

**PUBLIC LAW BOARD NO. 7163  
CASE No. 347**

**LCAT No.: 2017-227570  
BMW File No.: D21331417**

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

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- 1. The Carrier’s discipline (dismissal) of Mr. M. Mc Quinn, by letter dated October 9, 2017, in connection with allegations that he violated Operating Rules 100.1, 103.2, 104.2(a) and 104.4(a) was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File D21331417/2017-227570 CSX).**
  
- 2. As a consequence of the violation referred to in Part 1 above, Claimant M. Mc Quinn’s charges shall be dropped and he shall be ‘\*\*\* MADE WHOLE MONETARILY, AND THAT ANY FRINGE BENEFITS THAT HE MAY HAVE LOST WOULD BE REINSTATED TO HIM AS WELL.’ (Emphasis in original) (Employees’ 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 June 16, 2008. The Claimant was a member of the 6AR4 team, the jack-and-bore gang. On January 31, 2017 instructions were given to all System Bridge team members not to drive Company vehicles unless given permission by a supervisor. Thereafter, on Tuesday mornings**

during conference calls, employees were reminded of said instructions. On August 22, 2017, an employee of 6AR4 called the Claimant's Manager and notified him that the Claimant was driving a company vehicle home. The distance between Bridgeport and Mineral Wells is over an hour and a half. After being notified of a possible rule violation, the Manager contacted the local police office in Mineral Wells and asked them to go by the Claimant's place of residence. They took a picture of the company vehicle at his premises. After learning the vehicle had been driven to his residence, the Manager contacted the Claimant on August 24, 2017 at approximately 17:10 and asked him where the vehicle was. There is conflicting testimony whether the Claimant stated the vehicle was in the City of Bridgeport or at the hotel in Bridgeport. The Claimant admitted in the conversation that he did drive the Company Vehicle back to the hotel prior to his call, and explained that he had difficulty shuffling vehicles with his girlfriend. His Manager then had the bridge supervisor go to the hotel and verify if the vehicle was at the hotel. The bridge supervisor sat approximately 48 minutes before the Claimant drove to and arrived at the hotel to park the vehicle. The bridge supervisor approached the Claimant and requested his ID and keys. The Claimant surrendered the keys but did not have his ID in his wallet. The Claimant was removed from service for failure to follow instructions.

The Carrier issued a Notice of Investigation letter dated August 28, 2017, which stated as follows: "...The purpose of this Investigation is to determine your responsibility, if any, in connection with information received that at approximately 17:49 hours, on August 22, 2017, in the vicinity of Bridgeport, West Virginia, you utilized Company equipment for personal use, concealed facts under investigation, claimed pay for work not performed, and all circumstances relating thereto..."

After a postponement, the investigation hearing was held on September 19, 2017. Following the investigation hearing, Claimant received a Discipline Notice dated October 9, 2017, finding a violation of CSX Transportation Rules 100.1, 103.2, 104.2(a) and 104.4(a). The Claimant was dismissed and the Organization appealed. The Organization advanced the claim to the Highest Designated Officer by letter dated October 11, 2017, and the same was denied. A formal conference was held on November 16, 2017 and by letter dated December 15, 2017 with no change in the

position of the Carrier. 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 Charge letter provided sufficient information to alert the Claimant of the alleged misconduct that is the subject of the investigation. The Carrier is not required to specify operating rules in the charge letter. The controlling agreement does not contain a discovery provision, and absent such a provision, the Carrier is not required to provide pre-discovery. 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. The Carrier contends that there is substantial evidence that the Carrier 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 assessment of discipline is justified. The Claimant was found culpable for a major offense of dishonesty. 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.
- 4) 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. The Carrier's notice of investigation failed to specify the charges which the Carrier believed the Claimant had violated. The Carrier further failed to honor the Organization's pre-hearing discovery request and denied the Organization the opportunity to prepare a proper defense. The Organization maintains that these actions by the Carrier violate the Claimant's right guaranteed by the Agreement.
- 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.
- 3) Moreover, the Organization contends that the discipline imposed was arbitrary and unwarranted. The Discipline should be progressive rather than punitive in nature. The Claimant was a nine (9) year employee with no prior discipline. The Claimant had worked twenty-one (21) days straight. He had not been able to return home due to the location of his work assignments and had been left without the means to reach his personal vehicle to go home.
- 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 Rules 100.1, 103.2, 104.2 and 104.4.

**Operating Rule 100.1 states:**

Employees must know and comply with the rules, instructions, and procedures that govern their duties. They must also comply with the instructions of supervisors.

When there is uncertainty, employees must:

1. Take the safe course, and
2. Contact a supervisor for clarification.

**Operating Rule 103.2 states in relevant part:**

Do not use CSX equipment or communication systems unnecessarily or for unauthorized personal business.

**Operating Rule 104.2 states in relevant part:**

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

a. Dishonest...

Operating Rule 104.4 states in relevant part:

The following behaviors are prohibited at all times:

a. Concealment of facts under investigation...

The Board finds no material procedural error. The controlling agreement does not provide for specific charges to be stated in the Notice of Investigation. The Notice of Investigation provides sufficient information to apprise the Claimant of the nature of the offense to prepare a defense.

Operating Rule 100.1 states, in essence, that employees are required to know and comply with rules and supervisory instructions. Further, the testimony was unrefuted that employees received instruction on January 31, 2017 as well as during Tuesday conference calls thereafter. In reviewing the alleged violation in this matter, the Board finds that both the rule regarding the use of the Carrier equipment and the supervisory instructions were clearly communicated to the Claimant. The Board finds that there is substantial evidence that Claimant violated Operating Rules 100.1.

Rule 103.2 prohibits employees from using the company equipment either unnecessarily or for personal business. The Claimant admitted to using the company vehicle for personal use without management approval, and his admission, satisfies the Carrier's burden of proof. Although the Claimant may have felt compelled to retrieve his personal vehicle and return home due to the extensive period of time that he worked, the Board is persuaded that the Carrier's prohibition against unauthorized use trumps the Claimant's decision to utilize the Carrier's equipment in a manner inconsistent with the rule. The exigent circumstance of the Claimant only provided the basis for seeking management approval to use the company vehicle. However, the Claimant did not. Consequently, the Board finds that there is substantial evidence that the Claimant violated operating rule 103.2.

There was conflicting testimony about the Claimant's response to his Manager's question regarding the location of the vehicle. The Board finds problematic the admission by the Claimant of a material fact, he drove the company

vehicle home, and then, subsequently in the same conversation, state the vehicle was parked when in fact it was not. The Board cannot defer to a credibly finding of the hearing officer in this instance because there are conflicting facts between the Carrier's witnesses. The Board therefore finds there was insufficient evidence that the Claimant violated Operating Rule 104.2 Dishonesty and 104.4 concealment of facts under investigation. The Bridge Supervisor advised the Claimant he was being taken out of service, and the Claimant's prior conversation with his Manager indicated that he admitted to driving the vehicle home when confronted with the situation. There is no concealment of material facts related to the principle charge of unauthorized use of a company vehicle.

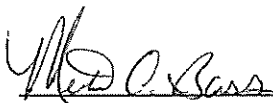
In consideration of the totality of the circumstances in this case, the Board finds that a dismissal is unreasonably harsh, and due to his length of service, the proven charges, and his employment record, an opportunity for correction is warranted. The Board has also considered that the charges of dishonesty and concealment, more serious violations, were not proven. The Board modifies the penalty 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