

AWARD NO. 325  
Case No. 325

Organization File No.  
Carrier File No. 2017-223151

**PUBLIC LAW BOARD NO. 7163**

PARTIES ) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION,  
          ) INTERNATIONAL BROTHERHOOD OF TEAMSTERS  
TO )  
      )  
DISPUTE ) CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM:

1. The Carrier's discipline (dismissal) of Mr. J. Ham, by letter dated June 14, 2017, in connection with allegations that he violated CSXT Operating Rules 104.2(a), 104.4(a), 712.23(a) and (b), 2400.1(4) and Maintenance of Way Instruction (MWI) M003C was arbitrary, unsupported, unwarranted and in violation of the Agreement (Carrier's File 2017-223151 CSX).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Ham shall now be '... returned to service, be fully exonerated of all charges brought against him and to be made whole, including all lost pay, benefits and credits.' (Employee's Exhibit 'A-2')."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated March 20, 2008, this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

On April 27, 2017, System Division Engineer Alexander Kurec was informed that Trackman B. M. Roberts had sustained a personal injury while installing switch timbers in Selkirk Yard the day before. At the time, Claimant was working with Trackman Roberts. In connection with this injury,

both employees provided written statements, each contending Trackman Roberts was pulling a spike with a claw bar when the head of the spike broke off. According to their statements, this caused Trackman Roberts to fall backwards. Claimant's statement concluded, "He said he was okay and kept working." In his statement, Roberts said, "When I landed my right elbow slammed into the ballast. I sustained a cut to the elbow and it has since swelled and the joint has become stiff. I am getting x-rays to make sure there are no fractures."

According to the Carrier, Mr. Kurec investigated this incident, reviewing video recordings from the yard and examining the work site and tools. He concluded that Trackman Roberts had been using the claw bar to lift the rail so tie plates could be inserted. The Carrier states that the claw bar was improperly used, and that caused the bar to slip, thereby causing Trackman Roberts to fall. Incidental to his review of the video recording, Mr. Kurec observed that Claimant was working within the red zone of a backhoe at the time.

Claimant and Trackman Roberts were directed to attend a formal investigation at which they were charged with failing to use the proper tools to install tie plates and concealing facts when questioned about an on-duty injury. Following the investigation, both employees were dismissed from service.

The Organization has raised several procedural objections in this case. First, it says the Hearing Officer reopened the investigation after it had been closed. The record reflects that the employees' representative made a closing statement after all witnesses had been questioned. At the conclusion of his statement, the Hearing Officer began to question the representative about his closing statement, and declared that the closing statement was improper because it was not based on

the facts gathered in the investigation. The Hearing Officer was wrong and his questioning of the employees' representative was improper. The representative was not a witness and was not presenting evidence or testimony. This was not, however, conduct that warrants setting aside the discipline, particularly since the representative refused to allow himself to be questioned. This did not really constitute a reopening of the investigation where additional evidence was received after the employees under charge had been asked if they had anything further to add to the hearing.

The Organization additionally objects to the fact that Claimant's discipline letter cited a violation of Rule 712.23, defining the red zone for on-track equipment. The Organization asserts that Claimant was not charged with this rule violation. We agree. There is nothing in the notice directing Claimant to attend the investigation that mentions his working in the red zone of a back hoe. The purpose of the notice of investigation is to inform an employee as to the nature of the charges against him, thereby enabling him to prepare a defense. It is not necessary, under the parties' Agreement, to cite specific rule violations. The employee is, however, entitled to "advance notice, in writing, of the exact offense of which he is accused." Inasmuch as Claimant had not been accused of working in the red zone of the back hoe, it was improper for the Carrier to include that in the discipline notice. The remedy for this procedural violation is that the Board will not consider that offense in its determination of the appropriateness of the discipline imposed.

The Organization also objects to the fact that Claimant was withheld from service pending the investigation. The Discipline Rule of the parties' Agreement specifically permits the Carrier to hold an employee out of service pending the hearing "when a major offense has been committed." It is our conclusion that withholding Claimant from service in this case was authorized by this Rule.

Finally, the Organization contends the Carrier failed to provide it with any information ahead of the hearing, despite a direct request for such information. We find nothing in the Agreement that gives the Organization a right to discovery in disciplinary proceedings.

Turning to the merits, it is the Board's conclusion that the Carrier had substantial evidence to support its charge against Claimant. The record establishes that Claimant knowingly provided false information regarding the injury of Trackman Roberts. Even if we disregard the charge that Claimant was working in the back hoe's red zone, we find that the balance of the charge constitutes a serious offense that calls into question Claimant's honesty. Notwithstanding the fact that Claimant had almost ten years of service at the time of this incident, we find that his dismissal in this case was neither arbitrary nor excessive.

AWARD: Claim denied.

  
\_\_\_\_\_  
Barry E. Simon  
Chairman and Neutral Member

  
\_\_\_\_\_  
Andrew Mulford  
Employee Member

  
\_\_\_\_\_  
Katrina Donovan  
Carrier Member

Dated: 2/4/19  
Arlington Heights, Illinois