Award No. 45
Case No. 45

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 March 27, 2009, Allen Warburton, Roadmaster, instructed J. L. Storozuk ("the Claimant") to attend a formal Investigation on April 9, 2009, at the Division Headquarters conference room in Jacksonville, Florida,"to determine the facts and place your responsibility, if any, in connection with your failure to protect your assignment on Thursday, March 12, 2009." The letter stated that the Claimant was "being charged with failure to follow instructions, being absent from work without proper authority, and failure to protect your assignment." His actions, the letter continued, possibly violated CSX Transportation Operating Rules General Rule A and General Regulation GR-1.

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 in approximately April, 2008. In March, 2009, he held the position of Machine Operator, and his supervisor was Roadmaster Allen Warburton. The Claimant's reporting location was the Greenville depot in Greenville, Florida. He was the only maintenance employee who reported to that location. According to Roadmaster Warburton, the Claimant did not report for work on March 12, 2009, and he did not call to report that he would be absent. Nor did he ask permission to be absent. This was unusual for the Claimant, the Roadmaster testified. In the past he had called to report when he would be absent. His failure to report to work on the 12th, the Roadmaster stated, was a failure to protect his job.

In his job, the Roadmaster explained, he covers the entire subdivision and knowing his head count for the day allows him to make plans for the work to be performed that day. When an individual does not report to work, the Roadmaster stated, it could affect the outcome of the planned work or make it more difficult to complete the task at hand. Every one of the seven employees who reports to him, including the Claimant in the past, the Roadmaster testified, has followed his instructions to let him know that they would not be in or would be late.

General Regulations GR-1 states:

GR-1 Employees must report for duty at the designated time and place. Without permission from their immediate supervisor employees must not:

1. Absent themselves from duty, or

2. Arrange for a substitute to perform their duties.

. . . When they wish to be absent or if they are unable to perform service, employees must notify the proper authority. They must not wait until a call for duty is received to request permission to be marked off.

* * *

On cross-examination the Roadmaster testified as follows. The Claimant did not call him at any time on March 12th. He called the Claimant at 0906 hours. His instructions to the Claimant (prior to March 12th) were to report to Greenville and get in contact with the Roadmaster for the day's lineup. The Roadmaster's office is in Tallahassee, Florida, and Greenville is an outlying point. The Claimant generally calls the Roadmaster on the latter's cell phone. The Roadmaster was waiting for the Claimant's call, and at 9:06 he realized that the Claimant wasn't coming to work, so he called the Claimant.

On redirect examination the Roadmaster stated that he was at the Greenville depot at 7:00 a.m. with management trainee Steven Tindell. Also present was Brett Johnson, the Signal Supervisor. The Claimant had been off work for a few weeks prior to March 12th during which time the Carrier had moved his (the Claimant's) vehicle to Tallahassee,

the Roadmaster stated, and he went to the Greenville depot to pick up the Claimant and transport him to the rail train where the Carrier was unloading rail on the Tallahassee subdivision.

The Roadmaster produced his cell phone billing record. It showed that he had no incoming call from the Claimant on March 12, 2009, but that at 9:06 a.m. he called the Claimant and that they spoke for three minutes. The Roadmaster's phone record for March 12 showed the first call was made at 5:33 a.m. and the first incoming call at 5:56 a.m.

The Claimant, the Roadmaster stated, drives a Nissan silver pickup. He did not see the Claimant's vehicle anywhere on the Greenville property, the Roadmaster testified. Nor, he stated, did he see a towing vehicle. In their telephone conversation, the Roadmaster testified, the Claimant did not mention anything about a flat tire or being towed. The Roadmaster denied that he called the Claimant at 6:45 a.m. or that he made any other call to him than two calls to the Claimant's cell phone at 9:05 a.m., which did not go through, and one to the Claimant's home phone at 9:06 in which they were connected and spoke. He did not use the phone in the Greenville office on March 12th, the Roadmaster testified.

On further cross-examination the Roadmaster testified that he arrived at the Greenville depot on March 12, 2009, 6:30 a.m. The Claimant was not at work when he arrived there, the Roadmaster testified. He did not see him there at any time on March

12th. He made contact with the Claimant by telephone, the Roadmaster stated, at 9:06 a.m. The following was said in their conversation, the Roadmaster testified: He inquired why the Claimant did not report to work. He (the Claimant) said that he felt that there was no job for him to come back to. The Roadmaster said that that was not the case, that nothing had changed from prior to the investigation[1] to that day. The Roadmaster further stated that the Claimant would not be compensated for that day and instructed him that he was being withheld from service with pay pending the results of the original investigation.

The Claimant testified that he reported for work at the Greenville depot on March 12, 2009, at 6:30 a.m. His reporting time is 7:00 a.m. At 7:00 a.m., he stated, he was right in front of the depot. According to the Claimant, he saw nobody else at the depot while he was there but did see the signalman's truck. At approximately 6:45 a.m., the Claimant testified, he spoke with the Roadmaster by phone, who told him to go back to Madison and he would call the Claimant back in a little while. Madison is where the Claimant has his residence.

Asked what phone he called the Roadmaster on, the Claimant testified, "I don't know if I called him or he called me. I think he called me on my cell phone. 90 percent of the time when I report to Greenville Depot I use their office phone and then I called his

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[1]The Claimant had recently been involved in another Investigation unrelated to the present one.

office phone and I normally call his cell phone." He tries the office, the Claimant stated, and if he can't get a hold of him in his office then he calls his cell phone. Asked by the hearing officer if he did not know if he called the Roadmaster or the Roadmaster called him on March 12th, the Claimant stated, "I believe he called me because it was prior to 7 o'clock." In their conversation, the Claimant testified, the Roadmaster said that he was working on what the Claimant was doing that day and that the Claimant should go to Madison, and the Roadmaster would call him in a little while.

The Claimant testified that around 6:30 a.m. he had a flat tire on the back of his truck and had to call a towing company to pick up his truck and tow it back to his house. The truck was towed approximately 7:15 a.m., the Claimant stated. The Claimant produced a receipt dated 3-12-09 for $75.00 from Monticello Towing in Monticello, Florida, for towing a vehicle to Madison because of "flat tire, no lug wrench." In the space on the receipt for "Location of Vehicle" was written "CSX Greenville." The Claimant produced the following statement from the owner of the towing company:

> To whom it may concern,
>
> I am owner of Monticello Towing. I received a call from Jody Storozuk on the morning of February [sic] 12th, 2009 and I went to the CSX Railroad office in Greenville Fl to tow his 2006 Nissan Titan. I arrived at the railroad office Approx. 7:15 AM. Mr. Storozuk had a Flat tire, no spare or lug wrench. I towed his truck back to his home in Madison. While I was there, Mr Storozuk had a conversation on the phone and after his call was completed, Mr. Storozuk told me that his boss told him to go back to Madison and he would call him in a little while. I only remember this because Mr. Storozuk was telling me how stupid it was that his boss would tell him to go back home and his boss could have called him before he

drove to Greenville thus saving him the gas and money on the tow.

/s/ Ray Tesby
4/1/09

The Claimant testified that the Roadmaster called him at home about 9:00 o'clock and told him not to report to work but to stay home with pay.

The hearing officer asked the Claimant how the tow truck driver could have overheard at 7:15 a.m. a conversation that he had with the Roadmaster at 6:45 a.m. The Claimant replied that it says "approximately" 7:15 a.m., which could mean a half hour before or a half hour later. The Claimant reiterated that he believed that the Roadmaster called him on his (the Claimant's) cell phone.

The hearing officer asked the Claimant if he went into the Greenville office at all that morning. He stated, "Very briefly just to use the restroom. . . ."

Steven Tindell, management trainee for a Roadmaster position, testified that he reported to the Tallahassee Roadmaster's office around 5:30 a.m. on March 12, 2009. He then drove with the Roadmaster, he stated, to Greenville where they were supposed to pick up someone to take to a railroad train. He thinks, he stated, that they arrived at Greenville between 6:15 and 6:30 a.m. He believes that there was a signal maintainer there, he testified.

Mr. Tindell testified that they waited for one of the workers to arrive, and he didn't arrive. Then, according to Mr. Tindell, the Roadmaster gave him a call, and there was a

telephone conversation about where he (the employee) was. The call, Mr. Tindell stated, was made around 9:00 a.m. The conversation, Mr. Tindell testified, took place in the small building, and it was on the Roadmaster's cell phone speaker. He described the conversation as follows.

The Roadmaster asked the person he was speaking to if he was J. Storozuk, and that person said, "Yes, it is." He asked him why he wasn't at work, and the person said that he was looking at bids on the computer, and did not think that there was a current position for him. The Roadmaster asked, "Who told you not to report?" He answered, "Well, I just didn't think that there was a position there for me." The Roadmaster told him that "in light of this event and due to the volatile nature of testimony given that he would be taken out of service with pay pending the results of the investigation." Mr. Storozuk asked a question about being paid during the investigation, and the Roadmaster said the he (the Claimant) could refer any matters about pay to Joanne Mattingly. The call ended about that time.

Mr. Tindell testified that when he got to Greenville he did not see the Claimant's vehicle broken down or with a flat tire anyplace. He did not see anybody else but the signal maintainer who was in the building. He did not see anybody come into the depot to use the restroom other than the people he testified were there. "We stood outside the office there the entire time looking for him to show up," Mr. Tindell testified, "and I did not see a tow truck vehicle."

On cross-examination Mr. Tindell testified that he has never previously met Mr. Storozuk and that he does not know what kind of vehicle he drives. The conversation between the Roadmaster and Mr. Storozuk, Mr. Tindell stated, was in the Greenville depot office. Except to make the phone call, Mr. Tindell testified, he never went into the Greenville office. They went inside to make the phone call, he explained, so that it would be quiet. The call was made about 9:00 o'clock, he stated.

Recalled by the hearing officer, the Claimant testified that his vehicle should have been visible from the Greenville depot where he parked it on March 12th. After he parked his vehicle, the Claimant stated, he walked to a nearby store where he goes every morning to have coffee. Right before he walked to the store, he stated, he called the tow truck. The Roadmaster could have called him as he was walking to the store, the Claimant testified, because he had his phone with him. He believes that the Roadmaster called him, the Claimant stated. He did not see the Roadmaster or Mr. Tindell at the depot, according to the Claimant. His pickup truck is gold colored, the Claimant testified.

The Claimant testified that when the Roadmaster called him at home around 9:00 o'clock he asked what the Claimant was doing and that he (the Claimant) told the Roadmaster that he was looking at different bids because his job at Greenville had been cut off approximately a month and a half earlier. Asked if he made any bids that day, he stated that he believed that he bid again on an assistant track inspector job that he had previously bid on. In his conversation from home with the Roadmaster on March 12th, the

Claimant testified, the Roadmaster did not ask him why he was not at work or why he failed to report for work.

The Claimant testified that when the tow truck came onto the railroad property it rode past the Greenville depot. Asked by the hearing officer if this was at approximately 7:15 a.m., the Claimant answered, "Approximately." Questioned if his conversation with the Roadmaster was at 6:45, the Claimant stated, "Approximately." In that conversation, the Claimant testified, he asked the Roadmaster what they were doing that day. The Roadmaster, the Claimant stated, said that he did not know; that the Claimant should go back to Madison and that he would call the Claimant later. He went back to Madison, the Claimant stated.

The Roadmaster produced records obtained by the hearing officer at the Roadmaster's request in her management position at the Carrier on April 4, 2009, prior to the hearing in this case, that showed that the Claimant bid on jobs on March 5, 2009, and March 18, 2009. There was no record of a bid by the Claimant on March 12, 2009.

The Roadmaster testified that when he arrived at the Greenville depot at 6:30 a.m. on March 12, 2009, it was dark. He stated that although it was dark, "I feel like I would have noticed the truck and his tow truck."

In a closing statement the Claimant declared that he did not think that the Investigation was unbiased. The Carrier's document regarding bids made by him, the Claimant asserted, shows that the hearing officer and the Roadmaster discussed his case

prior to the hearing and that the hearing officer was gathering information for the Roadmaster. That makes the Investigation biased, the Claimant stated. That put him in a very unfair "no win" situation, the Claimant stated.

The hearing officer asked the Claimant whether he did not feel that the hearing was fair and impartial since he acknowledged that he was given the right to cross-examine all witnesses and present witnesses, evidence, and exhibits in his behalf. He answered, "Absolutely not. I believe that people were talking about this prior to the investigation. I believe the charging officer was talking to the conducting officer and [that they] gather[ed] information together discussing this. There's absolute proof of it in Carrier exhibit 8; where [the hearing officer] yourself were getting emails and sending emails back and forth to obtain information for [the Roadmaster.] So that just shows that people were discussing this prior; working together in almost a conspiracy against myself that puts me in a no win situation."

The Organization representative stated similarly that he felt that the hearing was not fair and impartial "based on the evidence and the testimony that was given, and also based on the conducting officer had a knowledge of the investigation. . . ."

At the conclusion of the hearing, by letter dated April 28, 2009, Ricky Johnson, Division Engineer, notified the Claimant of his (Mr. Johnson's) finding that the evidence showed that the charges had been proven and that the Claimant's actions were in violation of General Rule A and General Regulations GR-1. "Due to the seriousness of the charges

that were placed against you," the letter stated, "and the fact that those charges have been proven; it is my decision that you are to be suspended for a period of 30 calendar days from the service of the Carrier." The period designated for the suspension was June 1-30, 2009.

The question of whether prior knowledge of a case by the hearing officer renders a hearing unfair and ground for reversal of any discipline administered was ruled on by the Board in Third Division Award No. 38957. The Board there stated as follows:

> It is true that the Hearing Officer had prior knowledge of the matter being investigated. He provided advice to the Roadmaster regarding what action to take after the Claimant was allegedly found sleeping on the gang bus while other members of his gang were working. In addition, at the Hearing, one of the questions he asked showed knowledge of the case from a source other than evidence given at the Hearing.
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> There is nothing in the Agreement which prohibits a Carrier official with prior knowledge of the case from serving as Hearing Officer in the Investigation. Nor is there anything inherently unfair for someone with some knowledge of the facts to conduct the Investigation so long as that person does not give evidence as a witness in the case or make a determination of a fact or an issue based on personal knowledge instead of evidence adduced in the Investigation.
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> What is essential is that the Claimant and the Organization be given every reasonable opportunity to present relevant evidence through witnesses who have knowledge of the facts, to freely cross-examine the Carrier's witnesses in accordance with commonly accepted Rules of procedure, and to introduce relevant documentary evidence. They must be allowed to present a defense and rebuttal. The Organization must be permitted to object to any evidence offered and to have its objection noted in the record. In addition, before the conclusion of the Investigation the Claimant and the Organization should be allowed to make a statement or argument in support of their position regarding the issue or issues under investigation. If all of these procedural safeguards are followed, the Board will then have a full and complete record before it in deciding the case, which is

the best protection for a fair decision in the case.

It would also be expected that neither the Hearing Officer nor the decision-maker for the Carrier be someone who is biased or prejudiced against the Claimant or have a conflict of interest regarding the outcome of the Investigation. Either situation could produce a tainted result in the Investigation.

The Board has carefully studied the record in this case and is satisfied that the Claimant and the Organization were able to present all relevant evidence they desired to, to cross-examine the witnesses, and to voice objections to evidence they felt to be improper. Objections were duly noted in the record.

There is no evidence or suggestion in the record that either the hearing officer or the decision-maker (who was someone other than the hearing officer) was biased or prejudiced against the Claimant. Prior knowledge of certain facts may not be equated with bias or prejudice against the Claimant. There is no indication of a conflict of interest on the part of either the hearing officer or the decision-maker. There is no indication in the record that a finding for the Claimant in this case would in any way be incompatible with any advantage or benefit that might otherwise belong or be granted to either the hearing officer or the decision maker. The Board has a full and complete record before it and finds no impediment to rendering a reasoned judgment regarding the Carrier's disciplinary action in this case.

The Board turns now to a consideration of the merits. The Claimant testified that he reported to work at the Greenville depot on March 12, 2009. Both the Roadmaster and

management trainee Tindell testified, however, that they were at the depot during the time that the Claimant stated that he was there and that they did not see him. From the testimony of both the Claimant and the other two witnesses (the Roadmaster and Tindell) it is clear to the Board that had the Claimant been there on March 12th, as he claimed, the Roadmaster and Mr. Tindell would have seen him. They also would have seen the tow truck that the Claimant testified came to the depot to tow him to his residence because of a flat tire. According to the Claimant's own testimony, the tow truck would have driven right past the depot on the way to where the Claimant's pickup truck allegedly was parked (Tr. 69). Even if the tow truck arrived while it was still dark outside, then the Roadmaster and Mr. Tindell would have seen the lights of the truck.

The Roadmaster's cell phone record belies the Claimant's contention that the Roadmaster called him around 6:45 a.m. It shows that the first call made by the Roadmaster to the Claimant on the Roadmaster's cell phone was at 9:05 a.m. The Claimant testified that the Roadmaster could have called him on the Greenville depot phone. The Roadmaster denied making any calls on the depot phone on March 12th. His phone record shows an outgoing call at 6:06 a.m.; incoming calls at 6:26, 6:33, 6:44, 6:45, and 6:50 a.m.; and outgoing calls at 7:04 a.m. and 7:22 a.m. These were followed by another string of incoming and outgoing calls.

The fact that the Roadmaster had a steady stream of both incoming and outgoing calls on his cell phone makes his testimony credible that he did not use the depot phone

on March 12th. Why would he have made and received so many calls on his cell phone to and from other people but decided to use the depot phone to call the Claimant? The Board has no reasonable basis for failing to credit the Roadmaster's testimony that he did not make any calls on the depot's telephone on March 12th. In addition, the phone record and Mr. Tindell's testimony corroborated the Roadmaster's testimony that the Roadmaster called the Claimant at 9:06 a.m. on his (the Roadmaster's) cell phone. The fact that the Roadmaster called the Claimant on his (the Roadmaster's) cell phone at 9:06 a.m. also makes it reasonable to believe that he did not call him earlier on the depot phone.

Nor does the receipt from the owner of the tow truck or his statement dated 4/1/09 persuade this Board to credit the Claimant's testimony that he (the Claimant) was at the depot at 6:45 a.m. on March 12, 2009. First, the tow truck driver's written statement asserts that he received a call from Jody Storozuk "on the morning of February 12th 2009," not March 12, 2009. Even if one were to assume that the owner meant to write March instead of February, he states that he arrived at the railroad office at approximately 7:15 a.m. The Claimant also testified that the tow truck arrived at approximately 7:15 a.m. (Tr. 69). It is a stretch to say that 7:15 a.m. is approximately 6:45 a.m.

In his statement the tow truck driver writes that while he was at the depot, the Claimant had a conversation on the phone and after his call was completed, the Claimant told the driver that his boss told him to go back to Madison and he (the boss) would call

him (the Claimant) in a little while. That is a discrepancy of one-half hour between the time that the Claimant testified he was called by his boss and the time that the driver stated that the phone call occurred. The facts that the driver's statement is hearsay; that the driver did not appear as a witness at the hearing so that he could be cross-examined; that the statement contains the wrong date; that it was prepared approximately three weeks after the alleged event; that both the Roadmaster and Mr. Tindell were at the Greenville depot at the time the driver claims he was at the depot and that they did not see the driver there; and the discrepancy between the time that the driver's statement says the Claimant was on the phone and when the Claimant testified he received the Roadmaster's call cause this Board to conclude that the written statement is not sufficiently trustworthy to be credited by this Board as a factual account of the incident it purports to describe.

In an effort to lend credence to his suggestion that the Roadmaster called him at 6:45 a.m. the Claimant testified that Mr. Tindell testified that "he remembers the phone ringing and then using the phone in the depot because the phone was working. That was Mr. Tindell's testimony." (Tr. 53). The Board has carefully perused the portion of the transcript containing Mr. Tindell's testimony and finds no such testimony as described by the Claimant. In fact Mr. Tindell testified that the only time that he was in the depot office was for the Roadmaster's cell phone call to the Claimant and that he and the Roadmaster went into the office for the call so that it would be quiet. (Tr. 39). There was no testimony by Mr. Tindell that he heard the depot phone ringing or that he saw or heard

anybody use the depot phone.

In addition to the objective evidence of the telephone record which belies the Claimant's testimony that the Roadmaster called him at 6:45 a.m., we have the testimonies of two persons (the Roadmaster and Mr. Tindell) against one person (the Claimant). There has been no evidence presented that the Roadmaster or Mr. Tindell bore the Claimant ill-will or had any reason to falsely accuse him of a rules violation or to otherwise testify falsely against him. There is therefore no basis for believing that the Roadmaster or Mr. Tindell testified in bad faith. The Claimant did have a reason to prevaricate or to give testimony that was less than the whole truth, namely, to avoid discipline. However, even if it is assumed that the Claimant also testified in good faith, when three people are all testifying about the same event in good faith, it is not likely that the two who agree will both be mistaken and the third one right.

For the reasons discussed, the Board finds that there is substantial evidence to support the Carrier's charge that the Claimant was absent without authority and failed to protect his assignment. So far as the discipline assessed is concerned, had the evidence established that the Claimant in good faith believed that he was not scheduled to work on March 12, 2009, then a 30-day suspension might be considered excessive discipline in light of the Roadmaster's testimony indicating that in the past the Claimant has always notified him in advance that he would be absent (Tr. 6). The Claimant, however, has not claimed in this proceeding that he thought that he was not scheduled to work on March

12, 2009. Rather his position is that he did report for work and was told to go home by the Roadmaster. The Roadmaster denies telling the Claimant any such thing, and the evidence supports the Roadmaster's rather than the Claimant's version of the facts. Under these circumstances, and in light of the Claimant's disciplinary record, the Board cannot say that the discipline administered was excessive. The claim will be denied.

AWARD

Claim denied.

ORDER

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

Chicago, Illinois
August 20, 2009