

AWARD NO. 412
Case No. 412

Organization File No. D606017
Carrier File No. 18-22473

PUBLIC LAW BOARD NO. 7163

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION,
) IBT RAIL CONFERENCE
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. P. Hughes, by letter dated March 2, 2018, in connection with allegations that he violated CSX Transportation Rules 100.1, 103.1 and 103.3 was inappropriate (System File D606017/18-22473 CSX).
2. As a consequence of the violation referred to in Part 1 above, Claimant P. Hughes must have all mention of this matter cleared from his record, be immediately returned to service with all rights and benefits unimpaired and be compensated for all loss suffered (including but not limited to those losses referenced in the March 6, 2018 claim letter)."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated March 20, 2008, this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

Claimant, P. Hughes, has been employed by the Carrier since January 6, 2004. At all times relevant herein, Claimant was working as a track inspector. On March 2, 2018, following an investigation, the Carrier found Claimant had violated CSX Transportation Operating Rules 100.1,

103.1, and 103.3 when he used a Carrier fuel card to purchase fuel for his personal use on November 14, 2017. The Carrier dismissed him from service.

The facts of this case are undisputed. On November 14, 2017, Claimant was working as a track inspector. In the company of fellow employee, Vehicle Operator Dickerson, Claimant was observed using a Carrier fuel card to purchase fuel for his personal use. Mr. Dickerson notified Roadmaster Charles Deaton that same day that he saw Claimant use the Carrier fuel card to fill two five-gallon tanks of gas, which Claimant then put into the trunk of his personal vehicle.

After conducting his own investigation, including reviewing charges made under Claimant's ID number and surveillance video from the gas station where the fuel was purchased, Mr. Deaton asked Mr. Dickerson if he would be willing to write a written statement, to which Mr. Dickerson agreed.

Mr. Deaton then spoke with Claimant, who admitted the theft; he asked Claimant if he would be willing to write a statement, to which Claimant agreed. Mr. Deaton provided Claimant a form, titled "Statement," in large letters, upon which to write his statement.

At the top of the form was the following italicized language:

Any employee shall be offered the opportunity to contact his accredited Union representative before a statement is reduced to writing. A copy of his statement, if reduced to writing and signed by him, shall be furnished him and his Union representative.

Mr. Deaton did not ask Claimant whether he wished to contact an Organization representative. Claimant said nothing about the notation on the form and did not request Organization assistance. At no point did Claimant allege that he was unaware of his right to the assistance of a union representative.

Mr. Deaton thereafter provided Claimant and the Organization copies of the statement. Claimant in the statement, and in his testimony at the investigation, admitted that he had stolen gas from the Carrier on the date at issue.

Despite Claimant's admission to purchasing the fuel for personal use, the Organization argues that the claim should be sustained on the basis that the Carrier violated Rule 25 – Discipline, Hearings, and Appeals, of the parties' June 1, 1999 Agreement. Rule 25(c) provides:

An employee who is required to attend an investigation and 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 to writing. A copy of his statement, if reduced in writing and signed by him, shall be furnished him and his union representative.

The Organization asserts that the Carrier had an "affirmative obligation" to make Claimant aware of his right to access his union representation, and the Carrier's simple inclusion of boilerplate language on the statement form was "passive" and insufficient. This procedural violation, the Organization urges, denied Claimant his right to a fair and impartial investigation. We disagree.

As noted in the award in PLB 7529, Case No. 73, which involved the same parties and the same contract language at issue here, the phrase *shall be informed* indicates that some type of action by the Carrier is required to inform the employee of the right to a union representative but the exact shape or details of that action is not spelled out in the rule. In other words, as that board noted, it is left to the Carrier's discretion to act in a manner that shows it "affirmatively inform[ed]" the employee of this right.

As also pointed out in the earlier award, the Carrier's one-page statement form clearly sets forth the right to contact a union representative at the top, quoting verbatim the applicable contract provision. The written notice of Rule 25(c) is easily viewable and obvious, even emphasized in *italics*. Claimant neither requested representation nor indicated that he was unaware of his right to do so.

We find that this notice satisfies the Rule 25(c) requirement that the Carrier “shall (offer the employee) the opportunity to contact his accredited union representative before a statement is reduced to writing.” In our view, the Organization requests, not just that the Carrier affirmatively inform the employee, but that it aggressively do so. That is beyond what Rule 25(c) requires.

Moreover, it is undisputed here that the Carrier complied with the second requirement of Rule 25(c), that it provide copies of the statement to Claimant and his Organization representative. This fact distinguishes this case from PLB 7529, Case No. 73, where in those circumstances, the Board sustained the claim, as well as PLB 7104, Case Nos. 29 and 30, relied upon by the Organization. Those awards therefore do not support the Organization’s position herein.

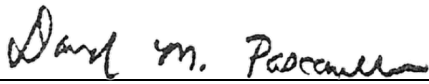
We therefore conclude that there is no procedural violation requiring us to sustain this claim. On the merits, there is no dispute that Claimant committed the misconduct at issue, as he admitted and the Organization acknowledged. The Carrier has satisfied its burden of proof by substantial evidence.

With respect to the penalty, it is well-established that theft is one of the most serious offenses an employee can commit, as it causes irreparable damage to the trust required in an employer/employee relationship. Such conduct is grounds for dismissal, even for a first offense. We also note, as stated by the Carrier, that Claimant was a relatively short-term employee with several other disciplinary incidents on his record. The Organization’s arguments as to the relatively small amount of money at issue and Claimant’s difficult personal circumstances are essentially a request for leniency, but it is well settled that leniency is the province of the Carrier, not this Board. We have no basis for disturbing the penalty deemed appropriate by the Carrier.

AWARD: Claim denied.

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Jacalyn J. Zimmerman
Neutral Member

A cursive signature of David M. Pascarella, positioned above a horizontal line.

David M. Pascarella
Employee Member

A cursive signature of John Nilon, positioned above a horizontal line.

John Nilon
Carrier Member

Dated: June 25, 2021