

**PUBLIC LAW BOARD NO. 7163
CASE No. 345**

**LCAT No.: 2017-226971
BMWE File No.: D91705217**

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 (dismissal) of Mr. M. Anderson, by letter dated August 31, 2017, in connection with allegations that he violated Rules 104.1(2) and 104.2(b) was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File D91705217/2017-226971 CSX).

2. As a consequence of the violation referred to in Part 1 above, the Carrier shall ‘... clear all mention of the matter from Claimant’s personal record, immediately return Claimant to service with rights and benefits unimpaired, and compensate him for all loss suffered. This loss includes, but is not limited to, any straight time, overtime, double-time or other Carrier provided compensation lost as a consequence of the discipline. It also includes healthcare, credit rating, investment, banking, mortgage/rent or other financial loss suffered as a consequence of the discipline.’ (Employee’s Exhibit ‘A-2’).”

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 September 19, 2000. Following a job briefing on July 19, 2017, the ADE requested that the Claimant remain in order to discuss some other matters. When the ADE mentioned that the subject of the conversation was the slow orders, the Claimant refused to have a discussion with the ADE without union representation. The ADE informed the Claimant that the nature of the conversation was not for purposes of discipline but to discuss business operations. The ADE described his gestures toward the Claimant, from greetings with the shake of hands when they first met to the Claimant's lifting his hands straight up in the air and saying "We're not talking about it without my union." The record reflects that both individuals' voices were raised. The conversation then turned personal in nature when the Claimant made a comment comparing his own experience to that of the ADE. The ADE in turn made a statement about changing shift hours to address the situation. The Claimant still refused, and walked out of the room, and the ADE sent him home. After a brief reflection of the conversation, the ADE made efforts to contact the Claimant to return to work the same day.

The Carrier issued a Notice of Investigation letter dated July 21, 2017, which stated as follows: "... The purpose of the formal investigation is to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 0:7:40 hours on July 19, 2017, in the vicinity of Nashville Terminal. You were insubordinate, failed to follow Instructions from management, disrespectful and belligerent towards your supervisor and all circumstances related thereto ..."

After a postponement, the investigation hearing was held on August 11, 2017. Following the investigation hearing, the Claimant received a Discipline Notice dated August 31, 2017, finding a violation of CSX Transportation Rules 104.1(2) and 104.2(b). The Claimant was dismissed. The Organization appealed on September 6, 2017, and a formal conference was held on October 10, 2017. The Carrier's Highest Designated Officer denied the appeal by letter dated November 3, 2017, and the Organization responded on November 15, 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 Carrier argues that the Conducting hearing officer properly excluded two written statements out of the five written statements from admission into the record when the hearing officer was unable to verify authenticity of the documents. The Carrier also asserts that these statements were also cumulative of the other three witness statements admitted into the record. The Carrier maintains that the Claimant's due process rights were protected and adhered to during the handling of this claim, and there was no harm resulting from the failure of conducting officer to admit the one witness statement.
- 2) The Carrier further contends that the Claimant testified and admitted that he refused to discuss the slow orders without an organizational representative present. The Carrier asserts that the Agreement does not provide the Claimant with the right to union representation in these circumstances. The Carrier maintains that there is no violation of Rule 25 (c) of the Agreement.
- 3) Moreover, the Carrier contends that the Claimant's admission along with other testimony and exhibits adduced at the investigation hearing establish the Claimant's Operating Rule violation by substantial evidence. The Carrier contends that there is substantial evidence that the company has met its burden of proof that the Claimant violated the cited rules, including the admission of the Claimant.
- 4) Lastly, the Carrier contends that the assessment of discipline is justified. The Claimant was found culpable for a major offense of insubordination. Under the Carrier's Individual Development and Personal Accountability Policy, as a major offense, the Claimant can receive a disciplinary penalty up to a dismissal, even for a first event. The Carrier maintains that the discipline was commensurate with the offense.
- 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 Carrier failed to afford the Claimant a fair and impartial hearing, thus depriving the Claimant of his rights under Rule 25 Section 1 of the Agreement which states that "An employee who is required to attend an investigation or make a statement prior to a hearing in connection with any matter which may eventuate in the application of discipline to any employee shall be offered the opportunity to contact his accredited union representative before a statement is reduced in writing." Further, the Conducting Officer refused to allow admission of evidence, a witness statement, to support the Claimant's version of the facts. The Conducting officer should have admitted the documents due to evidence as arguably relevant and contractually required. The Organization maintains that the conducting officer's refusal to accept the witness statement materially deprives the Claimant of their right to a fair and impartial hearing.
- 2) The Organization further contends that the Carrier's witness did not review or introduce Rule 104.1 (2) into the record. The Organization argues that the lack of the Rule means that the Board cannot determine if the Rule was violated. The Organization asserts that the Carrier cannot meet its burden as to this rule violation.
- 3) Moreover, the Organization contends that the evidence does not allow a reasonable person to conclude that the Claimant was insubordinate. Although he did disagree with the ADE, he did so in a respectful manner and did not outright refuse to comply with the instruction. The Claimant attempted to explain to the ADE that his request would prevent him from performing his other job duties.
- 4) Lastly, the Organization argues that the discipline assessed was arbitrary and unwarranted. The Claimant is a seventeen-year employee with only a formal reprimand for missing a defect during track inspection on his record. The conversation with the ADE arose out of the Claimant's concern about performing mandated track inspections, and the record is unchallenged that the ADE's tone of voice and choice of words were extremely harsh.
- 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 104.1(2) and 104.2(b).

and 104.2

Operating Rule 104.2 states in relevant part:

Employee behavior must be respectful and courteous. Employees must not be any of the following:

a. Insubordination...

Operating Rule 104.1. 2

Rule not provided.

The Organization attempted to introduce five (5) witness statements regarding the events surrounding this claim. The Hearing officer admitted two (2) statements after contacting the authors of the statements by telephone and authenticating their statements on the record. One (1) statement was admitted because the witness was in active duty military. The remaining statements were denied because the two (2) authors were unavailable when she attempted to contact them. The Board finds that the Claimant was not materially prejudiced by the failure to admit the remaining two (2) statements.

The Board has carefully reviewed the evidence and arguments advanced by each of the parties. The Board finds that the Claimant was not entitled to union representation in this instance, and his misbelief is not a defense. Flouting authority of a supervisor by disputing their orders constitutes insubordination. The Union asserts that if the Claimant had not been sent home, he would have discussed the slow order process. The Board finds that if the Claimant would have discussed the slow orders from the start, none of the adverse consequences of his decision would have happened (e.g. loss of hours, disruption in the work place, embarrassment and so forth). This is a chain of cause and effect consequences. The Board further finds that the Carrier has established by substantial evidence a legitimate justification for disciplining the Claimant for insubordination.

The Board does not find that the Claimant violated Operating Rule 104.1(2) as it was neither introduced nor included in the record.

The Board should not substitute its judgment for that of management unless she finds that the penalty is excessive, unreasonable, or that management has

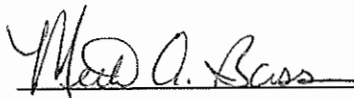
abused its discretion. It is well recognized that insubordination is an offense that a Carrier need not tolerate. However, insubordination entails a broad spectrum of conduct, and in this instance, the penalty of dismissal is unreasonably harsh. Here, there are mitigating factors that weigh in favor of a penalty less harsh than termination. The Claimant is a seventeen-year employee with only a formal reprimand on his record. This is a less serious offense, as demonstrated by the ADE's actions to return the Claimant to work almost immediately following the incident in recognition that the situation got out of hand. The penalty of dismissal violates principles of corrective or progressive discipline, noting that the Claimant's single prior discipline was a written warning. For the aforementioned reasons, the penalty is modified to a time-served suspension.

AWARD


Claim sustained in accordance with these findings.

ORDER

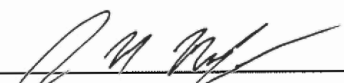
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



Meeta A. Bass, Neutral Member



Carrier Member
Dated: 5/21/19



Organization Member
Dated: 5/21/19