

**PUBLIC LAW BOARD NO. 7163
CASE No. 340**

**BMW File No.: D91411717
TFA: 313294
LCAT No.: 2017-225728**

Brotherhood of Maintenance of Way Employees Division)	
Of the International Brotherhood of Teamsters)	
)	
Vs.)	Parties to Dispute
)	
CSX Transportation, Inc.)	

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline [three (3) day actual suspension] of Mr. S. Lang, by letter dated August 16, 2017, in connection with allegations that he violated Operating Rules 104.1 and 2002.3 was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File D91411717/ 2017-225728 CSX).

2. As a consequence of the violation referred to in Part 1 above, Claimant S. Lang shall now have this matter removed from his disciplinary record and be:

‘... made whole for all financial and benefit losses as a result of the violation. Restitution for financial losses as a result of the violation shall include compensation for:

1) Straight time for each regular work day lost and holiday pay for each holiday lost, to be paid in the rate of the position assigned to Mr. Salas at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by Mr. Salas while wrongfully suspended);

2) Overtime pay for lost overtime opportunities based on overtime for any position he could have held during the time the Claimant was suspended from service, or on overtime paid to any junior employee for work the

“Claimant could have performed had the Claimant not been removed from service;’ (Employees’ Exhibit ‘A-4’).”

FINDINGS:

The Board, 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. The Parties to said dispute were given due notice of hearing thereon.

The Carrier hired the Claimant on April 26, 2010. On July 5, 2017, the Claimant’s Manager received a call from his Foreman informing of an incident resulting in damages with an estimate repair cost between \$500.00 to \$1,000.00. The Claimant assisted his Foreman with the backup move in the company vehicle; the two conducted a job briefing. When the Claimant saw that his Foreman was about to hit the signal mast ladder, he shouted for the Foreman to stop. His Foreman failed to do so, which caused damage to the signal mast ladder. His Foreman was looking outside his passenger mirror at the utility post, and thus not looking at his back up man. The Foreman signed a waiver accepting full responsibility for the incident and was the driver of the vehicle. On August 16, 2017, the Carrier informed the Claimant that he had been found guilty of minor discipline and would be assessed a three (3) day actual suspension beginning August 28 and continuing through August 30, 2017, after which he would be able to return to work.

The Carrier issued a Notice of Investigation letter dated August 28, 2017, which stated as follows: “...The purpose of this formal investigation is to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 11:30 hours, on July 5th, 2017, in the vicinity of Elsdon Sub. You failed to have an effective job briefing resulting in damage to CSX property and all circumstances relating thereto...”

After a postponement, the investigation hearing was held on August 3, 2017. Following the investigation hearing, the Claimant received a Discipline Notice dated

August 16, 2017, finding a violation of CSX Transportation Rules 104.1(a) and 2002.3. The Claimant was assessed a 3-day actual suspension and the Organization appealed on August 18, 2017. The Carrier denied the appeal on October 3, 2017. The Organization replied on October 19, 2017 and the Carrier responded on November 27, 2017. On December 21, 2017, the Organization presented an additional rebuttal. After on-property handling between the parties, the case was mutually listed on PLB 7163 for review.

The Board has reviewed the record developed by the parties during their handling of the claim on the property, and considered evidence related to the following to make its determination of this claim:

- 1) Did Claimant receive a full and fair investigation with due notice of charges, opportunity to defend, and representation?
- 2) If so, did the Carrier establish by substantial evidence that the Claimant was culpable of the charged misconduct or dereliction of duty?
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory, or unreasonably harsh in the facts and circumstances of the case?

POSITION OF CARRIER:

- 1) The Carrier contends that the Claimant was afforded a fair and impartial hearing. The Carrier maintains that the Claimant's due process rights were protected and adhered to during the handling of this claim.
- 2) The Carrier further contends that the Claimant and his coworker accounted for the fact the Foreman could not go off the Claimant's hand signal while simultaneously watching his driver-side backing. The job briefing was inadequate. Both the Claimant and foreman failed to take the safe course of action which caused the accident to the signal mast and causing the damage. The Carrier contends that although the Foreman accepted responsibility, that does not relieve the Claimant of his own responsibility. There is substantial evidence that the Carrier has met its burden of proof that the Claimant violated the cited rules.
- 3) The Organization failed to show a violation of Rule 26. The Organization has not enforced a stay of suspension when a case has been appealed. The Carrier argues that for over 17 years, the Organization has not requested enforcement of Section 3 (a) until mid-2016. In reliance on such a practice, the Carrier has

built its computer systems and streamlined BMWED discipline procedures and schedules in which employees serve suspensions without having to wait on the Organization's decision to appeal or request a stay. The Carrier has so heavily relied upon the parties' practice over seventeen (17) years that the revocation of this acknowledged mutual understanding is prejudicial and harmful to the Carrier's interest.

- 4) Moreover, the Carrier contends that the Carrier's assessment of discipline is justified. The Carrier asserts that the Claimant was found culpable for a serious violation which on a first offense carries a disciplinary penalty of up to a 3-day actual suspension. The Carrier maintains the discipline imposed reflects the serious nature of the violation while weighing the Claimant's year of service.
- 5) It is the position of the Carrier that this claim should be denied in its entirety.

POSITION OF ORGANIZATION:

- 1) The Organization contends that the Claimant had properly participated in a job briefing, and the Foreman deviated from the discussions of the job briefing, thus resulting in the incident. The Organization argues that the Carrier's stance that no job briefing occurred or that the job briefing was inadequate is unfounded. The Claimant and his Foreman testified that a proper job briefing occurred, and that the Foreman deviated from the same, resulting in the incident.
- 2) The Organization further contends that the Claimant's Foreman accepted full responsibility for this incident. The Foreman testified to a proper job deviation but failed to adhere to the course of action discussed, resulting in the accident. The Organization maintains that the Claimant should not be held culpable for the independent action of his Foreman.
- 3) Moreover, the Organization contends that the Organization initiated an appeal on behalf of Rule 25, Section 3 and requested that the suspension be stayed until after the Carrier complied with the provisions of Rule 25, Section 3. The Organization maintains that this is a clear violation of the Contract and the claim should be sustained in order to protect the integrity of the Agreement. Based on the Carrier's failure to comply with Rule 25's procedural provisions, the Board must move in favor of the Claimant without review of the merits.
- 4) Lastly, the Organization argues that the Carrier failed to meet its burden of proof, and therefore there is no just cause to discipline.
- 5) It is the position of the Organization that the claim be sustained as submitted.

The Carrier has charged the Claimant with a violation of CSXT Operating Rules 2002.3 and 104.1.

Operating Rule 2002.3 states:

To conduct a job briefing, employees must:

1. Discuss the sequence of job steps;
2. Identify, eliminate, contain, or communicate all potential hazards related to the task(s);
3. Identify any related close clearance locations;
4. Inspect tools and equipment before use;
5. Identify proper personal protective equipment (PPE) for the job task(s);
6. Ensure understanding of the planned sequence of events, and
7. Follow-up to ensure compliance with safe work practices.

Operating Rule 104.1 states in relevant part:

When on duty, employees must:

5. Take the safe course when conditions are not covered by rule.

After consideration of the evidence, the Board has determined that whether the claim is resolved under procedure or merits, the outcome will not change, and an award on merits is preferred. After a careful review of the record, the Board finds that the Carrier failed to establish that the Claimant violated the cited rules. The driver of the vehicle was the Claimant's Foreman. The Foreman not only signed a waiver accepting full responsibility but testified at the investigation, and reasserted his complete responsibility in the incident. Contrary to the testimony of the Manager, the Claimant and his Foreman did have job a briefing in which they discussed all the material variables, i.e. who was moving the vehicle, designation of back up man, a couple of obstructions near the vehicle, tight areas, signal structures, the fiber optic locator pole, hand signals, the window down or up, and so forth. His Foreman explained that he was the driver and the Claimant was the backup man. The Foreman also testified that during the backing move, he failed to follow through with the briefing instruction and took his eyes off the signals of the Claimant and relied on his mirrors. In his own words, the Foreman testified "that I believe it was just my, what's the word I'm looking for, I was trying to keep an eye on him and also the obstructions around me, even though he was controlling me, my back-up move, I also was trying to

take it upon myself to keep an eye on both sides of the vehicle...And it's just my focus just went over to that fiber optic pole. So that's when I lost concentration." It was the opinion of the Foreman that adding a second man would not have made the move safer. The Foreman explained that if the Claimant had complied with the briefing instructions, the incident would not have likely occurred. The Board finds that the actions of the Foreman are independent than that of the Claimant in these circumstances.


In summary, the Board has reviewed and carefully weighed all the arguments and evidence in the record and has found that it is not necessary to address each facet in these Findings. The Board finds that the Carrier failed to meet its burden of proof that the Claimant violated CSXT Operating Rules 2002.3 and 104.1 on the merits of this claim.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

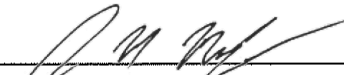


Meeta A. Bass, Neutral Member



Carrier Member

Dated: 5/21/19



Organization Member

Dated 5/21/19