

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated June 5, 2009, Ken Spivey, Roadmaster, instructed C. C. White ("the Claimant") to attend a formal Investigation on June 15, 2009, in Palatka, Florida, "to determine the facts and place your responsibility, if any, in connection with your failure to protect your assignment as a machine operator on team 5JAB beginning May 18, 2009, and continuing and requesting pay for the dates beginning May 18, 2009, through the [sic] May 21, 2009, when you preformed [sic] no service." The letter stated that the Claimant was "charged with conduct unbecoming an employee of CSX Transportation, abandoning your assigned position, failure to protect your assignment, falsification of payroll documents, fraud, and insubordination, in that you failed to follow my instruction, and possible violations of, but not limited to, CSX Transportation Operating Rules - General Rule A, General Regulations GR-1, GR-2, GR-15." At the request of the Organization the Investigation was postponed until July 14, 2009.

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 January 9, 2006. At all times here relevant he was assigned to the position of Machine Operator on the 5JAB Roustabout Regulator. He was operating rules qualified as of January, 2009.

The Regulator to which the Claimant was assigned began having mechanical problems in late April, 2009, and on April 30<sup>th</sup><sup>1</sup> it was put out of service. Around 11:00 o'clock on May 13, 2009, the Claimant called Assistant Roadmaster Elizabeth Creedon to check in with her. Roadmaster Spivey took the phone from her and asked the Claimant what was going on. He said that he had been working with the mechanic every day trying to get the machine up and running. Roadmaster Spivey told the Claimant that he had spoken with the mechanic, who said that there wasn't anything more that he could do. The Roadmaster, according to his testimony, instructed the Claimant to report to his (the Roadmaster's) office the next morning at 0700, "and he could come work with my section until we got an answer from Mr. Sorensen on what they were going to do with the machine." Mr. Sorensen was equipment manager for the division. The Roadmaster's office was at section headquarters in Palatka, Florida, at Pecan yard.

The Claimant reported to the Roadmaster's office on Thursday, May 14, 2009, at 0700 hours as instructed. The Claimant was working a Monday through Thursday schedule of 10 hours per day. His next scheduled workday was Monday, May 18. The Claimant was not present at the Roadmaster's job safety briefing on May 18. After the briefing, the Roadmaster testified, the employees went out and did their "morning

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<sup>1</sup>All dates herein for which no year is given are in the year 2009.

exercises.” When he did not see the Claimant at the office on Monday, May 18, the Roadmaster asked his foreman if he had spoken with the Claimant on Thursday, if anything was mentioned between them that the Claimant was taking off or vacation.

The foreman, according to the Roadmaster’s testimony, said that he had not seen the Claimant after they did the exercises that Thursday morning. The Roadmaster then called the mechanic to find out if the Claimant was with him at the machine. The mechanic said that he hadn’t talked to the Claimant and that the last day that he (the mechanic) was at the machine was May 4<sup>th</sup>. According to the Roadmaster’s testimony he tried on two or three occasions to make contact with the Claimant on May 18 but was unable to do so.

On May 19, and May 20, the Claimant again was absent at the Roadmaster’s job briefing. On both days, the Roadmaster testified, he personally went down to the machine to check, and there was no Mr. White. Mr. Howell, his boss, the Roadmaster testified, called wanting to know what was going on with the machine. During that conversation he told Mr. Howell that he did not know if there was something wrong with Mr. White, that he tried to contact him and could not get ahold of him. Mr. Howell said to get the Claimant’s home telephone number and try to reach him there. The Roadmaster testified that he called the Claimant’s home on May 20<sup>th</sup> but was not able to reach him.

On May 21<sup>st</sup>, the Roadmaster testified, he went to the machine three times, but the Claimant was not there. That same day, the Roadmaster stated, he called the signal maintainer, who had three switches right where the machine was parked, and asked him if had seen the Claimant in the last week. The signal maintainer said that he had not seen anybody at the machine. The machine, the Roadmaster stated, was tied up at Builders Supplies in Seville, Florida, about 25 to 30 miles from the Roadmaster’s office in the

headquarters building in Palatka, Florida.

On May 25, 2009, the Roadmaster saw that pay had been approved for the Claimant for the previous week for 40 hours plus travel expenses and FTV travel time. It is the employee's responsibility, the Roadmaster testified, to enter into the computer system his hours worked during the payroll period. The previous week, the Roadmaster stated, he had handed the Claimant codes for the payroll entries, and the Claimant had made the payroll entries in the computer. Because he had no evidence that the Claimant had worked May 18-21, he sent in a correction denying payment to him for the week and marked him absent without permission. According to the Roadmaster's testimony he considered the Claimant's requests for payment both for wages and travel expenses for the week of May 18-21 to be fraudulent. The Roadmaster cited General Regulation GR-15, which provides as follows, as one of the rules allegedly violated by the Claimant:

GR-15 Time or wages must not be claimed on payroll, except for work actually performed:

1. By the person whose name appears on the roll.
2. In accordance with agreed-to rules.

Actual time that each member of a crew goes on and off duty must be shown on the payroll. This must be done, regardless of the assigned hours.

A second rule which he violated, the Roadmaster testified, was General Regulation GR-1, which states, "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. . . ."

If an employee has no machine to work and can't do his job, the Roadmaster testified, he is supposed to ask his supervisor for clarification. General Rule A states:

A. Employees must know and obey rules and special instructions that relate to their duties. When in doubt as to the meaning and application of any rule or instruction,

employees must ask their supervising officer for clarification.

On May 13<sup>th</sup>, the Roadmaster stated, his instruction to the Claimant was “to report to my office till we figured out what we could do with the machine.”

May 25, 2009, was a holiday at the Carrier. Tuesday, May 26, the Roadmaster testified, the Claimant was not at the office at 0700 hours. Once again, the Roadmaster testified, he went by the machine in a car. With him, he stated, were the Division Engineer and the Engineer of Track. The machine, the Roadmaster testified, was still in the same spot without an operator or anybody else. They went to a siding, where he sent his foreman, who was following them, around to verify that the Claimant was not there. When they drove back to the office, the Roadmaster stated, they again looked to see if the operator was by the machine, but no operator was there. Mr. White was not paid for May 26<sup>th</sup>.

On May 27<sup>th</sup> the Roadmaster received a call from John Sorensen that a new Regulator was going to arrive that afternoon and that they needed Mr. White to get the wings up as soon as he could so that they could load the machine. The Roadmaster went to the machine, and there was nobody there. He called Claimant White and got no answer. He then received a call from Rob Foster, the mechanic, who asked if the Roadmaster was aware that a new machine was coming.

The Roadmaster, according to his testimony, said that he was aware but that he could not get ahold of Mr. White to get the wings up. The mechanic said that he had talked to Mr. White who had asked him if he had heard anything about a new machine. A couple of minutes later, the Roadmaster testified, he got a call from Engineer of Track Howell, who asked what was going on, that he had just received a call from Mr. White. The Roadmaster explained that a new machine was coming in and that he had to have the

wings up. The Engineer of Track, the Roadmaster testified, said, "Well Carlos [Mr. White] just told me that he is sitting at the machine there, so get him to put the wings up." The Roadmaster, according to his testimony, said, "Well, that'll be great, but I'm sitting next to the machine. There is no Mr. White."

About 20 seconds later, the Roadmaster stated, Claimant White called him. The Roadmaster asked him where he was. He said that he was at the motel. The Roadmaster asked him why he was at the motel at 2:00 o'clock. According to the Roadmaster, he told Mr. White that he had a truck coming in (presumably with the new Regulator machine) and that he had to have the wings up. The Roadmaster testified that he said to Mr. White, "I'll sit here and wait on you," and that Mr. White said that he would be there as fast as he could.

The Roadmaster stated that he waited about 45 or 50 minutes for Mr. White; went and cut a tree off the main line; got back in about an hour, and no Mr. White. The wings were still down. The Roadmaster went home for about two hours and came back about 7:30 p.m. to see if the wings were up. The wings, according to the Roadmaster, were still down, and Mr. White was not there and had not been there. The next morning, the Roadmaster testified, he left his house at 4:00 a.m. and drove to the machine to see if the wings were up, and they were not up.

About 9:00 o'clock in the morning, the Roadmaster stated, Mr. White called him and asked if the mechanic was going to come down there, that the battery was dead on the machine, and he couldn't get the wings up. He asked him, the Roadmaster testified, "You didn't notice that yesterday?" and got no response. He told Mr. White that the mechanic was on the way and that he also had a backhoe operator there to help carry it on the trailer.

Mr. White was paid for May 27<sup>th</sup>, the Roadmaster testified, because “I couldn’t prove that he wasn’t there that day.” Engineer of Track Jim Howell told him to pay Mr. White for May 27<sup>th</sup>, the Roadmaster stated.

Asked by the hearing officer how Mr. White was dishonest, the Roadmaster testified that he was dishonest for turning in payroll when he could not be found at the job site; for telling the Engineer of Track that he was at the machine at the same time that the Roadmaster was at the machine and he (the Claimant) was not there; and by telling the Roadmaster that he was at the motel.

Rob Foster, the mechanic who worked on Claimant White’s Regulator machine, testified that the machine first began having problems around April 22<sup>nd</sup>. On April 28<sup>th</sup> he installed a radiator, but on April 30<sup>th</sup> he had to go back out to the machine because it was overheating. At that time he performed diagnostic testing and determined that the engine had failed, and the machine was put out of service. After April 30<sup>th</sup>, Mr. Foster testified, the next time he serviced the machine was May 28, 2009. Between April 30<sup>th</sup> and May 28<sup>th</sup>, he stated, he did not visit the machine. During the entire time, according to Mr. Foster, the machine remained at the same location in the Wood Yard in Seville, Florida.

The one time he spoke to the Claimant after April 30<sup>th</sup>, Mr. Foster testified, was on May 22<sup>nd</sup> [sic 27<sup>th</sup>?], “to let him know that the truck was coming and we needed to start the machine and get the wings up.” Mr. Foster explained that the “wings” were the “attachments.”

Claimant White testified that from May 18 and continuing his reporting location was Seville, Florida, as a machinist. It is “not true,” the Claimant stated, that Roadmaster Spivey told him to report to the headquarters from May 14 on. He reported to that location on May 14<sup>th</sup> on his own initiative, the Claimant stated. On May 12<sup>th</sup>, according

to the Claimant, he called Assistant Roadmaster Creedon and told her that he would work the section because he was not being informed what his assigned duties were. He called her, he testified, because he could not get Mr. Spivey on the phone after several attempts.

On May 14<sup>th</sup>, the Claimant testified, he was at the office to go to work, but everybody left without instructing him what to do. He was at the job briefing, the Claimant stated, and everybody got their assignments and their vehicles, but he never got a personal briefing from Mr. Spivey at all, where he was told what he needed to do. "It was always in general terms, with everybody," the Claimant stated.

On May 12<sup>th</sup>, the Claimant testified, Mr. Spivey called him on Ms. Creedon's phone and said that he was trying to figure out why his (the Claimant's) time was not in yet. He informed him, the Claimant stated, that he did not know how to put his time in and that his password would not work. The previous week, according to the Claimant, Ms. Creedon put his time in. On the 12<sup>th</sup>, the Claimant testified, Mr. Spivey asked him if he wanted Mr. Spivey to put in his time. The Claimant testified that he told Mr. Spivey, "Yes."

According to the Claimant, on May 12<sup>th</sup> he called Assistant Roadmaster Creedon and told her that he would be in the office on May 13<sup>th</sup>. He called her from the machine at the end of the day on the 12<sup>th</sup>, he stated, and explained to her that he had some stuff to get out of the machine the next day and would probably be there at headquarters at lunch time. Even though the mechanic testified that the machine was out of commission since April 30<sup>th</sup>, the Claimant stated, he did not know that. "I didn't know that was what was going on," the Claimant testified. "Nobody communicated that to me at all. . . . [T]he only thing that I knew to do was to go to the machine every day and that is what I did. I went to the machine every day."



On May 18<sup>th</sup>, according to the Claimant, he reported to the machine. He testified: “On the day when I went to the office at 7:00 that morning on the 14<sup>th</sup>, Mr. Spivey still didn’t give me any information to tell me where I needed to go, who I needed to work with. Today is the first day I have heard anything about the foreman of the section which is Mr. Brantley. He never told me to work with Mr. Brantley or nothing like that. Matter of fact, I never told Mr. Spivey that I was going to work with the section; I told Ms. Creedon, I [would] work with the section.”

The hearing officer asked the Claimant if beginning May 18<sup>th</sup> he was at the machine all day long. He stated, “I wouldn’t say I was there all day long, I mean, it was at lunch and different times I was getting to the little city a little south of—see, I can’t remember the name of it.” The first time that he put his time in by himself, the Claimant testified, was for the week of June 1<sup>st</sup>, when Mr. Spivey gave him the code to put his time in. Prior thereto, he stated, Ms. Creedon or Mr. Spivey entered his time into the payroll system.

The Claimant testified that he did not stay at the motel for the week of May 18 to 21, or May 25 to 28, for personal reasons and that he drove back and forth from Waycross, Georgia, to Palatka, Florida, those two weeks. He arrived at the machine at 8:00 or 8:30, he stated. He did not think that he had to get to the job site at 7:00 o’clock, the Claimant explained, because he would normally leave the hotel at 7:00 o’clock to get to the job site. Asked by the hearing officer if he notified his supervisor that he was not staying at the hotel, the Claimant stated, “No, I did not and I did not know who my supervisor was.” From Waycross to the job site, the Claimant testified, was a 2½ or 2¾ hours’ drive.

The Claimant was asked by the hearing officer if he could explain how come

nobody saw him at the machine between May 18 and 21 if he went there every day. He stated that he could not explain it. After May 14<sup>th</sup>, the Claimant testified, he did not try to contact Mr. Spivey until May 27<sup>th</sup>.

Asked by the hearing officer, “. . . but you still reported to the machine every day even though it was broke down?,” the Claimant stated, “Yes ma’am. I felt that was my duty because I wasn’t being told what I needed to do.” He stated that he was also at the machine on May 26<sup>th</sup> and May 27<sup>th</sup>. According to the Claimant’s testimony, in his telephone conversation with Roadmaster Spivey on May 27<sup>th</sup>, he told Mr. Spivey that he was going to the machine because the mechanic said that they needed to move the machine. Mr. Spivey, the Claimant testified, said, “Don’t worry about it; we are going to do that tomorrow.”.

The hearing officer asked the Claimant what service he performed for the company from April 30 to May 28<sup>th</sup>. He stated, “I was knocking rocks off the tires and kind of just dressing up where they dumped too much rock and when they had too much rock piled up on the head of the tires; I was just dressing it out.” The hearing officer asked him how he was doing that. He said, “With the Regulator.” The Regulator was down, he was reminded. He stated, “When I got another one—well off and on between the 30<sup>th</sup> and the time I left, that was what I was doing that was the duty I was performing.”

Asked what he was doing from May 18 to 21<sup>st</sup>, the Claimant stated, “I was going back and forth to the machine every day. I didn’t . . . do anything with that machine from May the 14<sup>th</sup> till the time they loaded it up on the truck.” The hearing officer asked, “So you were just going to the Regulator and not doing anything, just sitting at the Regulator?” He answered, “Yes, just looking at the machine, cranking it up, checking the gauges and stuff like that, peddling around the machine . . . .”

In reference to General Rule A, the Claimant was asked what supervising officer he asked for clarification. The Claimant stated, "I say again, I did not know which supervisor I needed to communicate with, talk with and as I said before, I thought the foreman of the CAT team was my immediate supervisor at the time and I followed whatever it was they was doing at the time and they left the hotel at 0700, that's when I left the hotel." In addition, the Claimant testified that he attempted three times to call Mr. Spivey but was unable to make contact with him.

The foregoing testimony of the Claimant was given in answer to questions by the hearing officer. In reply to questions by the Organization representative, the Claimant testified as follows. He first reported to the Palatka territory on April 20<sup>th</sup>. He was not assigned to work at any specific location. He was just told where his machine was at. He worked with the CAT gang from April 20<sup>th</sup> to April 30<sup>th</sup>. Foreman Danny Newman was in charge of that gang. He reported to Danny Newman every day. A Track Inspector got their time, but Mr. Newman was the foreman.

There was also a manager of the CAT team that was there [the Claimant's testimony continued]. During the week of May 18 through May 21, he did not enter his payroll time. He did not know how to do it and had not been trained on entering payroll into the computer. The first time he put his time in the computer was June 1<sup>st</sup>. In the weeks he was there, Mr. Spivey called him only once, and that was about not having the Claimant's payroll information. The only time that he told the Claimant that he tried to get in contact with him was when the Claimant called him on May 27<sup>th</sup>.

He does not feel that he violated any CSX rules or regulations [the Claimant's testimony proceeded] because, first of all, he was there. Second, no instructions of anything he needed to do were communicated to him at all. He pretty much was left to

“wing it” on his own after the CAT team left. He reached out to Mr. Spivey several times. He could not get him on the phone. He tried to find out what he needed to be doing. He does not feel that he abandoned his assignment or failed to protect his assignment. He did not falsify any CSX document. He was not insubordinate to any supervisor who gave him a direct order.

Recalled as a witness by the hearing officer, Roadmaster Spivey testified as follows. When the Claimant first reported in the area, the Roadmaster did not talk to him because he (the Roadmaster) was working different shifts. It is the Roadmaster’s understanding that Assistant Roadmaster Elizabeth Creedon was giving him instructions. The Claimant was not part of the actual CAT team. The CAT team had its own Ballast Regulator Operator. From April 20 to 30, 2009, the Claimant worked behind the CAT gang. He was to clean the ballast left behind by the gang. There was a foreman that was on site with him every day that had the track time for him.

The Roadmaster [to continue his testimony on recall] came off of working nights and was full-time days on May 18. That is the first day that the Roadmaster could personally say that he was at the machine, and there was nobody there. It is the first day that he tried to contact Claimant White and could not get ahold of him. On Thursday, May 14<sup>th</sup>, the Claimant was supposed to be working with the section, “and they told me, after [the] job briefing they didn’t see him, . . . that’s when I started taking notes, following up for myself. . . .”

On May 13<sup>th</sup> he was sitting at his desk when he heard Ms. Creedon talking to Mr. White. He said, “Let me talk to him.” That is when he told Mr. White to be at the headquarters the next day, May 14<sup>th</sup>. He expected Mr. White to be at the headquarters from that day forward until the machine was repaired.

On May 14<sup>th</sup>, [the Roadmaster's testimony on recall proceeded] he saw the Claimant in the office. In the job briefing he told the team what they were supposed to be doing that day. He had a surfacing team and his section team on the 14<sup>th</sup>. He broke down what each team was going to do that day. In the job briefing, with everybody present, he (the Roadmaster) made it a point to tell the section team that Mr. White would be with them for the day. To the best of his knowledge the Claimant worked with the section that day. He (the Claimant) did not tell the Roadmaster that he was leaving the property. He did not say that he would not be working the section.

He did not give the Claimant permission [to continue with the Roadmaster's testimony] to drive back and forth from his home in Waycross, Georgia, May 18 through 22, and the Claimant did not ask for permission. Employees assigned to floating jobs are given additional payments for travel costs: an AXP per diem payment for each day away from home and a weekly FTV payment at the end of the week as reimbursement for travel time to and from work. The Claimant was paid AXP expenses of \$25.00 each for May 27 and May 28 and FTV pay for the week even though he did not stay in a motel or hotel on any day during his workweek of May 25-28, 2009.

After the close of hearing, by letter dated July 29, 2009, R. J. Spatafore, Division Engineer, notified the Claimant that the "Carrier representatives presented sufficient evidence and testimony to substantiate the . . . charges." "Based on evidence and testimony from the witnesses and yourself during the course of this hearing," the letter stated, "sufficient proof exists to demonstrate that you are guilty as charged." The discipline assessed by the Division Engineer was "dismissal in all capacities from CSX Transportation."

There is a factual dispute in the record regarding whether Roadmaster Spivey

instructed the Claimant to report to section headquarters on May 14, 2009, and to continue to report there until a decision was made concerning what to do with the disabled Regulator. Roadmaster Spivey testified that he gave such an instruction to Claimant White, but the Claimant states that this was not true. He testified that it was his own decision to report to Roadmaster Spivey's office on May 14<sup>th</sup>. According to the Claimant's testimony, he was given no instruction to continue reporting to section headquarters after May 14<sup>th</sup> and, in fact, no instruction at all concerning his duties at any time after the Regulator machine to which he was assigned was placed out of service.

As between the Roadmaster's testimony that he instructed the Claimant to report to the section office on May 14<sup>th</sup> and the Claimant's that he did so on his own, the Roadmaster's testimony is the more reasonable. It is not clear from the Claimant's testimony just why he suddenly decided on his own to report to the Roadmaster's office at section headquarters at 7:00 a.m. on May 14<sup>th</sup>, when he did not report there any day before or after May 14<sup>th</sup>.

In fact the Claimant's testimony about May 14<sup>th</sup> is confusing and contradictory. His initial testimony was that on May 12<sup>th</sup> he called Assistant Roadmaster Creedon and told her that he would come into work with the section around noon on May 13<sup>th</sup>. According to the Claimant, the reason that he did this was that his machine was out, and there was no contact at all from a supervisor with him about what he needed to do (Tr. 65). The Claimant's cell phone records for May 13, however, show him to be almost continuously on his phone from 10:40 a.m. to 2:20 p.m. There would have been no opportunity for him to have worked those hours because of his continuous cell phone usage. Nor is it likely that he worked after 2:20 p.m. Who would have given him a job briefing? The Claimant did not testify that he actually worked on May 13, only that the

day before he said he would work with the section on May 13.

The Claimant acknowledged that he was present in the Roadmaster's office at 7:00 a.m. on May 14 for the Roadmaster's job briefing (Tr. 67). Although the Claimant denied that he was there because the Roadmaster told him to report there at 7:00 a.m. and insisted that he came there on his own to work with the section, if that were true, one would have expected him to actually work the day with the section gang. The evidence shows, however, that he left shortly after the job or safety briefing and did not perform any work with the section gang on May 14.

Thus Roadmaster Spivey testified that when the Claimant did not report to the office for the job briefing (or safety briefing) his next workday on Monday, May 18, he began to look into the matter. He asked the foreman if he had spoken with Mr. White on Thursday and had Mr. White said anything about being off or taking vacation on Monday. The foreman said that he had not seen Mr. White after they did their exercises that Thursday morning, that he did not go with him and hadn't spoken with him (Tr. 9).

When asked by the hearing officer, "So what did you do on the 14<sup>th</sup>?", Claimant White answered, "I—from the 14<sup>th</sup> from that date on, I just went to the machine every day like I had been doing previously." (Tr. 67-68). Claimant thus did not even claim that he worked with the section gang on May 14<sup>th</sup>, other than to show up for the job briefing. In the Board's opinion it is not reasonable that the Claimant would have come on time to the job briefing voluntarily on May 14<sup>th</sup> prepared to work with the section gang and then suddenly change his mind and decide to leave without working. The more likely course of events is that the Claimant reported to the section office at 7:00 a.m. on May 14 only because he was ordered to do so by the Roadmaster. At the earliest opportunity, however, he left without telling anybody to attend to his personal business.

The Claimant attempted to blame lack of supervision as the reason for his not working with the section gang on May 14. He testified, “. . . On the day when I went to the office at 7:00 that morning on the 14<sup>th</sup>, Mr. Spivey still didn’t give me any information to tell me where I needed to go, who I needed to work with. . . .” (Tr. 67). General Rule A, however, is very clear about such a situation. “Employees must know and obey rules and special instructions that relate to their duties. When in doubt as to the meaning and application of any rule or instruction, employees must ask their supervising officer for clarification.” The Claimant was well-acquainted with that rule, having become rules qualified only a few months earlier in January, 2009, with a passing grade of 100. Moreover, it is common sense to ask one’s supervisor if in doubt about one’s assignment.

Roadmaster Spivey was in the same room with the Claimant the morning of May 14<sup>th</sup>. If the Claimant was in doubt about what he had to do, all he needed to do was ask. In fact, the Roadmaster testified that he did make clear to the Claimant that he was to work together with the section. Be that as it may, the Claimant was well aware that he needed only to ask if in doubt about his assignment. His failure to do so and the fact that he left the location indicate that he did not want to work with the section gang May 14<sup>th</sup>.

As noted, the Claimant testified that from May 14<sup>th</sup> on he went to the machine every day as he had been doing previously. Documentary evidence in the form of the Claimant’s own cell phone records, however, show that the Claimant did not go to the machine at all on May 14<sup>th</sup>. Although the Claimant’s payroll record for May, 2009, shows that he was paid for 10 hours’ work on May 14, the record of calls made on his cell phone on that date shows that by 8:30 a.m. he was already headed north to his home in Waycross, Georgia. Thus the phone record shows him receiving a call in Green Cove, Florida, at 8:30 a.m.; making calls from Orange Park, Florida, at 9:14, 9:29, 9:37, and



10:07 a.m.; receiving calls in Jacksonville, Florida, at 10:11, 10:18, and 10:21 a.m.; receiving a call in Hilliard, Florida, at 10:45 a.m.; making a call from Folkston, Georgia, at 10:52 a.m.; and receiving calls in Waycross, Georgia, at 11:17, 11:31, 11:52 a.m., and 12:07 p.m. He worked neither at the machine or at headquarters on May 14<sup>th</sup>.

All of the telephone calls and other events referred to above occurred prior to May 18, 2009, the first date that the Claimant is charged with any wrongdoing in the charge letter. None of them is therefore relied on as a basis for finding a violation on the part of the Claimant. They are relied on by this Board solely for the purpose of making a credibility determination of whether to credit the Claimant's or the Roadmaster's testimony on the factual issue of whether the Roadmaster told the Claimant to report to the section office from May 14 on until they found out from Mr. Sorensen what was going to be done with the Claimant's machine.

The Claimant's testimony regarding May 14 was not credible. He testified that Roadmaster Spivey did not instruct him to report for work with the section on May 14. If that were true, why else did he report to section headquarters for work that day? He remained there for less than an hour and a half. If he felt that the instructions given to him by Roadmaster Spivey were unclear, why did he not ask for clarification? Further, he testified that from the 14<sup>th</sup> on he went to the machine every day, but documentary evidence shows that he did not go to the machine at all on that day. The Claimant's testimony simply does not stand up to scrutiny. It is not credible.

Roadmaster Spivey's testimony, on the other hand, contains no contradictions and is perfectly reasonable. The Claimant's machine was out of service. There was no work that he could perform with it. That was a perfectly reasonable basis for requesting the Claimant to come work with the section gang. It also made perfect sense to instruct him

to continue working with the section gang until some disposition was made of the Claimant's own disabled machine. There was nothing else for the Claimant to do. As between the Claimant's testimony and the Roadmaster's, the Roadmaster's is the more credible. In fact, the Claimant's is not credible. It is clear that in deciding to dismiss the Claimant from service the Carrier credited the Roadmaster's testimony over that of the Claimant. The Board finds that there was more than substantial evidence to support the Carrier's credibility determination.

The Claimant does not deny that he did not report for work at the section office beginning May 18, 2009. The charge letter states the hearing's purpose to investigate the Claimant's alleged "failure to protect your assignment as a machine operator . . . beginning May 18, 2009, and continuing and requesting pay for the dates beginning May 18, 2009, through . . . May 21, 2009, when you performed no service." The evidence fully supports these charges.

Beginning May 18, 2009, through May 27, 2009, the Claimant performed no service for the Carrier. His assignment was to come work with the section gang in Palatka, Florida, until Mr. Sorensen decided what to do about the Claimant's machine that was out of service. No decision was made regarding the machine until the afternoon of May 27, 2009. The Claimant was therefore required to report at section headquarters for work continuously from May 18 to May 27, 2009, but failed to do so. He therefore failed to protect his assignment and abandoned his assigned position during that period of time. The foregoing finding is based on the fact that the Roadmaster's testimony has been credited over that of the Claimant regarding what was said to the Claimant about the Claimant's assignment beginning May 14, 2009.

The Claimant's situation is not helped, however, even if it were to be found that he

did not understand that the Roadmaster was requiring him to report to the section office and work with the section gang not only on May 14, when the Claimant showed up (but did not remain) for work, but also on May 18 and continuing. The Claimant does not dispute that his machine was out of service between April 30, and May 28, 2009. He was not charged for the days preceding May 18, so this Board will not consider them. It is clear, however, that from May 18 until May 28 the Claimant performed no service for the Carrier. He submitted payroll documentation, either personally or by his direction, requesting to be paid for those days but performed no work to be entitled to pay.

The Claimant, however, makes the implicit argument that supervision was at fault and not he. That argument is implicit throughout the Claimant's testimony. An example is found in his answer to the hearing officer's question, "Okay, so where were you on May 18<sup>th</sup>?" He answered, "I was reporting to the machine and the reason why I reported to [the] machine every day after that was because there was still no communication, instructions or anything given to me. On the day when I went to the office at 7:00 that morning on the 14<sup>th</sup>, Mr. Spivey still didn't give me any information to tell me where I needed to go, who I needed to work with. . . ." (Tr. 67).

Similarly, in response to his Organization representative's question of why he felt that he did not violate any CSX rules, the Claimant testified (Tr. 95):

I don't feel I violated any CSX rules . . . because I was here first of all. Second of all, no instructions or anything that I needed to do was communicated to me at all. I was pretty much here after the CAT team left, I was pretty much here winging it, on my own. I reached out to Mr. Spivey several times, I couldn't get him on the phone. I tried to find out what I needed to be doing where I wanted to be at.

Contrary to the Claimant's testimony, however, the evidence shows that he made no reasonable effort to get instructions from Roadmaster Spivey regarding a work assignment. The Claimant's machine was placed out of service on April 30, 2009 (Tr.

48). The Claimant's cell phone records show no call placed by the Claimant to the Roadmaster at any time after April 29, 2009. Moreover, he testified that he received a telephone call from Roadmaster Spivey, who was using Assistant Roadmaster Creedon's telephone, regarding a payroll matter on May 12, 2009. If the Claimant was seeking guidance from the Roadmaster concerning his job assignment, that would have been a perfect opportunity to obtain it. But the Claimant asked for no clarification or instruction regarding his work assignment. The evidence shows that there is no substance to the Claimant's contention that he was seeking direction or help from Roadmaster Spivey pertaining to his job assignment. Under General Rule A it was his responsibility to seek clarification or guidance.

The record, in addition, makes it very doubtful that the Claimant was at his machine for any significant period of time between May 18 and May 28. First of all, the machine was out of service and inoperable. What purpose would be served by going to the machine? Second, Roadmaster Spivey repeatedly went to the machine after May 18 to see if he could locate the Claimant, and not once did he find the Claimant there. He checked with other employees whose duties brought them near the machine, and not one of them ever saw the Claimant there.

Third, on May 27, in a telephone conversation, the Claimant told the Roadmaster's supervisor, Mr. Howell, that he was at the machine, but, in fact, he was not there. This was revealed when, immediately after his conversation with the Claimant, Mr. Howell called the Roadmaster, who happened then to be at the machine. The Claimant, however, was not at the machine.

Fourth, as previously discussed, the Claimant testified that he was at the machine on May 14, but his cell phone records showed that he could not have been at the machine

during his working hours on that date. Similarly his cell phone records in evidence for May 11, cover the hours 1:45 p.m to 9:29 p.m. and show all calls made or received by the Claimant as being in Waycross, Georgia. From Seville, Florida, where the disabled machine was parked to Waycross, Georgia, was approximately three hours' driving time. That would mean that at least from 11:00 a.m. on the Claimant was not at the machine on May 11. The payroll records show that May 11 was a scheduled workday for him, and he was paid for 10 hours' work that day.

The Claimant's cell phone records in evidence for May 12 begin at 12:28 a.m. and run to 11:36 a.m. Except for the midnight call, all calls were made from or received by him in Palatka, Florida, where his motel was located. There is no call listed for Seville, Florida, where the disabled machine was located. For May 13, 2009, the Claimant's cell phone call records begin at 10:27 a.m., when he received a call in Callahan, Florida. Google Maps shows Callahan, Florida, to be between approximately 56 and 70 miles from Waycross, Georgia, depending on one's route. At 10:27 a.m. the Claimant thus was traveling south from his home toward work. He continued south and received a call in Jacksonville, Florida, at 10:40 a.m. Further south, in Orange Park, Florida, the Claimant made a call at 11:03 a.m. The remaining calls, with one exception, for May 13 were all made or received by the Claimant in Palatka, Florida. There is no entry on the phone records for that date for Seville, Florida.

The Claimant testified that "from the 14<sup>th</sup> from that date on, I just went to the machine every day like I had been doing previously." (Tr. 68, emphasis added). The documentary evidence shows that on the dates for which the Claimant's cell phone records are available he spent no time at all (or, at most, very little time) at his disabled machine. If we take him at his word that he continued "like I had done previously," then,

in fact, he was seldom, if ever, at his machine from May 18 on.

His prior pattern of attendance in May plus the additional evidence adduced by the Carrier—the fact that on repeated visits to the site of the machine beginning on May 18 never once did the Roadmaster find the Claimant there; that other employees who worked near the machine who were questioned by the Roadmaster had not seen the Claimant there; that the Claimant told Mr. Howell on May 27<sup>th</sup> that he was at the machine when he, in fact, was not there; and the fact that the machine was disabled and out of service—provided substantial evidence, in this Board’s opinion, that between May 18 and May 27 the Claimant was seldom, if ever, at the machine. Nor, as previously noted, during this time did the Claimant seek clarification or instruction regarding his assignment from the Roadmaster or any person in authority as he was required to do under General Rule A if he was in any doubt concerning it. Thus even if the Claimant had misunderstood the instructions given him by the Roadmaster on May 13 in their telephone conversation, he failed to protect his assignment as a machine operator and abandoned his assigned position beginning May 18 and continuing.

The evidence shows that the Claimant did not report to his assigned work location during his workweek of May 18-21, 2009, and did not otherwise perform any service for the Carrier during that period of time. There is serious doubt in the record whether he was even on the Carrier’s premises for many of his scheduled workhours during that week based on the facts that he did not report to his assigned work location at section headquarters; he could not be found at his disabled machine any day that week, although the Roadmaster checked each day and three times on May 21; and his pattern of attendance on his scheduled workdays immediately preceding May 18. The Board finds that the Carrier has proved by substantial evidence that the Claimant improperly requested

40 hours of pay for the workweek May 18-21, 2009. The fact that the Roadmaster refused to authorize payment does not change the fact that the Claimant improperly requested payment for work not performed.

The Claimant attempted to clear himself of any responsibility for the original payroll record submitted for him for the week of May 18-21 claiming pay for the week. According to his testimony either the Assistant Roadmaster or the Roadmaster submitted the original payroll documentation into the computer system that was disallowed by the Roadmaster. According to the Roadmaster's testimony, employees are personally responsible for the correctness of their payroll information.

Even, however, if the Claimant allowed someone else to enter his payroll information into the computer system, there is no evidence that he informed the Roadmaster, the Assistant Roadmaster, or anybody else that he was not at his machine or otherwise doing productive work for the great majority of his scheduled hours, if not all of his scheduled hours, during that workweek. Nor did he call in to report that he would be absent from work that week.

In the normal course, therefore, as he was aware, the Claimant would have received full pay for the week of May 18-21 had the Roadmaster not corrected the payroll records. The Claimant had done nothing to alert the Carrier that he was not entitled to be paid his full wages, if any wages, for the week of May 18-21. According to the evidence he was attempting to make it appear that he was reporting for work and remaining at work as scheduled that entire week. That was not honest.

The Claimant's conduct during the period covered by the charge letter was basically dishonest. He intentionally avoided performing productive work, although that was the purpose for which he was hired. He also attempted to receive pay for hours that

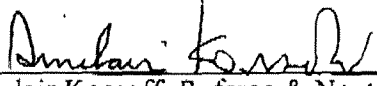
he did not perform any work or service for the Carrier. His offenses were of the kind for which the Individual Development & Personal Accountability policy and common industrial practice permit discipline up to dismissal. The claim will be denied.

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.

  
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Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois  
November 18, 2009