

PUBLIC LAW BOARD NO. 7163

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES
DIVISION - IBT RAIL CONFERENCE**

vs.

**Case No. 475
Award No. 475
Organization No. DRA833318919
Carrier No. 19-22423**

CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (time served suspension) imposed upon Mr. J. Walker, by letter dated July 31, 2019, in connection with allegations that he was in violation of CSX Transportation Rules 104.4 and 2007.3 was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File DRA833318919/19-22423 CSX).
2. As a consequence of the violation referred to in Part 1 above:

‘... the Carrier must clear all mention of the matter from Claimant’s personnel 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, to include rail-road retirement accrualment (service months and contributions lost) because of the discipline.’ (Employees’ Exhibit ‘A-2’).”

JURISDICTION

The Board upon consideration of the entire record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; that the parties were given due notice of hearing.

FINDINGS

The Carrier hired J. Walker (“Claimant”) on June 19, 2000. The investigative hearing for this incident was held on July 11, 2019. By letter dated July 31, 2019, the Carrier found Claimant culpable of violating CSX Transportation Rules 104.4 and 2007.3 and suspended him with time served amounting to a 52-day suspension. Specifically, the Carrier determined that Claimant failed to report a vehicle incident to his manager before going off duty and being dishonest during the investigation by failing to provide the facts of the incident. The Organization appealed Claimant’s suspension the same day. Thereafter, the dispute was handled according to the ordinary and customary on-property handling process, including the parties discussing the matter on September 20, 2019. The parties were ultimately unable to resolve the dispute and the matter is now before this Board for final adjudication.

The applicable rules are as follows:

Rule 104.4(a) states:

The following behaviors are prohibited at all times: concealment of facts under investigation[.]

Rule 2007.3(3) states:

When operating a company vehicle, employees must: report any incident or damage to equipment immediately to the proper authority[.]

The Organization makes several procedural arguments. First, the Organization argues that the Carrier violated Rule 25, Section 1 (b) because the Carrier had no right to remove the Claimant from service because this was not a major offense. Rule 25, Section 1 (b) requires the Carrier to give written confirmation to an employee that he is being held out of service when a major offense has been committed. Nothing in the June 17, 2019 charge letter (Carrier’s Transcript Exhibit #1) mentions anything in regards to a major offense, the Organization argues. The Carrier counters that the described incident put Claimant on sufficient notice that a major offense was being alleged. Thus, there was no violation of Rule 25, Section 1 (b).

Second, the Organization contends that the Carrier violated Rule 25, Section 1(c) when it failed to give the Claimant the opportunity to contact his accredited union representative prior to reducing his statement to writing. The Carrier counters that prior boards have held that the written advisory on the

Carrier's statement form meets the Carrier's obligation. (PLB 7529 Award 108).

Third, the Organization argues that Claimant was not provided with reasonable prompt advance notice of the exact offense of which he was accused in that the June 17, 2021 charge letter did not state the exact offense of which Claimant was being accused. The Carrier argues that it is well established that such rules are not necessary to provide proper notice since the facts described in the charge letter were sufficient for Claimant to establish a defense.

Fourth, the Organization objected to the Carrier entering written statements into the record without presenting the witnesses and allowing them to be cross-examined in person by the Organization. On this point, the Carrier maintains that investigatory hearings are not court trials in which formal rules of evidence are followed. There is no prohibition of hearsay evidence unless specifically prohibited under the language of the applicable agreement. The admissibility of written statements is not prohibited by the parties' Agreement, past practice on the property, or generally in the industry.

Fifth, the Organization contends that the Claimant was further deprived of a fair and impartial investigation when someone other than the hearing officer rendered the decision in this case. The Carrier counters that a Hearing Officer's duty is to, "assemble an evidentiary record comprised of testimony and documents related to the charged rules violations of the deciding official's review." PLB 7529, Award 72 (Halter) (on-property). And further, Hearing Officers have never made a final ruling on discipline. Therefore, this objection is without merit, the Carrier argues.

On the merits, the Organization maintains that Rule 104.4 was stricken from the record. Therefore, the Carrier did not meet its burden of proof on this charge. Regarding Rule 2007.3(3), Claimant made every effort to follow proper protocol and report the damages after performing his post trip inspection on the subject vehicle. Additionally, any factual disputes must be resolved in favor of Claimant, the Organization argues.

In reaching its decision the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence *de novo*. As such, our function is not to substitute our judgment for that of the Carrier, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain the

charges. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion.

The Board finds that none of the procedural arguments raised by the Organization are a sufficient basis to overturn the discipline. However, the Board does find that there is insufficient evidence in the record to prove the charges against Claimant. The charges here are based on dishonesty and failure to immediately report damage to a Carrier vehicle. The Carrier relies upon the statements provided by Director of Track Rex Carter and Claimant. Claimant stated that the truck slid while leaving his work area but that he did not think that he hit anything. He stated further that when he returned to his hotel, presumably, sometime near 5:00 a.m., he noticed the damage. About thirty minutes later, he texted Carter to, as Claimant stated, inform Carter about the damage. Claimant's text message does not mention the damage but states that the matter is "urgent." Carter's statement references the conversation he had with Claimant after the damage was discovered by a Carrier foreman that same morning. In Carter's statement, he states that Claimant told him that the vehicle was struck by an unknown person when it was parked on the cul-de-sac near the area where Claimant was working.

Carter did not testify during the investigation. Where an uncorroborated statement made outside of the reviewing forum is relied upon as the key evidence without the person being subject to questioning, the resulting statement is inherently unreliable. This is especially true where, as in this case, the charge is dishonesty for concealing information. The Board finds it difficult to understand how the deciding official was able determine whether Claimant was mistaken in his speculation about where or how the damage occurred; Claimant intentionally concocted a story knowing that he caused the damage; or whether Carter had a clear understanding of Claimant's explanation. Given these unanswered questions, there is sufficient doubt as to whether Claimant possessed the requisite level of intent to establish the dishonesty charge, particularly in light of the fact that he did reach out to Director Carter within a reasonable period of time after discovering the damage. Accordingly, the relief sought by the Organization is sustained. The time-served suspension shall not remain on Claimant's personal record. Claimant shall receive back pay for the time served. 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.

AWARD

Claim sustained in according with the Findings above.



Jeanne Charles

Chairman and Neutral Member



John Nilon

Carrier Member



Ross Glorioso

Labor Member

Dated: 1/20/2022