

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated October 16, 2008, Mike Dier, Roadmaster, notified J. R. Burlinson ("the Claimant") to attend a formal Investigation on October 30, 2008, in Palatka, Florida, "to determine the facts and place your responsibility, if any, in connection with information that was received on Wednesday, October 8, 2008, from Special Agent R. R. Richardson, that CSXT Tractor Mower TM-9201 was retrieved from your residence on Monday, October 6, 2008. During your interviews with Special Agent Richardson, you subsequently admitted that you had taken the Tractor Mower without authorization for personal use."

An additional purpose of the Investigation, the letter stated, was "to determine the facts and place your responsibility, if any, in connection with information obtained between Wednesday, October 8, 2008, and Tuesday, October 14, 2008, which appears to indicate that sometime between April and May 2008, or earlier this year, you had CSXT Tractor Backhoe TBH200701 at your residence performing work on your property without authority, and that you may have been responsible for damage to this equipment."

The letter informed the Claimant that in connection with the two incidents he was

“charged with conduct unbecoming an employee of CSX Transportation, unauthorized use of Company equipment, misuse of company equipment, dishonesty, fraud, theft of company assets, and possible violations of, but not limited to, CSX Operating Rules – General Rules A and L, General Regulations GR-2 as well as CSX Code of Ethics Policy.” A hearing was held on October 30, 2008, as scheduled.

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 began his employment with the Carrier on April 12, 2004, and at the times here pertinent held the position of Track Inspector. On October 6, 2008, Roadmaster Mike Dier was informed by his backhoe operator that a tractor mower was missing from the compound at Rands Yard in Tampa, Florida. Roadmaster Dier had sent a mechanic to make some minor repairs to the ignition system, but when the mechanic got there the mower was missing. The compound at Rands Yard where the tractor motor had been parked is fenced in with locks on the

gates. Roadmaster Dier had last seen the mower on September 29, 2008.

Roadmaster Dier reported that the mower was stolen to the Carrier police department. Special Agent R. Richardson was assigned to the case. Roadmaster Dier called Roadmaster Kenneth Spivey to inquire if he had borrowed the mower to do some work on his territory, but he said that he had not. Assistant Roadmaster Carlos Guffey overheard the conversation between Roadmaster Dier and Roadmaster Spivey. He told Roadmaster Spivey that he had seen Claimant Burlinson in the evening several days earlier with a tractor mower of the kind that was missing on the back of his truck. Roadmaster Spivey called Special Agent Richardson and reported what Mr. Guffey had told him to Mr. Richardson. He gave Special Agent Richardson Claimant Burlinson's phone number.

Special Agent Richardson called Claimant Burlinson and asked him about his knowledge of the missing tractor mower. He said that he did remove the tractor mower, loaded it on his personal pickup truck and trailer, and carried it to his residence. He did this, he said, to bring it to the Seville, Florida, area to cut the CSX right-of-way and make some overtime pay. The reason he had the equipment in his residence, he stated, was to sharpen the blades on the mower. Mr. Richardson asked the Claimant if his supervisor had instructed him to remove the machine, and he said that his supervisor did not so instruct him.

Special Agent Richardson called Roadmaster Spivey and informed him of his conversation with Claimant Burlinson. Mr. Spivey drove to the Claimant's residence. He asked the Claimant what he was thinking in taking the tractor mower. The Claimant said that he was going to use it to mow the right-of-way. Roadmaster Spivey said that he had been talking with

Mr. Richardson and that this was very serious, that Mr. Richardson was probably going to arrest him the next morning. If his explanation about the right-of-way was not true, Roadmaster Spivey told the Claimant, he (the Claimant) needed to contact Mr. Richardson and tell him the truth. That was in the Claimant's best interest as far as he could see, Roadmaster Spivey stated. The Claimant said that he would contact Mr. Richardson.

Roadmaster Spivey retrieved the tractor mower and returned it to the Carrier's premises. After the Roadmaster left, the Claimant did call Special Agent Richardson, admitted that he had not told the truth to Mr. Richardson in their initial conversation, said that he took the tractor mover to mow an area around his home, and apologized for lying during his initial interview.

A short time after the tractor mower incident, an employee came up to Roadmaster Spivey and said that he wanted to tell him something. He referred back to an incident several months earlier on May 12, 2008, when, returning from the weekend on Monday morning, the machine operator doing his morning inspection found his backhoe, trailer and dump truck had been removed from the premises, used, and brought back with damage. The tractor had a right flat front tire and was missing two binders. The trailer had two flat tires. One rear window was broken out of the cab, and the cab had oak limbs inside of it. The dump truck was full of fencing, dirt, and oak limbs. The Carrier had just had the tires replaced on the backhoe on the preceding Friday and now had to replace the tires again on Monday.

At the time Roadmaster Spivey, according to his testimony, interviewed every employee in the group, including Claimant Burlinson, one on one, and asked if they used the backhoe during the weekend. All of them denied using it. Mr. Spivey reported the incident to his

managers and to the CSX Police Department. The employee told Roadmaster Spivey that the Claimant had taken the backhoe and had then put pictures on the Internet on My Space about the backhoe. Roadmaster Spivey testified that the employee who told him of the Claimant's removal of the backhoe said that he had spoken with the Claimant and asked him what he had in mind in putting pictures on the Internet about the backhoe. Claimant Burlinson, Roadmaster Spivey testified, did not have authority to use the backhoe or the tractor mover for personal use. He has not authorized any employee to take work equipment home for personal use, Roadmaster Spivey testified.

Roadmaster Dier testified that he has never authorized an employee to take work equipment home for personal use. He subsequently modified his testimony and stated that he did permit employees to take home personal protective equipment such as hard hats, safety glasses, earplugs, and chaps. The reason he permitted that, he explained, was "because we want to keep people work safe at home too." He "made a general statement to them that as long as they brought it back," Mr. Dier testified, "personal protective equipment could be used at home."

The Claimant, Roadmaster Dier stated, violated General Rule A, which requires employees to know and obey the rules. He violated Rule L, Roadmaster Dier testified, which prohibits unauthorized possession or removal of railroad property. He violated Rule GR-2, according to Roadmaster Dier, by his initial dishonesty with Special Agent Richardson. In addition, Roadmaster Dier stated, taking the tractor mower with intent to use it for personal use was immoral. He also concealed facts under investigation, Roadmaster Dier testified. Further, Roadmaster Dier testified, the Claimant violated the Code of Ethics. One of the unethical things

the Claimant did, Roadmaster Dier stated, was to use the switch key he possessed as a Track Inspector to unlock the lock on the compound where the tractor mower was kept and enter the compound to remove the machine for personal use.

Roadmaster Spivey identified four pictures he had taken off of the Internet and described them as follows. The first picture shows the claimant sitting in the backhoe holding his daughter. The number plate of the backhoe is visible at the top of the picture. The second picture shows the backhoe with a right front flat tire in the Claimant's backyard. The third picture shows some fence being torn up with the backhoe in the Claimant's backyard. The fourth picture shows the Claimant behind the backhoe tearing down or rolling up some fence by hand. The first comment on the picture on My Space is dated May 18, 2008. Roadmaster Spivey testified that because of the damage to the backhoe he lost a day's work out of the machine; the operator had to sit at the shop to get it fixed; and he incurred \$725 in damages. With regard to the tractor mover, Roadmaster Spivey testified, the Carrier lost a day's work of the mechanic who came to fix the tractor that was not there. In addition, Roadmaster Spivey stated, both Roadmaster Spivey and Roadmaster Dier lost time in connection with locating and retrieving the machine and testifying at the Investigation on the charges against the Claimant.

The tractor mower, Roadmaster Spivey testified, was discovered missing on Monday, October 6, 2008. Claimant Burlinson's rest days were Sunday, Monday, and Tuesday. The Claimant took the operating rules test on June 25, 2008, and passed it with a grade of 98. The Claimant viewed a video on ethics on March 3, 2008, and had a session called Ethics for Contract Workers on August 15, 2007.

Prior to his investigation of the tractor mower and backhoe incidents, Roadmaster Spivey testified, he had no reason to suspect that the Claimant was dishonest or would abuse company-issued equipment. According to Roadmaster Spivey the Claimant was considered to be a good employee. In response to questions from Claimant Burlinson, Roadmaster Spivey testified the he "sure could" always rely on Mr. Burlinson to work late for him and that if he ever needed someone to work weekends, he could rely on him. Mr. Burlinson was always at work early, Roadmaster Spivey acknowledged. The tractor mower was not covered or hidden, Roadmaster Spivey testified. Claimant Burlinson has always been a good worker, Roadmaster Spivey confirmed. Roadmaster Dier also testified that Mr. Burlinson was a good employee, who reported for work everyday. Mr. Burlinson always answered the phone, Roadmaster Dier stated, whenever the Carrier called him.

The employee who reported the Claimant's role in the missing backhoe was called as a witness by the Carrier. He testified as follows. He has been a CSX employee for just over ten years. He has worked with the Claimant six to eight months. Mr. K. L. Spivey is his reporting supervisor. He mentioned something to the Claimant about the pictures of the backhoe at the Claimant's house that were on the Internet. He did not ask the Claimant how the backhoe came to be at his house or question why it was at his house. He had a conversation with Roadmaster Spivey about the backhoe being at the Claimant's house. He asked Roadmaster Spivey about the backhoe deal, and he (the Roadmaster) didn't know anything about it. That's when he said that he had seen the pictures of the backhoe on the Internet, that it looked like it was at his (the Claimant's) house. When the incident about the tractor mower came up, he thought that the

Roadmaster already knew about the backhoe incident, but Mr. Spivey informed him that he did not. He has not used company equipment for his personal use since he was hired, and that was about 11 years ago. He was always told that they were not allowed to use company equipment for personal use.

In response to questions from the Claimant, the employee stated, "Hand's down Mr. Burlinson's been . . . an asset to the railroad—hard worker." He further testified that when they were in a bind he has called on Mr. Burlinson several times to help out to do some work, and Mr. Burlinson was more than happy to give them a hand. He does not know of anyone using company equipment, the employee stated, but has heard "rumors people using this and that."

Claimant Burlinson gave the following testimony. He has been employed by CSX for a little over four and a half years. He has been in his present position for probably seven or eight months. His supervisor is Roadmaster Spivey. He is rules-qualified and familiar with CSX's Code of Ethics. Employees are expected to know and observe and follow the Code of Ethics. On September 30th he was in Sanford helping a buddy out doing some work on his trailer. He had his own trailer and truck down there. On his way home late in the afternoon he picked up the mower and transported it to his house and unloaded it.

The next day [the Claimant's testimony continued] was Wednesday, October 1, and he went to work his normal track inspection workday. He also worked Thursday and Friday, October 2, and 3. After his regular shift on Friday, October 3, he worked all night until Saturday morning flagging for the tie pickup. Saturday, October 4, he did his normal track inspection job. Saturday evening until Sunday morning he flagged for tie pick until Sunday morning. Sunday

morning he went to the south end of Deland to help the section put in switch ties. Sunday night he flagged for the tie pickup until Monday morning. He got off late Monday morning and went home to sleep. He slept until October 7. Tuesday morning he got up and took his little boy to school; did some business in town; and picked his little boy back up from school. That is when Special Agent Richardson called him.

He took the tractor to his house on September 30th, the Claimant testified, to do some work around his house for his little boy's birthday party, which was October 15th. He took the tractor to his house without permission. It is a violation of a CSX operating rule to take a tractor without permission, the Claimant acknowledged. It is also violation of the Code of Ethics, the Claimant stated. It was not theft of company assets, the Claimant testified.

The Claimant admitted lying to Special Agent Richardson when first contacted about the tractor mower. He did so, he stated, because he was "nervous scared." Asked whether he was dishonest with Mr. Richardson, the Claimant stated, "Partially." Questioned by the hearing officer what he told Roadmaster Spivey about the backhoe, the Claimant stated, "I do not recall." He does not recall Roadmaster Spivey asking him about the backhoe, the Claimant testified. He admitted that the pictures introduced into evidence of a backhoe at his house were of a CSX backhoe. He transported the backhoe to his house in a trailer, he testified. He transported the backhoe to his property, two, three, four, five, or six months ago, the Claimant stated. He said that he had "no idea" if it was in May. He took the backhoe to his house only once, the Claimant stated.

He took the tractor mower home to do some work around his house for his little boy's

birthday, the Claimant stated, but he did not do the work. He had the tractor mower in his possession about six days, the Claimant testified. He had the backhoe in his possession half a day, the Claimant stated. He used the backhoe, he said, to spread dirt and pick up random stuff. He does not recall Roadmaster Spivey questioning him about the backhoe, the Claimant testified. When he returned the backhoe, the Claimant stated, it did not have flat tires.

Asked whether he was honest with his fellow employees, the Claimant stated that he was; that he never did anything wrong to his fellow employees. He has always helped out his fellow employees, the Claimant stated, and did so gladly. He stated that taking CSX equipment did not harm his fellow employees, although it did harm CSX. He is legally qualified to drive a vehicle towing a trailer, the Claimant testified.

The Claimant testified that in his four and one-half years of employment with the Carrier he has never previously been in trouble with the Carrier or the law. It was not his intention, the Claimant stated, to steal from, defraud, or be dishonest with the Carrier. It was not his intention to keep the mower or to steal it, the Claimant testified.

In a closing statement the Claimant stated that he loves his job, that when someone asked him what he did for a living he would say with pride, "I work for CSX." He described the different kinds of work he has done for CSX and stated that he has worked with all kinds of supervisors and all kinds of people and has never been in trouble. He always worked late or on weekends when someone was needed to do so. Work started at 7:00, and he would always arrive about 6:00. He has inconvenienced his family life to secure a position with the railroad. He borrowed the tractor to do some work around his house in preparation for his little boy's birthday

party. When he borrowed it, he drove it up highway 17 right by the gang he knew would be working there. He honked the horn and waved. He was not trying to hide or conceal that he had the tractor. He just did not realize the severity of what he was doing. Now he realizes how bad a decision it was. He has a wife and two kids that depend on him. If he knew any of this was going to come about he would never have touched it. He can promise that it will never ever happen again.

Following the hearing, by letter dated November 18, 2008, Ricky Johnson, Division Engineer, notified the Claimant that the charges placed against him were valid and proven; that he was guilty as charged; and that "due to the seriousness of the charges that were placed against you, and the fact that these charges have been proven, it is my decision that the discipline to be assessed is your immediate dismissal in all capacities from CSX Transportation."

The Carrier contends that Claimant Burlinson was provided a fair and impartial investigation. The charge letter was not untimely with regard to the backhoe incident, the Carrier argues, because Roadmaster Spivey did not learn of the Claimant's involvement in the incident until called by an employee and informed of it around October 11, 2008. The Claimant's guilt was proved as to both the backhoe and the tractor mower, the Carrier asserts, by his own admission. The discipline assessed was fully justified, the Carrier contends, because the acts to which the Claimant admitted constituted theft and fraud and cannot be condoned by any employer.

The Union contends that the Claimant was improperly charged with regard to the backhoe incident because it occurred more than 30 days prior to the charge letter of October 16, 2008.

However, Rule 25 of the Agreement is clear that the 30-day period runs “from the date management had knowledge of the employee’s involvement.” According to the evidence, the first member of management to have knowledge of the Claimant’s involvement in the backhoe incident was Roadmaster Spivey. The evidence shows that he did not learn of the Claimant’s involvement until October 11, or 12, 2008. The Board therefore finds that the charging of the Claimant for the backhoe incident by means of the charge letter dated October 16, 2008, was timely.

On the merits, this is another case where the adage that people do more harm to themselves than might be inflicted on them by others applies. Here was an employee who enjoyed his job, was proud of the company for which he worked, and was given the opportunity to earn good wages and substantial overtime. Whatever possessed him to borrow a backhoe and a tractor mower from his employer without permission this Board does not know. Had it happened only once, with the tractor mower, this Board might be persuaded that it was a one-time error of judgment. It is not disputed that he took the tractor mower in the plain site of his other team members. Moreover, the fact that the Assistant Roadmaster informed Roadmaster Dier that he saw the Claimant with the Tractor Mower in the back of his truck tends to corroborate the Claimant’s testimony that he acted openly. As a general rule, someone who acts openly in taking something is not intending to steal it.

This was not the first incident, however, of removal of a machine from Carrier property without permission. The Claimant also removed the backhoe from the Carrier’s premises in May, 2008. At that time it was made clear to him and to all of the other employees who worked

on the team that management considered such conduct to be a very serious violation and a police matter. Roadmaster Spivey, in fact, reported the matter to the CSX Police Department.

With regard to the backhoe incident, moreover, the Claimant acted most irresponsibly. Not only did he borrow an expensive piece of machinery without permission, but he misused and damaged it. He testified that he returned the backhoe without any flat tire, but the picture of the backhoe while it was on his residential property showed that the backhoe had a right front flat tire (Tr. 26). His testimony that he returned the backhoe without a flat tire therefore cannot be believed. The fact that he had oak trees on his premises makes it likely that the oak limbs and debris found in the cab of the backhoe and in the dump truck were there because the Claimant had used the backhoe on his premises and not cleaned out the equipment before returning it. The Carrier had a valid basis for believing the Claimant to be responsible not only for borrowing the backhoe without permission but for the damage that was done to it and the failure to admit responsibility for the damage.

As much as the Board is impressed with the fact that the Claimant appears to be a hard worker, who is rarely if ever absent from work, is cooperative, and is willing to work late hours and weekends as needed, the Board cannot overlook the fact that by the two incidents for which he was charged and properly found guilty, he provided cause for discharge. The two incidents, of which the Carrier presented abundant evidence of his guilt, and in which he admitted his guilt, violated a basic Carrier right to feel secure that its property or ownership interests will be respected by its employees.

It is for this reason that the Carrier (like virtually every other employer) has a rule that

says that company equipment may not be taken for personal use without permission. The Claimant violated that rule not once but twice, and each time with an expensive piece of equipment. The first time, involving the backhoe, was an especially aggravated instance because, in addition to being taken without permission, the property was damaged and abused. The second instance, involving the tractor mower, was not only a second intentional violation of the Carrier's ownership interests, but it came after the Claimant was put on notice of the seriousness with which the Carrier views such misconduct. Under these circumstances the Board must find that it was within the reasonable range of discretion for management to conclude that dismissal was an appropriate penalty for the serious misconduct committed and in order to protect its proprietary interests.

This Board does not have the power to forgive the Claimant for his serious misconduct, even taking into consideration the mitigating elements present in terms of his admiral qualities with regard to performance of his work, attendance, and reliability with respect to always being available for late and weekend work; and the fact that the Board has found, and believes to be true, that there was no intent to steal the tractor mower. Any appeal for special consideration based on the Claimant's positive qualities and the absence of an intent to steal (as opposed to improperly borrow), and perhaps as a new employee without credit for past service, would have to be made to the Carrier. This Board has no valid basis for granting relief to the Claimant in this case.

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.

A handwritten signature in cursive script, appearing to read "Sinclair Kossoff", is written over a horizontal line.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
May 15, 2009