

**PUBLIC LAW BOARD NO. 7163
CASE NO. 391**

LCAT No.: 18-80135

PARTIES)	BROTHERHOOD OF MAINTENANCE OF WAY
)	EMPLOYES DIVISION - IBT RAIL CONFERENCE
)	
TO)	VS.
)	
DISPUTE)	CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier’s discipline (dismissal) of Mr. R. Gerwitz, by letter dated May 2, 2018, in connection with allegations that he violated CSX Transportation Operating Rules 100.1, 104.7(a) and 104.10(1) was arbitrary, unsupported, unwarranted and in violation of the Agreement (Carrier’s File 18-80135 CSX).**
- 2. As a consequence of the violation referred to in Part 1 above, Claimant R, Gerwitz shall be exonerated, returned to service immediately, with all rights and benefits unimpaired and compensated for all loss including straight time, overtime and other compensation.”**

FINDINGS:

The Board, upon the whole record and all the evidence, finds that:

The Carrier and the Employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Board has jurisdiction over the dispute involved herein. Parties to said dispute were given due notice of hearing thereon.

The Carrier hired the Claimant on July 7, 2007. The Claimant and members of his gang carpooled to work on March 15, 2018. The Claimant received news that his wife was diagnosed with a serious medical condition. The Claimant left work, along with his coworker. It is not disputed that the Claimant did not inform his supervisor of his situation. The Claimant and his coworkers had previously worked through lunch without compensation. The Claimant alleged there was a practice with his supervisor of not reporting overtime in return for time off. This was disputed by his supervisor.

The Carrier issued a Notice of Investigation letter dated March 23, 2018 which stated as follows "...to determine the facts and place your responsibility, if any, in connection with information received on March 15, 2018, at approximately 1400 hours, in the vicinity of Austinburg, Ohio, you left work early without permission from a manager and claimed pay for hours you did not work, and all circumstances relating thereto..."

The investigation hearing was held on April 12, 2018. Following the investigation hearing, the Claimant received a Discipline Notice dated May 2, 2018, finding a violation of Rules 100.1 and 104.7(a), and 104.10(1). The Claimant was dismissed. The Organization appealed the Carrier's decision by letter dated May 2, 2018, and the Carrier denied the same on May 8, 2018. A formal conference was held with no change in the position of the Carrier. This matter is before this Board for a final resolution of the claim.

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 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?

The Carrier contends that the Claimant was afforded a fair and impartial hearing. The hearing office properly postponed the hearing because there were operational audits preventing the investigation from taking place on the original scheduled date. Rule 25 of the Agreement does not require agreement by all parties, but rather a reasonable request. The Carrier asserts that the Claimant was properly held from service. The Carrier also contends that the Claimant admitted that he left the worksite early without permission or notification. The pay was claimed for eight (8) hours when the Claimant had left two (2) hours and fifteen (15) minutes early. The Carrier maintains that the Claimant's admission, along with the other testimony and exhibits, establish his violation of operating rule violations by substantial evidence. Moreover, the Carrier contends that the discipline was justified and assessed in accordance with the Carrier's policy. It is the Carrier's position that the claim should be dismissed.

The Organization contends that the Claimant was denied a fair and impartial hearing. The Organization argues that the postponement of the hearing was not based on a valid reason, and thus, is a violation of the Claimant's due process rights. The Organization further contends that the Claimant did not violate any of the charged rules. The Claimant had worked through lunches on prior occasions and thus not incurred overtime. Per the acceptable practice, there was no issue for the gang leaving early. Moreover, the Organization contends that the discipline is arbitrary and unwarranted. The Claimant had twelve (12) years of seniority with no prior discipline. The Claimant received a phone call informing him that his wife was diagnosed with a serious medical condition, and he left. The Claimant had worked several days without lunch so there was no actual harm to the Carrier. It is the position of the Organization that the claim should be sustained and the Claimant be reinstated to service.

The Carrier charged the Claimant with violation of CSXT Operating Rules 100.1 and 104.7(a), and 104.10(1).

Rule 100.1 Employees must know and comply with 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.

Rule 104.7 reads:

Employees must have the permission of a supervisor to:

- a. Leave work before designated off-duty time, or**

Rule 104.10.1 reads:

Pay must only be claimed:

- 1. For actual time or work performed,**

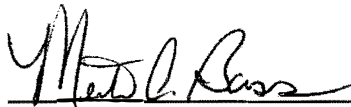
The Board has carefully reviewed the record, and finds no material procedural error in this case. The Board finds that the Claimant violated the cited rules. It is not disputed that the Claimant failed to seek permission of his supervisor before leaving work. The Claimant argued that there was a practice of trading time to avoid overtime. However, a mere assertion of a practice does not establish a practice, especially when the Carrier denies the existence of such a policy, and therefore, the Organization has not met its burden of proof as to the affirmative defense. The Board finds that Claimant violated Rule 100.1 and 104.10.1 under the substantial evidence standard. Nonetheless, the Board finds the penalty to be unreasonably harsh and/or excessive due to the unique facts and circumstances presented herein. The penalty is reduced to time-served suspension with all rights and benefits unimpaired.

AWARD

Claim sustained in accordance with these findings.

ORDER

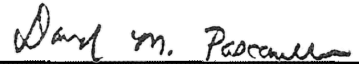
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



Meeta A. Bass
Neutral



Katrina Donovan
Carrier Member



David Pascarella
Organization Member

Dated at Chicago, Illinois, this 26th day of NOV. 2019.