

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated October 14, 2010, M. J. Anuszkiewicz, Engineer Track, instructed M. S. Goble ("the Claimant") to attend a formal Investigation in Martin, Kentucky, on October 28, 2010, in connection with information received on October 1, 2010, indicating that he falsified a bid for track inspector "by marking that you had a valid CDL license, when, in fact, you had no valid license whatsoever." The letter charged the Claimant "with conduct unbecoming an employee and falsification of a Carrier document in possible violation of, but not limited to, CSXT Operating Rules – General Rule A and General Regulations GR-2."

By letter dated October 27, 2010, to the Engineer Track, the Vice Chairman of the Organization requested that the Investigation be postponed due to scheduling conflicts. In addition, the Vice Chairman requested that "any statements that may be introduced by the Carrier be provided for our review before the investigation in order for us to attempt to prepare a proper defense." He further requested "a list of witnesses that the Carrier is bringing be provided for us to determine what information is needed for development of a Fair Investigation." He asserted, "It is impossible for us to prepare a proper defense if the Carrier does not provide material it is going to present at the investigation to us before the investigation for review." The Engineer Track denied the request by letter dated November 1, 2010. The hearing was rescheduled to November 11, 2010, at the Carrier's Appalachian Division headquarters in Erwin, Tennessee..

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.

Claimant M. S. Goble has a service date with the Carrier of July 23, 2007. On September 18, 2010, the Claimant received email confirmation of four bids that he had submitted that day, including a bid for the position of Track Inspector in Martin, Kentucky. The bid confirmation notice listed the Claimant's qualifications, including that he had a CDL License B that expired on 11/12/2013, with endorsements for HAZMAT AIR BRAKES TANKER. On September 21, 2010, he was notified that he was the successful bidder for the Track Inspector position. The notification stated that the assignment was effective September 27, 2010.

The Claimant reported for his new assignment on Wednesday September 29, 2010. He had made prior arrangements to take off work on September 27 and 28 as vacation days. When he reported to Martin, Kentucky, on September 29, 2010, to attend third quarter safety certification, the Engineer Track (the Charging Officer in this case) asked to see his driver's license. The Track Inspector job for which the Claimant bid required a regular driver's license as a condition for assignment to the position because the job involves operating a CSX vehicle to inspect track. The incumbent in the position must also drive to and from headquarters. The Claimant said that he did not have a driver's

license but that he had a hardship driver's license, which he did not have with him.

The Claimant was allowed to attend the certification session on September 29th and to leave work a little bit early in order, he said, to try to get a copy of his hardship license. He was also allowed to take off work early on Thursday and Friday, September 30, and October 1, 2010, but was not able to produce the hardship license he claimed he had. According to the testimony of the Engineer Track, on or about October 1, 2010, he went to the licensing office at the Johnson County, Kentucky, courthouse and was informed by the clerk there that the Claimant had a suspended driver's license.

The Engineer Track obtained documentation at the courthouse showing that the Claimant was arrested on January 12, 2010, for driving under the influence of alcohol and found guilty of that offense on June 30, 2010. His sentence included suspension of his driver's license for 90 days. The 90-day suspension period would have ended on September 28, 2010. Claimant Goble violated General Regulations GR-2, the Engineer Track testified, because he was dishonest and made a false statement about having a valid driver's license when he bid on the Track Inspector position at Martin, Kentucky.

On cross-examination the Engineer Track was questioned whether he asked the clerk at the licensing office if the Claimant had a hardship license. He stated that he did ask that question and was told that the Claimant did not have a hardship license.

Claimant Goble testified as follows. When he bid on the Track Inspector position he had a hardship license. With such a license, he stated, he has all of the driving privileges that someone would have with a regular license. "I talked to the judge," he testified, "I was allowed 24 hours a day in case of emergencies for track inspector use." Asked if he had any documentation to prove that, the Claimant produced a document called "Affidavit for Hardship License" on a Commonwealth of Kentucky District Court

form with the caption Commonwealth of Kentucky vs. Matthew Goble and the Case Number of the Claimant's court case. The Affidavit stated as follows:

The undersigned Affiant is the employer for the above-named Defendant. Pursuant to KRS [Kentucky Revised Statutes] 189A.420 (see page 2), the undersigned states under oath that the above-named Defendant should be granted a hardship driver's license for the reason(s) stated below, including the specific days and times when the Defendant is required to drive.

CSX Transportation traveling tie unit "To and from work." Expected to be on call 24 hrs a day in case of emergency.

Driving is necessary on the following days and at these specified times:

	From	To
Mon.	0600	2000
Tues.	0600	2000
Wed.	0600	2000
Thurs.	0600	2000
Fri.	0600	2000
Sat.	off days	off days
Sun.	traveling day	traveling day

WHEREFORE, Affiant prays that the above-named Defendant's Application for Hardship Driver's License be granted. NOTICE: Pursuant to KRS 189A.440(3), knowingly assisting Defendant in making a false application statement is a Class A Misdemeanor and results in revocation of the person's operator's license for six (6) months.

The affidavit was signed by Brian Holder and was notarized by a Notary Public as

“Subscribed and sworn to before me by the Affiant, this 21st day of September, 2010.”

Mr. Holder is manager of the T8 tie team. On September 21, 2010, he was Claimant Goble’s supervisor and prepared and signed the affidavit at the Claimant’s request to assist him in obtaining a hardship driver’s license. The Affidavit was stamped “FILED OCT 4 2010 . . . JOHNSON CIRCUIT COURT CLERK.”

Asked whether he provided the documentation to his supervisor, the Engineer Track, the Claimant stated that he did not because it was not filed in the court until October 4th. The Claimant testified that Mr. Holder signed the affidavit on September 21, the day before he went to court, and that the hardship license was granted in court on September 22nd. “The courthouse did not file until the 4th,” he testified. “So, therefore I could not pick up the documentation until October the 4th.” When he bid on the Track Inspector job, the Claimant acknowledged, he did not have a valid license.

The Claimant was asked by the hearing officer to explain where on the affidavit it said that he had permission to drive while at work, noting that the affidavit said “To and from work.” He answered, “It says driving is necessary on the following days at these specific times, so therefore between 0600 and 8:00 p.m.” He also noted the reference to being on call 24 hours a day in case of an emergency. He did not present his hardship license to his supervisor, he stated, because “they had already disqualified me from the job.”

In response to questions from his Organization representative, the Claimant testified that when he bid for the Track Inspector position he was aware that he was going to obtain a hardship license. He was asked. “So, when you bid on it you bid on it knowing that the time that you’ll report to work you would have a hardship license. Is that correct?” He answered, yes. At the time Mr. Holder signed the affidavit, the

Claimant testified, he was not yet aware that he was getting a Track Inspector's position. Therefore, he explained, the information on the affidavit for the hardship license pertained to the system production gang he was working on at the time. The Claimant testified that he had "no idea" why it took the court until October 4th to file the document with the Circuit Court Clerk.

Asked by the Organization Representative, "Do you currently have a driver's license?" the Claimant answered, "Yes." The hearing officer asked the Claimant, "Did this hardship license have an expiration date on it?" He answered, "No sir. I'm guaranteed until my license come back, my original driver's license." The Board understands that the license the Claimant testified that he currently had was a hardship driver's license.

Brian Holder testified as follows. He is the manager of SPT T8, and started in the position in the beginning of 2009. He filled out an affidavit for a hardship license for Claimant Goble. The hours listed on the document were for traveling to and from work. To the best of his knowledge the hardship license was not good to drive 24 hours a day but was good only for the actual hours specified on the affidavit that he signed. He signed the document on a Tuesday, and Mr. Goble had the next two days off to try to get his license taken care of. It was during those two days that he was informed that Mr. Goble had received another job. He (Holder) was not present when the affidavit was signed by the notary public.

Mr. Holder testified that other than specifying the times when it would be necessary for Mr. Goble to drive for purposes of his (the Claimant's) job, the only thing that he wrote on the affidavit was the sentence, "CSX Transportation traveling tie unit 'To and from work.'" He did not write the sentence. "Expected to be on call 24 hrs a day

in case of emergency.” To his knowledge, Mr. Holder testified, the affidavit he signed would only have given the Claimant authority to drive his private vehicle to and from work and not to drive a company vehicle during the day.

After he learned that the Claimant had bid onto another job, Mr. Holder testified, he called Mr. Goble and Engineer Track Anuszkiewicz and told them that the hardship license would no longer be good on the basis of his affidavit because the hours would be changed and that they would have to fill one out themselves. By that time, Mr. Holder stated, his gang had moved to Toledo, Ohio, while Mr. Goble’s new assignment as Track Inspector was in Kentucky.

After Mr. Holder’s testimony the hearing officer asked Claimant Goble how the sentence “Expected to be on call 24 hrs a day in case of emergency” got onto the affidavit. He stated, “It don’t matter. I knew that I was getting that job so I needed it to be, you know, for a longer period of time, therefore, okay to be available 24 hours a day.” He admitted that he added the sentence to Mr. Holder’s affidavit and that Mr. Holder had no knowledge that he did so.

The hearing officer then recalled the Engineer Track as a witness and asked him if he had a conversation with Mr. Holder about a hardship license for Mr. Goble. He stated that he did. Asked whether he obtained “any further information from him about this license . . . or any limitations,” the Engineer Track testified as follows:

Well, the best that I remember about it is he did have, Mr. Goble had a hardship license while he was working for T8 which would give him the ability to drive to and from work while he was working for Brian [Holder]. But again, when I asked Mr. Goble to provide that to show proof of it, it was never provided. So, I have never seen this before until today.

It was his understanding, the Engineer Track testified, that the hardship license gave Mr. Goble permission to drive to and from work in Mr. Goble’s personal vehicle.

The Engineer Track testified that in his conversation referred to previously with the Johnson County court clerk, he inquired whether perhaps the reason they did not have a record of a hardship license issued to Mr. Goble was because of a problem with the mail. The clerk, the Engineer Track stated, “said no, if he obtained a hardship license anywhere in any other state it would be registered electronically on their system there at Johnson County Courthouse in a computer system and they had no record of it at all. As far as they were concerned,” the Engineer Track’s testimony continued, “his license was still suspended.”

On cross-examination the Engineer Track was shown the affidavit signed by Mr. Holder and asked, “Had this been provided to you at the time [when Mr. Goble reported for the Track Inspector position] do you think it would have been sufficient enough to go ahead and allow him to be awarded the position?” He answered, “Again, if it’s a legal document and it says he can drive to and from work and during work hours, I suppose he would have been all right.”

The Engineer Track testified that his conversation with Mr. Holder took place prior to October 1st. He was asked on cross-examination if when Mr. Goble showed up at the Martin, Kentucky, Track Inspector position he (the Engineer Track) informed him (Mr. Goble) that he had a conversation with Mr. Holder. He stated that he did.

In its closing statement in behalf of the Claimant the Organization argues that the evidence does not support the Carrier’s charges against the Claimant. It notes that the charge letter alleges that the Claimant falsified a bid for Track Inspector by marking that he had a CDL license when, in fact, he had no valid license whatsoever. The Organization asserts that Engineer Track Anuszkiewicz “testified that if Mr. Goble had a valid driver’s license including a hardship license he would be in compliance with the

CSX provision,” and it contends that the Claimant did in fact have a valid driver’s license as confirmed by BMW Exhibit 2, the Affidavit for Hardship License.

The Organization further notes that the Claimant also testified that he had a valid driver’s license. Although the charge letter refers to a CDL license, the Organization calls attention to the unchallenged evidence that the Track Inspector position on which the Claimant bid did not require a CDL license. The Organization asserts, in addition, that the Claimant “knew he could not report to the Track Inspector position until the effective date of September 27, 2010.” Presumably the point the Organization wishes to make regarding the date is that, according to the Organization’s understanding of the evidence, by September 27, 2010, the Claimant had already obtained a hardship driver’s license.

The Organization concludes that “there has been no testimony provided that supports the Carrier’s charges against Mr. Goble.” The Carrier, the Organization argues, “has not met its burden of proving the charges placed against Mr. Goble and therefore he should not receive discipline and/or unfavorable mark placed on his personnel file.” Based on the asserted lack of proof and the procedural arguments raised by it at the beginning of and during the hearing, the Union requests that the Claimant “be exonerated from the charges placed against him” and any reference to the charges be removed from his personnel file.

Following the close of the hearing, by letter dated December 1, 2010, the Division Engineer notified the Claimant of the Carrier’s determination that a review of the transcript and exhibits demonstrated that the hearing was conducted in accordance with his contractual due process rights and that “[a]ll objections were properly addressed by the conducting officer during the course of the hearing.” In addition, the letter stated, the

Carrier's review showed that the charges against the Claimant "were valid and proven" and that "sufficient proof exists to demonstrate that you are guilty as charged and were in violation of the cited CSX Transportation Operating Rules and Regulations." As discipline for the violations found, the Division Engineer dismissed the Claimant from employment with the Carrier, explaining his action as follows:

The facts of this case clearly demonstrate that you knowingly and willfully allowed a bid submittal to be transmitted to our PACS Department and entered on your behalf that contained false and inaccurate information, which allowed you to be assigned to a Track Inspector position that you were not qualified to receive. This action potentially exposed the carrier to unnecessary liability being that the position required a valid driver's license, which you did not possess. The record further demonstrates that when you were requested on numerous occasions by a carrier official to present proper proof of possessing a valid driver's license you were unable to do so.

After reviewing your disciplinary record, which includes a recent reinstatement (see PLB 7120 Award No. 63) it is noted that you were specifically notified, in part that "It is now up to him to show that he was deserving of the benefit and that there is no cause to question his honesty and integrity or his commitment to fully abide with all rules and regulations of the Carrier." (Emphasis added)

Based on my support of the Conducting Officer's finding of guilt, in addition to your previous record as noted herein, and due to the seriousness of the charges that were placed against you in this matter it is my decision that the discipline to be assessed is your immediate dismissal in all capacities from CSX Transportation.

Before turning to the merits, the Board will address the procedural issues in this case. Prior to the convening of the hearing the Organization requested copies of statements and other documents the Carrier planned to present at the Investigation so that the Organization could review them in order to be able to prepare a proper defense to the charges. The Organization also requested a list of the Carrier's witnesses. The Carrier denied the request. At the start of the hearing, the Organization stated that it was proceeding under protest because of the Carrier's denial of its requests.

Prior awards involving these same parties have held that the failure of the Carrier

to provide documents to the Organization before a hearing in order to prepare for the hearing is not a due process violation requiring reversal of discipline imposed. That holding was first made in Public Law Board No. 7008, Award No. 16, and followed by this Board in Public Law Board No. 7120, Awards Nos. 3, 27, and 73. As stated by this Board in Award No. 73, "In the absence of the negotiation of new contract language or citation of contrary authority the Board will not make a different ruling on the procedural issue in this case."

The Board believes, moreover, that a finding made in the earlier cases regarding the requested documentation would also apply here, namely, that "there was nothing in the documentation of a surprising nature, or so complex in nature, that the Organization or the Claimant was prejudiced by not having the material available for perusal prior to the hearing." For example, the Organization could reasonably have anticipated that the documentation regarding the Claimant's bid for the Track Inspector job at Martin, Kentucky, would be introduced into evidence.

In addition, the Claimant told the Charging Officer, Engineer Track Anuszkiewicz, that he had a hardship license. Further, he gave the Affidavit for Hardship License form to his former supervisor, Mr. Brian Holder, to fill out. The form named the Claimant as a defendant in a pending proceeding in the Commonwealth of Kentucky Court of Justice. The fact that someone needs a hardship license to drive a car means that that individual's license has been revoked or suspended.

The Organization and the Claimant should reasonably have expected that in preparing for the Investigation the Carrier likely would attempt to find out if the Claimant had a valid current driver's license and, if not, why it was revoked or suspended. Moreover, since that information is available in the public records it was probable that the

Carrier would obtain the information. Therefore the court documentation introduced into evidence regarding the Claimant's prior arrests for driving under the influence and the suspension of his license for 90 days should not have been a surprise to the Claimant or the Organization.

So far as the Organization's request of the Carrier to be provided with a list of witnesses that the Carrier planned to call to testify at the hearing, no contract provision or award was cited entitling it to such information prior to the hearing. The Board finds that the Carrier's denial of the Organization's request to be provided with a list of witnesses prior to the commencement of the hearing did not violate the Claimant's right to a fair hearing. See Second Division Award No. 10790.

During the hearing the Organization requested that the hearing be terminated and the Claimant exonerated because the charge letter made reference to a CDL and no CDL was required of the incumbent in the Track Inspector position in question. The Organization also noted that Engineer Track Anuszkiewicz referred to the mention of CDL in the charge letter as a "typo." The Board has carefully read the charge letter and finds that the reference to a CDL therein was proper and not a typographical error.

The sentence in question in the charge letter states as follows: "It is alleged that you falsified a bid for track inspector by marking that you had a valid CDL license, when, in fact, you had no valid license whatsoever." The charge letter does not say that a CDL was required for the Track Inspector job. It states that the Claimant marked on his bid sheet that he had a CDL license. That statement is true as the Bid Confirmation document dated September 18, 2010, shows. The charge letter then goes on to state that the Claimant "had no valid license whatsoever." It does not state that he did not have a CDL license. The principal issue for determination in this proceeding is whether or not

the Claimant had a valid driver's license. There is no typographical error in the charge letter. It charges the Claimant with falsifying a bid by claiming that he had a CDL license when, in fact, he did not have any kind of driver's license. This Board must determine whether there is merit to the charge. There is no basis for the contention that the charge should be dismissed because it does not clearly inform the Claimant of the offense with which he is charged or because it is defective in some way.

There was, however, procedural error in this case. One of the co-hearing officers incorrectly ruled that the Organization representative's closing statement was improper and stopped the representative in the middle of his closing. The hearing officer stated, "I would stop you from making a summary of the investigation. The purpose of this is for you to make any statement on behalf of Mr. Goble that would apply to the facts in this case, however, it's not a chance to summarize the hearing from the record." (Tr. 51).

The hearing officer objected to the following statement by the Organization representative: "Mr. Anuszkiewicz testified that if Mr. Goble had a valid driver's license including a hardship license he would be in compliance with the CSX provision. BMW Exhibit 2 confirms he did have a valid driver's license."

The Organization representative had every right to refer to testimony that he believed supported the Claimant's defense and to attempt to show why it supported the Claimant's position. The hearing officer stopped the Organization representative a second time later in his closing, stating, "You're making your interpretation of the evidence that was provided here in the hearing. I would ask that you do not put that in your statement. If you have any new information that you would like to present I would certainly allow you to make that kind of a statement. But for you to sit here and put on the record your opinion of what was given as testimony is not appropriate at this time."

The Board has examined the transcript of the Organization representative's closing remarks and finds that he did not misstate any witness's testimony. What the hearing officer called the representative's "opinion of what was given as testimony" was nothing more than argument in support of the Claimant. The Organization has the right to argue the Claimant's case in its closing so long as it does not misstate the testimony. There was no misstatement, and it was improper for the hearing officer to interrupt the Organization's closing and attempt to restrict the representative's argument in a member's behalf. However, to his credit, the representative persisted in saying what he had to say despite the hearing officer's interruptions, and this Board has had the benefit of the Organization's position in the case. The hearing officer's actions therefore did not amount to prejudicial error and are not a basis for dismissing the charges.

The Board now turns to the substantive issues in the case. The evidence establishes that, as stated in the charge letter, the Claimant falsified a bid for Track Inspector by marking that he had a valid CDL when, in fact, he had no valid driver's license. The bid confirmation email for the Claimant showed that he had a CDL License B with an expiration date of December 12, 2013. The Claimant admitted in his testimony that the information on his bid sheet regarding the CDL was not correct; that, in fact, he did not have a CDL when he submitted his bid stating that he had such a license (Tr. 33).

The Claimant, however, testified that when he bid for the Track Inspector position he was aware that a driver's license was needed for the position and that he did have a valid driver's license, namely, a hardship driver's license. When he reported for the new position, he told Engineer Track Anuszkiewicz, who asked to see his driver's license, that he did not have one, but that he had a hardship driver's license. He testified at the hearing that he was granted the hardship license in a court proceeding on September 22,

the day after the Affidavit for Hardship License was signed (Tr. 22, 23, 27).

Based on the Claimant's testimony that he was granted a hardship license in court on September 22, 2010, the Organization argues that, contrary to the allegation in the charge letter that the Claimant had no valid license whatsoever, the Claimant had a hardship driver's license. The record in this case, however, fails to establish that the Claimant had a hardship driver's license when he bid for the Track Inspector job, when he reported for the job, or at any time thereafter.

No hardship driver's license was ever produced at the hearing. Apparently the Organization believed BMW Exhibit 2, the Affidavit for Hardship License, was a hardship license. Thus the Organization representative, referring to the affidavit, stated, "I'd like to enter in exhibit a copy of a hardship license that was presented on behalf of Mr. Goble and does reflect the fact that he did in fact have a hardship license." (Tr. 16). Claimant Goble testified that he had a hardship license and when asked by the hearing officer if he had documentation to prove it, testified, "Yes, I have a hardship license paper here." (Tr. 21).

In a court of law a judge may take judicial notice of the law. McCormick on Evidence, 2d Ed. (1972) §335: ". . . In the ordinary process of finding the applicable law, the normal method then is by informal investigation of any sources satisfactory to the judge. Thus this process has been traditionally described in terms of the judge taking judicial notice of the law applicable to the case at hand. . . ." Specifically with regard to domestic law, the treatise states, "As to domestic law generally, the judge is not merely permitted to take judicial notice but required to do so" Id. Similarly this Board may take arbitral notice of the applicable law.

The Claimant sought a hardship driver's license under the law of the State of

Kentucky where he resided and where his court case was pending under which he sought the hardship license. It is clear without doubt that the document he presented at the hearing was not a hardship driver's license and that he presented no documentation at the hearing which remotely indicated that he was granted such a license. As the title of the document indicated, it was only an Affidavit for Hardship License. Nothing the Claimant produced showed that he was ever granted a hardship license pursuant to the affidavit.

BMW Exhibit 2, the Affidavit for Hardship License, states in the first paragraph that the affidavit is given "[p]ursuant to KRS [Kentucky Revised Statutes] 189A.420" KRS 189A.420 provides as follows in pertinent part:

Section 189A.420 Required information for issuance of hardship license

Before granting hardship driving privileges, the court shall order the defendant to:

- (1) Provide the court with proof of motor vehicle insurance;
- (2) Provide the court with a written, sworn statement from his employer detailing his job, hours of employment, the necessity for the defendant to use a motor vehicle either in his work or in travel to and from work (if the license is sought for employment purposes);

* * *

- (8) Provide to the court such other information as may be required by administrative regulation of the Transportation Cabinet.

Pursuant to paragraph (8) of Section 189A.420 and related statutory provisions, the Transportation Cabinet promulgated the following regulation regarding a hardship driver's license:

601 KAR 12:060. Hardship driver's license.

RELATES TO: KRS 189A.010, 189A.070, 189A.107, 189A.400-189A.460, 434.650-670, 434.690, 506.120, 514.030-060, 514.070-090, 514.110, 514.120

STATUTORY AUTHORITY: KRS 189A.400-189A.460, 532.356

* * *

Section 1. Issuance of Hardship Driver's License. (1) A person who has been given a court order authorizing the issuance of a hardship driver's license shall apply for the license at the driver licensing issuance office of the circuit court clerk in his or her county of residence.

(2) The license shall be a photo license clearly designated "hardship" on the front of the license.

(3) A person arrested for an alcohol or substance offense shall not be issued a hardship driver's license sooner than the expiration of the minimum license suspension period imposed by the court as established in KRS 189A.010(6), 189A.070, 189A.107, or 189A.410.

* * *

Section 2. Submission of Withdrawal Notice. (1) If applying for the issuance of the hardship driver's license, the applicant shall present:

(a) The court order granting hardship driving privilege;

(b) Except as established in subsection (2) of this section, the driving privilege withdrawal notice from the Transportation Cabinet, Division of Driver Licensing; and

(c) Some form of identification to the driver licensing issuance office.

(2) If the applicant does not have the withdrawal notice from the Transportation Cabinet, Division of Driver Licensing, the circuit court clerk shall contact the Division of Driver Licensing to determine the date of expiration of the hardship driver's license.

Section 3. Eligibility. (1) A person whose Kentucky operator's license has been suspended or revoked as a result of the current charge of driving while under the influence of alcohol or other impairing substances or a person required to make restitution after a conviction of KRS 434.650-670, 434.690, 506.120, 514.030-060, 514.070-090, 514.110, or 514.120 may be issued a hardship driver's license.

* * *

Section 5. Hardship Driver's License Attachments. The circuit court clerk shall:

(1)(a) Attach the yellow copy of the court order to the hardship driver's photo license before it is given to the applicant; and

(b) The hardship driver's license shall not be considered complete or official unless the copy of the court order is attached.

(2) Attach a copy of the court order requiring interlock device installation, if applicable, and

(3) Note on the court order form that additional instructions are attached if the orders, instructions, or restrictions of the court are so extensive that they cannot be written in full. * * *

* * *

Section 7. Cancellation of Hardship Driver's License. (1) The court withdrawing the licensee's driving privilege has exclusive jurisdiction over the issuance of a hardship driver's license.

(2) If the person is convicted of an additional offense that would cause the withdrawal of his or her driving privilege, or reported by a court to have not satisfied an outstanding citation that would cause the withdrawal of the licensee's driving privilege, the Transportation Cabinet shall cancel the hardship driver's license and notify the licensee.

Section 8. Decal Requirements. (1) The decal required by KRS 189A.430 shall be placed in the lower corner of the rear window on the driver's side in a motor vehicle that has a rear window.

* * *

It is clear from the foregoing that the only official hardship driver's license in Kentucky is a photo license with a copy attached of the court order authorizing the issuance of the license. The Claimant produced no such document at the hearing, and there is no reasonable basis for believing that he ever possessed or was issued a hardship driver's license. Not only did the Claimant falsely represent that he had a valid driver's license when he applied for the Track Inspector position in question, but he was untruthful when he told the Engineer Track, who asked to see his driver's license, that he had a hardship license. The Engineer Track testified that when he inquired at the clerk's office in the courthouse, he was informed that their records indicated that the Claimant's license was suspended. The failure of the Claimant to produce either a court order showing that he was granted a hardship license, or the license itself, is corroboration that

the information given to the Engineer Track that the Claimant's license was still suspended was accurate.

Nor did the Claimant deny the testimony of Mr. Holder that after learning that the Claimant had bid into another position he (Holder) called the Claimant and told him that the hardship license obtained pursuant to his (Holder's) affidavit would no longer be good and that he would have to obtain another license. As it turned out, the Claimant had not obtained a hardship license. Nevertheless the Claimant was put on notice that the affidavit that Mr. Holder had filled out and signed would not be effective for his new assignment.

What Mr. Holder told the Claimant was accurate. KRS Section 189A.420, which is set out above, requires that a defendant seeking a hardship driver's license for employment purposes "Provide the court with a written, sworn statement from his employer detailing his job, hours of employment, and the necessity for the defendant to use a motor vehicle either in his work or in travel to and from work" (emphasis added). In addition, KRS Section 189A.430 makes clear that a hardship license permits use of a motor vehicle at specific times and places and for specific purposes and that all other activity with the motor vehicle is prohibited:

189.430 Permit card and window decal for hardship driving privileges - Requirement to carry permit – Penalty for failure to display decal.

- (1) The cabinet, upon a written order of the District Court, shall deliver to the defendant a permit card setting forth the times, places, purposes, and other conditions limiting the defendant's use of a motor vehicle. These terms and conditions shall be set forth in specific terms which identify permitted activity and specify that all other activity is prohibited.
- (2) The grant of hardship driving privileges shall be conditioned upon the defendant having the permit in his possession at all times during which he is operating, or authorized to operate, a motor vehicle.

- (3) The cabinet shall issue a decal, two (2) inches by three (3) inches, to be placed on the rear window of the vehicle to be operated by the defendant. Failure to display the decal shall be a Class B misdemeanor.

The affidavit that Mr. Holder prepared stated that it was necessary for the Claimant to use a motor vehicle to travel to and from work. It did not say that he needed to use the vehicle in his work. Any hardship license obtained on the basis of Mr. Holder's affidavit would not have permitted the Claimant to drive a motor vehicle in his work as was required for the Track Inspector job. Despite being told this by Mr. Holder, the Claimant testified at the hearing not only that he had a hardship driver's license but that the license permitted him to operate a company vehicle in his Track Inspector's position. Neither statement was truthful.

That the Claimant was aware that Mr. Holder's affidavit did not allow him to drive a company vehicle on his Track Inspector job is evident from his testimony that he knew that he was getting the Track Inspector job and that he "needed it [the affidavit] to be . . . for a longer period of time . . . to be available 24 hours a day." (Tr. 46). He therefore altered the affidavit, without Mr. Holder's permission or knowledge, by adding the second sentence to the body of the affidavit: "Expected to be on call 24 hrs a day in case of emergency." He then attempted to rely on that sentence in his testimony as a basis for maintaining that the affidavit permitted him to drive a company vehicle at work. In fact, the unauthorized sentence that the Claimant added to the affidavit could not reasonably be interpreted as permitting the operation of a company vehicle in his work.

At first this Board was puzzled why it was necessary for the Claimant to obtain a hardship driver's license. The Case History introduced into evidence as Carrier Exhibit 7 showed that on June 30, 2010, the Claimant's license was suspended 90 days for the offense of operating a motor vehicle under the influence of alcohol or drugs. As the

Engineer Track testified at the hearing, the 90 days ended on September 28, 2010. (Tr. 13). The Claimant did not report for his job until September 29, 2010. Why did he not simply apply for reinstatement of his regular driver's license on September 29, 2010, after the suspension ended?

The Board believes that the answer to the riddle is that the 90-day suspension was a different case from the case in which the Claimant applied for a hardship driver's license. Thus Carrier Exhibit 7 shows that the 90-day suspension was ordered by the court in Case No. 10-M-00045. The Affidavit for Hardship License, BMW Exhibit 2, was filed in Case No. 10-T-01451. The record is silent as to the date or the length of the license suspension in that case. Whether the Board is right or wrong about there being two separate cases, however, is immaterial since the record is clear that the Claimant did not have a valid driver's license – regular or hardship – either when he applied for the Track Inspector position or when he testified at the hearing in this proceeding.

The Carrier has established by substantial evidence that the Claimant was guilty of falsifying a bid for Track Inspector by marking that he had a valid CDL license when he did not have any kind of valid driver's license, whether CDL, regular, or hardship. The Claimant has been charged with violation of General Regulations GR-2, which provides in pertinent part as follows:

GR-2 All employees must behave in a civil and courteous manner when dealing with customers, fellow employees and the public. Employees must not

* * *

4. Be disloyal, dishonest, insubordinate, immoral, quarrelsome, vicious, careless or incompetent.

* * *

7. Make any false statements or
8. Conceal facts concerning matters under investigation.

The Claimant's conduct in this case violated GR-2, items 4, 7, and 8 .

The Claimant acted dishonestly when he submitted a bid for the Track Inspector and other positions claiming to have a valid driver's license, when he had no valid license. He made a false statement to his supervisor and acted dishonestly when he told Engineer Track Anuszkiewicz that he had a hardship driver's license. He concealed facts concerning matters under investigation when he failed to inform the Engineer Track that, contrary to what he had originally told the Engineer Track, in fact he had no hardship license or any other valid driver's license. He also made false statements and concealed facts throughout the hearing in this case when he testified that he had been granted a hardship license and tried to make it appear that BMW Exhibit 2 was his hardship driver's license. He altered Mr. Holder's affidavit without the permission or knowledge of Mr. Holder.

The evidence is very clear that the Claimant was guilty of dishonesty, making false statements, and concealing matters under investigation in connection with his bid for the Track Inspector position, where he represented that he did have a valid driver's license, but, in fact, had none and then engaged in a course of conduct in an effort to mislead the Carrier into believing that he had a hardship driver's license.

Having found that the Carrier has proved that the Claimant was guilty of dishonesty, making false statements, and concealing matters under investigation, the Board must next determine whether the penalty of dismissal imposed by the Carrier for the Claimant's misconduct was appropriate in the circumstances. The Claimant testified that the reason he applied for a job requiring a driver's license and stated on his bid sheet

that he had a valid driver's license was because "I knew I had my license coming." (Tr. 35). If, in fact, the Claimant submitted his bid for the Track Inspector position in a good faith belief that he would have a valid hardship driver's license in his possession when he reported for work on September 29, 2010, we would have a different case. It still would have been a violation for the Claimant to submit a bid stating that he had a valid driver's license when, in fact, he did not, but, if he actually had a license on the first day he reported for work, the violation would have been a less serious one.

However, the bid award shows that the Track Inspector assignment was not effective until September 27, 2010. According to the Claimant's testimony he was in court on September 22, 2010. It is obvious that on that date the court did not issue an order granting the Claimant a hardship driver's license since, as late as the hearing date herein, November 11, 2010, the Claimant still did not have a hardship driver's license and produced no documentary evidence that the court had ever ordered that he be granted such a license. When the Claimant did not receive a court order granting him a hardship license on September 22, 2010, the only safe and honest course for the Claimant to follow would have been to cancel his bid and either attempt to remain on his existing assignment with Mr. Holder or bid for another job that did not require a driver's license. Instead he reported for the Track Inspector assignment and lied to his supervisor about having a hardship driver's license. Whether his plan was to operate the company vehicle without a license cannot be known because the Engineer Track asked to see his license, and the Claimant was unable to produce it. What he would have done had he not been asked for the license we do not know.

Sir Walter Scott said it well: "O, what a tangled web we weave, When first we practice to deceive!" The Claimant got deeper and deeper into a morass of lies and

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deception as he attempted to mislead the Carrier into believing that he had a valid hardship driver's license. This is the second case against the Claimant involving dishonesty within less than a year. He was previously dismissed on a charge of dishonesty, but was given a second chance and reinstated without back pay by this Board in April, 2010, with the admonition that he was being given the benefit of the doubt and that "[i]t is now up to him to show that he was deserving of the benefit and that there is no cause to question his honesty and integrity or his commitment to fully abide with all rules and regulations of the Carrier." See Public Law Board No. 7120, Award No. 63.

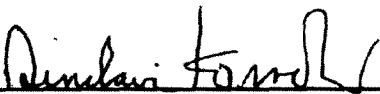
The Claimant's deceptive and dishonest actions in this case, coming so soon after his earlier case involving dishonesty, entitled the Carrier to conclude that he was unable or unwilling to conduct himself in its employ with the honesty and integrity it has the right to expect of all employees and that is necessary for the successful conduct of its business and the welfare of the company and its employees. The Board will not disturb the discipline imposed by the Carrier in this case.

A W A R D

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
February 7, 2011