

PUBLIC LAW BOARD NO. 7120

(BROTHERHOOD OF MAINTENANCE OF WAY

PARTIES TO DISPUTE: (EMPLOYES DIVISION

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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated May 20, 2009, J. M. Parrott, Engineer Track, instructed J. M. Aericko ("the Claimant") to attend a formal Investigation on June 1, 2009, in the Carrier's Division Headquarters building in Nashville, Tennessee, to determine the facts and place his responsibility, if any, in connection with an incident that occurred at approximately 1900 hours on May 7, 2009, in Madisonville, Kentucky, where the vehicle he was driving "struck a railroad bridge dislodging the bed of the truck causing extensive damage to the vehicle." A further purpose of the Investigation, the letter stated, was to determine the facts and place the Claimant's responsibility, if any, "in connection with you possibly falsifying your bid for the Welder position of Force 5N61 that you submitted on April 7, 2009, indicating that you had a valid Commercial Driver's License." A review of company records, the letter stated, "indicates that your license expired in September 2005."

The letter charged the Claimant "with failure to perform the responsibilities of your position in a safe and efficient manner, falsifying bid documents (making false statements), operating a Commercial Motor Vehicle without proper licensure,

endangering life and property, carelessness and incompetence, as well as possible violations of, but not limited to, CSX Transportation Operating Rules – General Rule A; General Regulations GR-2, GR-2A, GR-3, GR-5, GR-16; CSX Safeway Rules GS-1, and GS-3, as well as Maintenance of Way Instruction G025.” The Claimant was withheld from service pending the outcome of the Investigation.

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 June 16, 2003. At the time of the incident he held the position of Welder 5N61-063 with floating headquarters and had been a Welder for approximately three years. As part of his duties he was required to drive a truck on the highway. He shared the 5N61-063 position with another Welder.

Until January, 2009, the only truck that the Claimant was ever required to drive on

the job was a three-quarter or one-ton pickup truck. A CDL (commercial driver's license) was not required to operate the pickup truck. In January, 2009, however, the Claimant and the other 5N61-063 Welder together with whom he worked were assigned an International truck with a gross weight capacity of 33,000 pounds. The Claimant and the other Welder shared the same truck and normally rode in it together. By Department of Transportation regulations a Class B CDL is required in order to operate any truck with a gross weight listing of more than 26,000 pounds. According to the Claimant's testimony, two other pairs of Welders were assigned the larger trucks at the same time, namely, those in the 5N63-063 and 5N64-063 Welder classifications.

From January to April, 2009, the Claimant regularly drove the new truck. During that period, according to the Claimant's testimony, the Carrier never informed the Claimant that he was required by law to have a CDL in order to operate the truck. In April, however, the 5N61-063, 5N63-063, and 5N64-063 Welder positions were cut off and readvertised as CDL positions. The Claimant and the other five Welders were required to file new bids to avoid being furloughed.

According to the Claimant's testimony he was not told that the reason for the cut-off was that the Carrier was changing the requirements of his position to include the holding of a valid CDL. No witness in the Investigation contradicted the Claimant's testimony on that point. The Claimant stated that he did not ask why he was being cut off. He was told at the time, he testified, that they were no longer going to have a helper,

only two Welders. "I was already the Welder," he stated, "so I bid right back on it."

After being cut from his existing position, the Claimant, on April 7, 2009, submitted bids for his previous position (5N61) and for the 5N63 and 5N64 Welder positions, all three of which had been readvertised. On April 14, 2009, the Claimant was notified that he was the successful bidder for the 5N61 Welder position that he formerly held. However the bid advertisement for the position had included a new requirement not previously in effect, namely, a "Valid CDL License."

The Claimant submitted his three bids by email, and he received an email confirmation shortly thereafter. The confirmation is dated Tuesday, April 07, 2009 6:35 PM. It contains the Claimant's correct ID number and hire date, and lists the three Welder job positions he applied for and their pay rate. In addition, at the bottom of the confirmation email, separated by spaces from the remainder of the text, is a part headed Qualifications that states in pertinent part as follows:

Operating Rules Qualified: Y

FRA Rules Qualified: Y

CDL License: B Exp Date: 04/23/2011

Endorsements: AIR BRAKES

Medically qualified: Y

On May 7, 2009, at the end of his regular workday at approximately 5:30 p.m., the Claimant was asked to move a rail puller that he used on his welding job from

Indianapolis, Indiana, to the Carrier's yard in Madisonville, Kentucky. The rail puller had been placed on the new International welding truck, which had a clearance of 12 feet, six inches. It was the end of the workweek, and the Claimant's partner went home for the weekend. The Claimant therefore drove the truck by himself to Madisonville, where, inside the city limits, he failed to notice a road sign that said that an underpass that he was approaching had a clearance of only 10 feet, nine inches. He struck the bridge over the underpass, severing the bed of the truck from the truck body. The damage to the truck was extensive. The present charges followed.

The Claimant at one time had a CDL, but, according to the charge letter, it expired in 2005. He did not renew it. Nor did he have a current medical certification. Maintenance of Way Instruction G 025 provides in Section III. C., "For CSX Vehicles with gross weight greater than 26,000 pounds . . . , the driver must: i. Have a valid commercial driver's license with proper class and endorsement based on vehicle size and commodity carried ii. Have a current medical certification . . ." Department of Transportation regulations also require a CDL when driving a truck of that weight.

T. R. Presser, Roadmaster at Madisonville, Kentucky, testified with reference to the new trucks, "On our morning call it was stated that all the welders were going to be cut off [their jobs] so the jobs could be re-advertised for the CDL license." Roadmaster Presser stated that he had to get cut-off letters for the two Welders in position 5N63 who were on his territory at the time.

At the Investigation the hearing officer questioned the Claimant about the information concerning his qualifications that appeared on the Bid Confirmation email dated April 7. The Claimant testified that he did not enter that information on his bid when he submitted it for the three Welder positions. He stated that the information was placed on the bid automatically based on a previous bid that he had submitted in relation to the Welder position that he held prior to his April 7 bid.

The hearing officer asked the Claimant, "Did you indicate on that bid that you had a CDL license?" He answered, "No, sir, I did not." Asked how he could explain it being part of his bid, he testified, "I do not know." In response to further questioning, the Claimant stated that he had never showed on a bid that he had a Class B license. The Claimant was asked how did he think that he could be awarded the position if it required a CDL license and he did not have such a license. He answered:

I just – like I said I just bidded back in. Prior to that we did not require a CDL and when we first come and got the brand new truck, I was never told anything about it and I drove it from January till April 14th, when that bid come out.

The license expiration date which appears on the Bid Confirmation, the Claimant testified, is the date that his Class D regular driver's license expires. He did not provide any information regarding the endorsement for air brakes, the Claimant stated, and he has no idea where the information came from. At one time, the Claimant testified, he had a card saying that he was medically qualified, but he does not still have the card. He was not aware that it had an expiration date, he stated.

The Claimant acknowledged that he was aware of the height of the truck with which he had the accident and that the gross weight of 33,000 pounds was shown on the side of the truck. He was not made aware of the requirements to operate the new truck he received, the Claimant stated, and did not know of the CDL requirement until after the accident. He did not read the bulletin advertising the position, the Claimant testified, but “just went in and put in another bid” for the job he was then holding “and I got it awarded to me, sir.” He did not hear the conference call about which Roadmaster Presser testified in which the Welders were informed that their jobs would be cut off and readvertised with a CDL requirement, the Claimant stated.

Engineer of Track Parrott was recalled to testify. He produced a Bid Confirmation email for Employee ID: 57068, the Claimant’s ID number, dated Tuesday, April 07, 2009 6:14 PM. The time was 21 minutes earlier than the April 7, 2009 6:35 PM Bid Confirmation on the basis of which the Claimant was awarded the newly advertised Welder job position on April 14, 2009. The 6:14 PM Bid Confirmation listed the same three bids as the 6:35 PM Bid Confirmation, but the Claimant’s Qualifications listed on that bid were very different.

Whereas the 6:35 PM Bid Confirmation had “B Exp Date: 04/23/2011” after the words “CDL License,” the 6:14 PM Bid Confirmation had the letter “X” after “CDL License” and no date after “Exp Date”. The second difference was that the 6:14 PM Bid Confirmation had nothing written after “Endorsements,” while the 6:35 PM endorsement

had "AIR BRAKES." The Welder position was awarded to the Claimant on the basis of his latest bid, which was his 6:35 PM bid.

Engineer of Track Parrott testified that whoever submitted the two bids changed the information from the earlier to the later bid. The computer system permits such changes to be made. The Claimant testified that he submitted the 6:14 PM bid but not the 6:35 PM bid. "... I didn't have air brakes, I didn't have B," he stated, "but yes, I did have medically qualified. And that's exactly what that one says." Asked by the hearing officer, "So how do you explain the second bid at 6:35?", the Claimant testified, "I can't."

Following the close of the hearing, by letter dated June 17, 2009, Kenny Durbin, Division Engineer, notified the Claimant that a review of the transcript and exhibits supported the charges against him. "Based on your prior personal record, and due to the seriousness of the charges proven in this case," the letter continued, "discipline assessed is immediate dismissal from the service of CSX Transportation and forfeiture of all rights and seniority."

It is the position of the Carrier that the Claimant was provided a fair and impartial Investigation and that it rightfully determined that he was guilty as charged. Although the Claimant contended that he was not guilty, the Carrier asserts, the hearing officer chose to credit the testimony of the Carrier witnesses over his. It is well established in this industry, the Carrier argues, that the hearing officer's determination of credibility satisfies the Carrier's burden of producing substantial evidence. Dismissal was fully

justified, the Carrier contends, given the severity of the offense. The Claimant, the Carrier asserts, altered his qualifications and lied about it in order to obtain a position. This placed him in a job position for which he was not qualified, the Carrier contends, and resulted in significant damage to a Carrier vehicle. Many Boards in this industry, the Carrier argues, have upheld dismissals for such acts of dishonesty.

The Organization argues that the Carrier's method of handling the CDL requirement is flawed. If supervision had merely requested to view the Claimant's CDL license, the Organization asserts, he would never have been allowed to operate the vehicle to begin with, and the incident would not have occurred. Some responsibility lies with the Claimant, the Organization acknowledges, but much greater responsibility rests with the Carrier, the Organization insists, because the sequence of events in this case can be repeated with other employees in the future.

The accident which the Claimant had in crashing his Carrier truck into the roof of an underpass was caused by his negligence and was a serious violation. However, it would not be ground for dismissal under the Carrier's Individual Development & Personal Accountability Policy. Nor does the Carrier argue that the accident merited dismissal as a penalty.

The Carrier contends that the Claimant's dishonesty in regard to falsifying his qualifications for the Welder position is ground for dismissal. The Board believes that the Carrier has presented substantial evidence to show that the Claimant falsified his

qualifications for the Welder position for which he bid on April 7, 2009, and was awarded to him on April 14, 2009. Although the Claimant denies that he submitted the bid for which a Bid Confirmation was sent at 6:35 p.m. on April 7, it contains his correct ID number and hire date. In the normal course, a Bid Confirmation would not be issued with an employee's correct ID number and hire date unless the employee had submitted a corresponding bid.

Neither the Claimant nor any other witness was able to explain how the Bid Confirmation in question could have been created except in response to the Claimant's bid. The most reasonable explanation of what happened is that when the Claimant saw that his 6:14 p.m. bid was not sufficient to award him the job, he altered his purported qualifications to show that he had a valid Class B CDL and an Air Brakes endorsement. It is not disputed in the record that a bidding employee can change the existing information on record for him in the computer system.

Dishonesty is a very serious offense for which dismissal is often found to be appropriate discipline. When the Claimant falsified his qualifications so that he could be awarded the 5N61 Welder position for which he bid, he acted dishonestly. There is, however, a strong mitigating element in this case. According to the undisputed evidence, the Carrier permitted the Claimant, from January to April, 2009, to operate the very same truck with which he had the accident without a CDL.

Thus, when the Claimant was asked by the hearing officer how he thought that he

could be awarded the position when he did not have a CDL, he testified, “. . . Prior to that we did not require a CDL and when we first come and got the brand new truck, I was never told anything about it and I drove it from January till April 14th, when that bid come out.” (Tr. 48). Not only was the Claimant’s testimony not disputed, but it was corroborated by the testimony of Engineer of Track Parrott, who stated that the truck was five months old. (Tr. 19). That coincides with the Claimant’s testimony that he received a brand new truck in January and drove it from then. The accident occurred on May 7, 2009.

No Carrier witness explained why the Claimant was permitted by it to drive a truck with a gross weight of 33,000 pounds for three months, from January to mid-April, without a CDL. So far as appears in the record the Carrier permitted the Claimant to operate the new truck in violation of its own regulations and Department of Transportation and state laws or regulations with its approval.¹

The Carrier is correct that it is the employee’s responsibility to make sure that he has a valid CDL if his job position requires one. Nevertheless it is good practice for a supervisor to make sure that an employee who bids for a job requiring a special driver’s

¹CSX Maintenance of Way Instruction G 025, for example, was issued on 11/14/03 and revised on 8/30/06. It provides in Section III. C that “For CSX Vehicles with gross weight greater than 26,000 pounds, the driver must: i. Have a valid commercial driver’s license with proper class and endorsement based on vehicle size and commodity carried. . . .” There is no contention that the applicable state and federal laws or regulations requiring a CDL for operating such a vehicle first went into effect sometime after January, 2009.

license has the required license. Thus Roadmaster Presser testified, "I believe if I had one of my guys bid in a job, yes I would check that." (Tr. 37).

Where, however, the Carrier itself, in violation of the law and its own regulations, has permitted an employee to operate a truck requiring a CDL for three months without the necessary license, then it is no longer a matter of good practice. If the Carrier decides to reverse itself and require a license, then special steps are required to assure compliance. This is so because, given human nature, an employee who has been permitted to operate a large truck without a CDL for three months in violation of company, state, and federal regulations is liable not to take with sufficient seriousness a sudden change of course by his employer to require a CDL. More than ordinary measures are therefore called for to assure that the message gets home that what was heretofore permitted is no longer allowed. At a minimum, these should include checking that the employee who up to now has been permitted to operate its large truck without a required CDL, actually has the CDL.

The Board has examined the Claimant's work record. He has very close to six years of employment with the Carrier. During that time, prior to the present incident, he had not received discipline more severe than a Time Out. In light of that fact and taking into consideration that the Carrier is also at fault in this matter, as discussed above, it is the Board's decision that dismissal was an excessive penalty. Where an employee is guilty of wrongdoing, but management is also at fault, the Board, in appropriate

circumstances, may be persuaded to reduce or overturn the discipline assessed by management. The Board believes that the fault of management or supervision in this case reasonably could have contributed to the Claimant's decision to operate his truck without a CDL so as to justify modification of his discipline.

However, the Claimant acted dishonestly in respect to his bid and exposed the Carrier to serious liability by operating his truck without a CDL. In addition, his negligence in the operation of the vehicle caused extensive damage to Carrier property. He will not be awarded any back pay. His time off work shall be considered a lengthy suspension. He shall be reinstated to employment but to a position consistent with his actual qualifications.

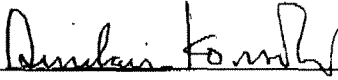
An additional point must be made. The Claimant must understand that any further act of dishonesty on his part will put his job in serious jeopardy. Trust between employer and employee is an essential element of their relationship. By his future conduct the Claimant must regain his employer's trust. Toward that end, and given his conduct in the present case, the Claimant must be scrupulous to assure that all of his actions in the future are aboveboard and honest. Otherwise, he will have only himself to blame for the consequences.

A W A R D

Claim sustained in accordance with the findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the date the signed Award is transmitted to the parties.

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

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
November 2, 2009