

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
CASE NO. 42, AWARD NO. 42**

**Brotherhood of Maintenance of Way
Employees Division – IBT Rail Conference**

v.

CSX Transportation Inc.

**P.J. Halter, Neutral Member
R.A. Paszta, Carrier Member
A.M. Mulford, Organization Member**

STATEMENT OF CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s decision to dismiss Claimant M. Waddy for the alleged violations of CSX Transportation Operating Rules – General Rule A; as well as the CSX On-Track Worker Rules and Classification – Rules 700 and 707 in connection was on the basis of unproven charges, arbitrary, capricious and in violation of the Agreement (System File D70810213/2013-146574).
2. As a consequence of violations referred to in Part 1 above, Claimant M. Waddy shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement.”

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 this dispute.

Claimant entered service with the Carrier on July 9, 2007 whereupon he established and maintains seniority as a Track Inspector in the Carrier’s Maintenance of Way Department. On April 20, 2013 at approximately twelve (12) noon, Claimant obtained 704 authority from the Dispatcher for a section of track between mileposts CAB 0.0 to CAB 0.9. This section of track was subject to the 707 authority held by Bridge Employee M. Gonzales, the Employee-In-Charge (EIC), from 0930 to 1530 hours. Without notice to or permission from EIC Gonzales, Claimant entered and occupied this section of track. Approximately three (3) hours after Claimant’s incursion into the EIC Gonzales’ 707 authority, the EIC reported it to the Roadmaster.

On May 2, 2013, Claimant received notice of a formal investigation “to determine the facts and place your responsibility, if any, in connection with” an allegation that Claimant “entered a 707 work authority without” the EIC’s permission. The hearing convened on June 6, 2013 and,

based upon the investigative record, the Carrier notified Claimant on June 21, 2013 that the evidence established Claimant's violation of General Rule A and On-Track Worker Rules and Qualifications – Rules 700 and 707. Given these rules violations, the Carrier immediately dismissed Claimant from employment.

By letter dated June 28, 2013 the Organization notified the Carrier of Claimant's "desire to elect 'expedited handling' as is provided for by [the Expedited Discipline] Agreement."

CARRIER'S POSITION:

Entering and occupying track without authority is a major offense under the IDPAP. When the Carrier suspected that Claimant committed this major offense, it withheld him from service pending investigation in accordance with Rule 25. Claimant received a fair and impartial hearing with advance notice of the charges in sufficient detail that enabled Claimant to prepare for the hearing with evidence and testimony. Any assertion by the Organization of procedural improprieties is without merit.

There is ample evidence that Claimant violated the rules because he acknowledged violating General Rule A (obey rules and specials instructions relating to duties) and Rule 707 (EIC holds authority to authorize movement between mileposts). On April 20, 2013 Claimant reviewed the Dispatcher's bulletin but he "missed" the EIC's track authority between mileposts CAB 0.0 and CAB 0.9. Claimant acknowledged that the EIC's 707 authority is controlling over his 704 authority. "Multiple PLB and NRAB awards provide that a Claimant's admission of guilt fulfills the Carrier's burden of proof." [Br. at 4] Additionally, the Carrier asserts that Claimant's violation of Rule 707 established a violation of Rule 700, that is, Claimant did not conduct and complete a job briefing on safety rules to follow for the track he fouled.

EIC Gonzales reported the incident approximately 3 hours after it occurred because, at the time of occurrence, he was on the bridge where use of a phone is not authorized. As the EIC testified, he was "upset" because "I could have passed a train and ran somebody over." Regardless of whether the incident was reported at the moment of its occurrence or 3 hours later, the EIC's comment to Claimant about his movement into 707 track authority without approval - - ok and move forward - - does not insulate Claimant from the consequences of rules violations.

Occupying track without authority is a major offense. This incident of April 2013 is Claimant's third major offense within two (2) years. In September 2011 Claimant accepted a waiver and thirty (30) days actual suspension for a major offense when he failed to follow supervisory instructions causing a delay on work at a project and in June 2011 Claimant accepted a waiver and 30-day actual suspension for a major violation when he failed to operate his on-track equipment at the proper speed and did not stop within one-half the range of vision. Given Claimant's history of rules violations, dismissal is appropriate and not arbitrary or capricious. The claim should be denied.

ORGANIZATION'S POSITION:

Since the Carrier did not produce substantial evidence that Claimant violated General Rule A, Rule 700 and Rule 707, the Board must set aside the dismissal and sustain this claim. In this regard, the Carrier did not establish the charge that Claimant failed to conduct a job briefing (Rule 700). The only evidence offered by the Carrier is the Roadmaster's testimony wherein he concluded that Claimant's violation of Rule 707 (EIC's track authority) shows Claimant did not conduct a job briefing. Claimant testified, however, that he did conduct a job briefing. The competing and unreconciled testimony of the Roadmaster and Claimant do not establish a violation of Rule 700. Consequently, the "Carrier cannot validly claim it met its burden" on all of the charges. [Br. 3]

Although the Organization recognizes the seriousness of the alleged violation, it notes that the Carrier did not consider mitigating factors when it assessed Claimant with the penalty of dismissal. For example, earlier in the day on April 20, 2013 Claimant contacted the EIC to obtain permission to enter a different section of track under the EIC's 707 authority. In other words, Claimant followed the safety rules for track fouled by him prior to this incident. Around 12 noon on April 20 the Claimant engaged the Dispatcher on a job brief to validate his 704 authority. Claimant read the Dispatcher's bulletin but "missed" the EIC's 707 authority; Claimant committed an "honest" mistake and expressed remorse for it which the EIC recognized by responding to Claimant "that was a close call. Don't worry about it." Notwithstanding the EIC's determination that Claimant's mistake was not an issue, the EIC reported the incident to the Roadmaster approximately 3 hours after it occurred.

Claimant obtained 704 authority to protect himself and while he failed to obtain permission to proceed through the EIC's 707 authority, the Claimant did not release his 704 authority so the EIC and four (4) co-workers never were placed at risk. Claimant was traversing through a section of the EIC's authority to inspect another area of track. Claimant did not intentionally or blatantly breach the rules. Claimant's honesty in acknowledging his error is a favorable trait.

In view of these mitigating circumstances, the dismissal is in violation of the Agreement. The Organization requests that the claim be allowed.

CONCLUSIONS:

There is sufficient evidence establishing Claimant's violation of General Rule A and Rule 707 because Claimant acknowledged he violated these rules in his testimony; however, there is insufficient evidence that Claimant violated Rule 700.

The Carrier's evidence for a violation of Rule 700 is the Roadmaster's testimony in response to the hearing official's question:

Q: In your investigation, did Mr. Waddy have a self job briefing?

- A: Under the investigation, by occupying the 707 limits held by Mr. Gonzales – no, I do not think that he had a self job briefing. If he would have had a self job briefing, he would have reviewed the day's bulletins, which would have shown that M.R. Gonzales had a 707 work authority within the limits that he actually occupied with his hi-rail truck.

[Tr. 15]

The record does not establish that the Roadmaster investigated the issue whether Claimant conducted a self job briefing on April 20, 2013. Rather, the Roadmaster concludes there is a violation of Rule 700 because, in the Roadmaster's view, a violation of Rule 707 means that the Claimant did not review the Dispatcher's bulletins. The Roadmaster's testimony is insufficient evidence to establish a violation of Rule 700. It is further diminished by Claimant's possession of the bulletins when the EIC encountered Claimant on track number two in his 707 authority without permission. Claimant testified that he conducted a job briefing but "missed" the EIC's authority. In short, the Roadmaster speculated about, but did not investigate, the issue whether Claimant conducted a self job briefing on April 20, 2013.

Claimant completed the self job brief but he did not apply it on the afternoon of April 20, 2013; this led to his violations of Rule 707 and General Rule A. The Board must determine whether dismissal is appropriate for two rules violations. Although Claimant did not release his 704 authority to provide for movement on the track he occupied, the EIC was unaware of Claimant's intrusion on that track and, thus, the EIC could have released a train or other equipment for movement thereby placing Claimant at risk. As explained by EIC Gonzales, "[i]t still bothered me that – I mean I could have ran him over with a train ... because I could have given a train permission through my limits. If I do not have knowledge that somebody is in my limits and I pass a train, how do I know that person is there?" [Tr. 34-37]

This incident on April 20, 2013 is Claimant's third major offense that, standing alone, can lead to dismissal under the IDPAP. In addition to this major offense, Claimant incurred major offenses in May 2011 and July 2011 for which penalties short of dismissal were imposed. In less than 2 years Claimant has committed 3 major offenses as well as incurred other infractions during six (6) years of service with the Carrier. Under these circumstances, dismissal is not arbitrary or capricious.

In determining that dismissal is appropriate, this Board considered Award 1 and Award 11 as they were cited by the Organization. In those awards none of the charges were proven and the claimants did not have an accumulation of offenses whereas this claim has two proven charges or rules violations which, when placed in the context of Claimant's employment history of offenses large and small, justified his dismissal.

Since the charges are proven and dismissal is not arbitrary or excessive, there is no violation of the Agreement. Consequently, the claim will be denied.

AWARD
Claim denied.

Patrick Halter /s/
Patrick Halter

Signed on this 31st day
of March, 2014