

**PUBLIC LAW BOARD NO. 7163
CASE No. 341**

**BMWE File No.: D91410517
LCAT No.: 2017-224792**

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. K. Salas, by letter dated July 26, 2017, in connection with allegations that he violated Operating Rule 104.6 was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File D91410517/2017-224792 CSX).

2. As a consequence of the violation referred to in Part 1 above, Claimant K. Salas shall 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;’ (Employes’ 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 June 1, 2015. The Claimant's regular start time is 0700. On June 8, 2017, the Claimant notified his manager that he would be thirty minutes late. The Claimant arrived at work at approximately 0755. Another employee had to wait for Claimant to arrive before beginning his duties.

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 to an incident that occurred at approximately 07:00 hours on June 8, 2017, in the vicinity of Garrett, Indiana. You failed to report to work at the designated time and did not notify your manager in a timely manner, resulting with operations being delayed for 1 hour and all circumstances related thereto..."

After a postponement, the investigation hearing was held on July 11, 2017. Following the investigation hearing, Claimant received a Discipline Notice dated July 20, 2017, finding a violation of CSX Transportation Rules 104.6. The Claimant was assessed a 3-day actual suspension and the Organization appealed. The Organization advanced the claim to the Highest Designated Officer by letter dated July 28, 2017. The Organization appeal requested that the Carrier stay the Claimant's suspension per Rule 25, Section 3, and a formal conference was held on September 6, 2017. The Carrier did not grant the stay. The Carrier denied the appeal on October 3, 2017, and the Organization responded on November 27, 2017. 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 Organization asserted no procedural objections. 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's admission along with testimony and the Carrier's exhibits establish the Claimant's Operating Rule violation by substantial evidence. Arbitral precedents state that an employee's admission to a rule violation satisfies the employer's burden of substantial evidence. The Carrier contends that the company has met its burden of proof that the Claimant violated the cited rules, including the admission of the Claimant.
- 3) Moreover, the Carrier contends that the Carrier's assessment of discipline is justified. The Claimant was found culpable for a serious violation which on the first offense carries a disciplinary penalty of up to a 3-day actual suspension. The Claimant's actions had an impact on his coworker's duties and caused an operational delay. The Carrier asserts that the company does not have any obligation to reschedule its workforce to minimize or accommodate the Claimant's conduct. The Carrier maintains that the discipline imposed reflects the serious nature of the offense while weighing the Claimant's years of service, CSX policies, and the Claimant's discipline record.

- 4) The Carrier contends that 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 the past many years that revocation of this acknowledged mutual understanding is prejudicial and harmful to the Carrier's interest.
- 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 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. The Organization maintains that it has the unilateral right to force the Carrier to stay any suspension. Based on the Carrier's failure to comply with Rule 25's procedural provisions, the Board must find in favor of the Claimant without review of the merits.
- 2) The Organization further contends that the Carrier failed to meet its burden of proof. The Organization asserts that arbitral precedents states that factual disputes must be resolved in favor of the Claimant. The Organization maintains that the Carrier did not produce sufficient evidence to establish that the Claimant was in violation of any rules.
- 3) Moreover, the Organization contends that the discipline imposed was arbitrary and unwarranted. The Discipline should be progressive rather than punitive in nature.
- 4) It is the position of the Organization that the claim be sustained as submitted.

The Carrier charged the Claimant with a violation of CSXT Operating Rule

104.6 on July 20, 2017.

Operating Rule 104.6 states in relevant part:

Employees must report for work at the designated time and place. Employees unable to work or who want time off must make the request:

1. To the proper authority, and
2. Sufficiently in advance to allow the vacancy to be filled.

The Organization asserts a procedural issue that the Board must address prior to proceeding on the merits. The Organization alleges that the Carrier violated Rule 25, Section which reads:

"RULE 25 - DISCIPLINE, HEARINGS, AND APPEALS

* * *

Section 3 - Appeal

- (a) Appeal from discipline must be made, in writing, by the employee or on his behalf by his union representative to the carrier's Highest Labor Relations Officer within thirty (30) days after receipt of written notice of discipline. This appeal, when the discipline imposed is suspension, shall act as a stay (except in the case of a major offense) in imposing the suspension until after the employee has been given a hearing.
- (b) At a hearing on appeal, an employee may attend or be represented by his union representative.
- (c) After the appeal has been acted upon, the employee or his union representative shall be advised not later than thirty (30) days after the hearing, in writing, of his decision. If the decision in cases of suspension is to the effect that suspension will be imposed, whether in whole or for a reduced period, the stay referred to in paragraph (a) shall be lifted and the suspension shall be imposed.

. (d) Further appeal will be subject to the procedural provisions of paragraph (c) of Rule 24.

(e) The time limits of this Rule may be extended by written agreement between the Company and the employee or his union representative. In the event the time limits are not complied with, the discipline or right of appeal shall be dropped as the case may be."

The Organization letter appeal dated July 28, 2017 states:

"In accordance with Rule 25 Section 3, we are appealing your decision. This appeal shall act as a stay in imposing the suspension until after the employee has been given a hearing. Accordingly, please accept this as our request for a hearing on appeal under the provisions of Rule 25 Section 3(a) & 3(b) at your earliest available opportunity." (Employee's Exhibit "A-2")

Thus, the Organization appeal of July 28, 2017 requested that the Carrier stay the Claimant's suspension per Rule 25, Section 3 in accordance with the terms of the Agreement. The Claimant was scheduled to and served his suspension beginning August 2, 2017. In defense of its noncompliance, the Carrier argues that the Organization and the Carrier have a seventeen-year practice of scheduling and having a claimant serve a suspension regardless of an appeal, and therefore the Organization has slept on its rights and waived its ability to seek Rule 25, Section 3 relief.

It is not disputed that the parties have developed expedited disciplinary boards to handle disciplinary claims. The claimants in those situations made an election to forego the provisions of Rule 25 and instead have their dispute sent directly to an arbitrator for a decision. Once the employee opted to have the claim heard by the expedited process, the claim was governed by the expedited board process and not Rule 25. In those cases, those particular claimants waived his or her right under the CBA, but not the membership. It appears that as this system developed over the years, more and more claimants opted for the expedited board rather than the traditional forum provided by Rule 25. This Option 1 or Option 2 Avenue to grievance resolution does not create a practice in labor. The fact that the claimants have not exercised their rights to

a stay under Rule 25 because they chose to move under the expedited process in the past 17 years or more does not necessarily mean that the parties have a binding past practice that precludes an individual claimant to elect to proceed under the traditional bargained process under Rule 25 in the future. As the Organization correctly asserts, past practice, even a past practice of long duration, does not overcome or alter a clear and unambiguous contract provision.

However, not all contract violations warrant overturning an employer's otherwise valid disciplinary decision. In this instance, there is a violation of the rules. The Carrier argues that procedural errors should not nullify substantively proper discipline unless it prejudices the Claimant. The Board would extend the Carrier's assertion to include the concept of fairness. Material bargained-for rights afforded to membership through the parties' Agreement are at issue. The Claimant, in this instance, was given notice, hearing and opportunity to cross examine, and independently review the transcript prior to issuance of discipline. The Claimant's due process rights were protected and adhered to during the handling of this claim. However, his procedural rights flowing from the Agreement were violated. This stay provision provides some economic cushion for a Claimant facing discipline; for a person living pay check-to-pay check, he would have some ability to prepare for the economic consequence of discipline. For the claimant who is vindicated at hearing, this represents a no-harm, no-foul provision. So, contrary to the assertions of the Carrier, there is an economic impact resulting in prejudice to the Claimant.

The Carrier argues that the language prohibits the company from effectively disciplining its employees if the employee chooses to file an appeal. The rule does not provide for a time limit for conferencing, and arguably the discipline is left in limbo until the conference is requested by the Organization as the next step in its grievance process. The Board has no authority to add, amend or modify the parties' Agreement. The parties must go back to negotiations to address this "blackhole" in their grievance process.

The Carrier also argues that the company has built its administrative processes around this alleged practice. The company made these administrative changes absent

an agreement with the Organization and never incorporated the alleged practice into the controlling Agreement. The Board cannot resolve how the company internally resolves this matter; the Board must enforce the Agreement as the embodiment of the parties' negotiations.

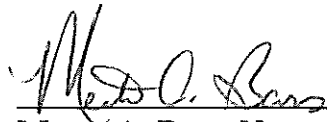
The Board finds a material procedural error in this claim, and the grievance is sustained without a determination on the merits.

AWARD


Claim sustained.

ORDER

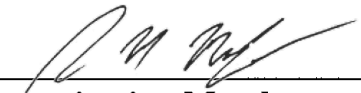
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



Meeta A. Bass, Neutral Member



Carrier Member
Dated: 5/21/19



Organization Member
Dated 5/21/19