

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
AWARD NO. 9, (Case No. 9)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE
(Organization File: EN 573502)**

vs

**CSX TRANSPORTATION, INC.
(Carrier File: 2012-127143)**

William R. Miller, Referee and Neutral Member
P. E. Kennedy, Employee Member
R. Paszta, Carrier Member

QUESTION AT ISSUE:

Did the Carrier comply with Rule 25 of the Agreement when it charged R. N. Howard with violation of Operating Rules - General Rule A, General Regulations GR-2 and CSX Ethics Policy and was substantial evidence adduced at the Investigation on June 5, 2012, to prove the charges; and was the discipline assessed in the form of permanent dismissal warranted?

FINDINGS:

Public Law Board No. 7529 finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute.

The Board has thoroughly reviewed the record and will first address the Organization's procedural argument. It argued the Claimant was denied a "fair and impartial" Investigation because three Carrier witnesses testified telephonically. Countless Boards have ruled that telephonic testimony is permissible provided it is intelligible and the respective parties are allowed to examine and cross-examine all witnesses. Review of the transcript shows that the Investigation met the aforementioned standards. It is determined that the Carrier complied with Rule 25 of the Agreement and Claimant was afforded all of his "due process" Agreement rights.

On September 9, 2011, Claimant was directed to attend a formal Investigation on September 20, 2011, which was mutually postponed several times until June 5, 2012, concerning in pertinent part the following charge:

"...to determine the facts and place your responsibility, if any, in connection with information received August 23, 2011 regarding an incident that occurred at approximately 1755 hours, on August 13, 2011, in the vicinity of Irvine, Kentucky, when it alleged that you used a Company Procard to purchase cigarettes, gasoline,

and a drink, all totaling \$103.96, at the Brown County Market, for your personal use.

In connection with the above incident, you are charged with dishonesty, conduct unbecoming a CSX Employee, and possible violations of, but not limited to CSXT Operating Rules - General Rule A; General Regulations GR-2; as well as the CSX Ethics Policy."

On June 25, 2012, Claimant was notified that he had been found guilty as charged and was assessed discipline in the form of permanent dismissal. On July 2, 2012, the Claimant requested expedited handling of his case as provided for in Appendix (N) Expedited Discipline Agreement of June 1, 1999 BMW/CSXT Agreement.

The facts indicate that on August 13, 2011, Claimant who was the Foreman of the R2 Rail Gang possessed and was responsible for a CSX procurement credit card commonly called a "Pro Card". On that date the Pro Card was used to purchase two cartons of cigarettes, fuel for a non-CSX vehicle, and a drink totaling \$103.96 from Brown's Country Market at Irvine, Kentucky. The Carrier asserted that during its review of the matter (prior to the formal Investigation) the Claimant's immediate Supervisor M. Powell discussed the alleged incident with the owners of the Brown's Market and was told that the Claimant and a Ms. LaTonya Myers were the ones who made the purchase. The owners told Powell they recognized both individuals having dealt with them before. Powell questioned the Claimant who stated he did not know anything about the purchase. When the Carrier contacted Ms. Myers, she stated the Claimant took her to the store on August 13th and instructed her to make the purchases. Based upon that information the formal Investigation was convened.

On page 40 of the transcript Ms. Myers read into the record the statement she offered concerning the incident which stated in pertinent part:

"Russell Howard drove us to Brown's Country Market and gave me his card to purchase a carton of cigarettes, gas for his car and soda. He told me to ask them if they could run it as a gasoline purchase because he thought that CSX would not catch him. He said he had done it before and that it would be alright. When I got back to the car to give his card back he asked what name I signed on the receipt and I told him his but I signed whoever's name was on the card. How I was supposed to know-how was I supposed to know what name to sign? He had forgotten about that small detail until I had already done what he asked."

On pages 40 and 41 of the transcript the questioning of Ms. Myers continued as follows:

"Palleschi: The question was is when you said he gave me his card to purchase a carton of cigarettes what card did he give you?

Myers: All I know it was a CSX card, it is a company card is what he told me.

Palleschi: Okay and what did he tell you to-instruct you to do with that card?

Myers: He told me to get the cigarettes and things; he was actually selling the cigarettes to other people to have cash or something to buy drugs. He told me what to do and he asked me to see if they would run it as strictly a gasoline purchase, that way it wouldn't show anything else."

Claimant testified that Ms. Myers a scorned ex-girl friend lied about the incident. He maintained that Ms. Myers stole the Pro Card from his wallet which was in the glove box of his car. He further suggested that he was at Supervisor M. Powell's house in Irvine, Kentucky, on August 13th at the time the purchase was made. On page 72 of the transcript Supervisor Powell could not recall whether or not the Claimant came to his house on the date of the incident, however, it is noted that he was one of the Officers who investigated the incident just days after it occurred. The Carrier suggested that if Powell had any indication that the Claimant was at his home when the purchase was made he would have remembered it during the pre-Hearing review. The Board is not persuaded that Powell's inability to recall the Claimant's presence at his home on August 13th either aids or inhibits the Claimant's defense.

The Organization argued that the case comes down to the testimony of Claimant versus a scorned ex-girl friend, out for revenge, and asks the Board to follow those Awards which stand for the principle that if there is a direct conflict of testimony between the Claimant and the Carrier's primary witness against him with no supporting testimony for either's position it is a "net wash" and the Carrier must lose because it had the burden of proof. The Board takes no exception to the aforementioned logic and/or rationale and if the only testimony offered was that of Ms. Myers and the Claimant those Awards could be applicable, however, the record reveals that the testimony offered at the Hearing was not just "one" against "one". The testimony also included that of the storeowners (Browns) and their written statement. That testimony substantiated that Ms. Brown and her son were both working in their store on August 13, 2011. Ms. Brown was questioned about the incident on pages 29 and 30 of the transcript as follows:

"Palleschi: Okay. Ms. Brown did you identify Mr. Howard as being in the store at the time of this purchase?

Brown: Yes sir, I was there- I was present at the store. I did not wait on him but I was present at the store and I observed him, yes.

Palleschi: And how do you know Mr. Russell Howard?

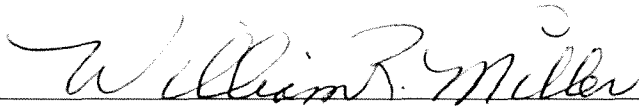
Brown: He'd previously been in the store and cashed a check stub, a CSX check stub, one of our cashiers had cashed it and I had confronted him and had called him on several occasions to try to get my money back for that, but yeah, I've- I know people that owe me money, yes. I recognized him." *(Underlining Board's emphasis)*

Ms. Brown's testimony was not effectively refuted that Claimant was in her store on August 13th and is consistent with Ms. Myers recollection of the incident. It is determined that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant purchased unauthorized items for personal use and was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately eight years of service. Many Boards have determined that theft and/or dishonesty are major offenses for which first time offenders may be dismissed. Review of Claimant's personnel file indicates that three months prior to the instant dispute he was issued a 60 day suspension for making a misleading and dishonest statement to a Carrier Claims Agent. Claimant's violation was of a serious nature and coupled with a prior act of dishonesty the Board finds and holds no reason for mitigating the discipline as it was not arbitrary, excessive or capricious and was in accordance with the Carrier's Progressive Discipline Policy. The discipline will not be set aside and the appeal/claim is denied.

AWARD

Appeal denied.



William R. Miller, Referee

Dated: January 8, 2013