reading, the police declared him to have been a test refusal. The attempts at testing were video taped to show what transpired during the testing process.

Claimant's brother, who was also a Carrier employee, paid by credit card to have the truck released from impound and drove it to the Carrier's headquarters. According to the Carrier's testimony, the truck was missing in the morning and was found present later that afternoon.

According to claimant's testimony, he worked long hours on July 2 and 3, 2007 as employee-in-charge of a gang performing curve resurfacing. The long hours are undisputed. He started work at approximately 0530 on the morning of July 3 and did not finish until 2200. Rather than return his company truck to the work headquarters immediately thereafter, he decided to take a nap at the home of his nearby in-laws before returning the truck and driving home in his personal vehicle. His home was more than one hour away. He thought he napped for a couple of hours before waking and trying to return the truck. He did not pay attention to the time. He admits he must have fallen asleep while stopped for the traffic light on his way to headquarters.

To be at his in-laws by 2230 and then be found at the intersection at approximately 0300, claimant would have had to have napped for approximately four hours.

Claimant's testimony coincides with much of the written report of the Carrier's Special Agent. However, it does conflict in several significant respects. For example, claimant denies consuming any alcohol. He claims the troopers decided to arrest him for DUI because of the circumstances in which they discovered him. For another example, he denied having three test attempts. He claims the trooper stopped after two failed attempts and was not going to fool with him any more before declaring him to be a test refusal. Claimant vigorously maintained several times that the video tape of the testing process would corroborate his contentions about the number of test

attempts and how he was treated. Claimant also denied making any untoward remarks to the arresting officer or being belligerent during the arrest or testing process. He denied biting off the end of the test mouthpiece.

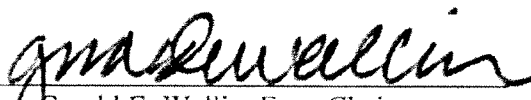
The video tape was never produced by claimant at the investigation or at any time during the appeal process on the property. Claimant's criminal trial on the DUI charge remained pending during the development of the instant record. As a defendant in the criminal DUI proceeding, claimant should have had access to it. Prosecutorial evidence cannot be withheld from an accused person. In addition, except as noted previously, claimant's testimony corroborated virtually all other details contained in the report of the Carrier's Special Agent. Except for claimant's conflicting testimony, the Special Agent's report is not in conflict with any of the other extrinsic evidence in the record. Finally, that report was properly included in the record and was entitled to full consideration.

We have carefully reviewed the record in this dispute and find that it does contain substantial evidence upon which the Carrier could have made the determination it did except in one part. The record does not establish that claimant was engaged in unauthorized personal use of a company vehicle during the incident in question. However, that part is the least serious of the charges.

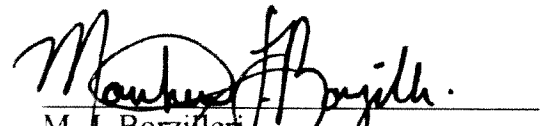
Considering the nature of the misconduct determined by the Carrier, we do not find that the Carrier's disciplinary decision was unreasonable or otherwise improper. The claim, therefore, must be denied.

AWARD:

The Claim is denied.


Gerald E. Wallin, Esq., Chairman


T. W. Kreke,
Organization Member


M. J. Borzilleri,
Carrier Member

Date: 7-2-10