

**PUBLIC LAW BOARD NO. 7163**

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

**Case No. 479  
Award No. 479  
Carrier No. 19-07811**

**vs.**

**CSX TRANSPORTATION, INC.**

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**STATEMENT OF CLAIM**

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) imposed upon Mr. R. Dunn, by letter dated September 24, 2019, in connection with allegations that he was in violation of CSX Transportation Rules 104.3 and 700.10 was arbitrary, unsupported, unwarranted and in violation of the Agreement (Carrier’s File 19-07811 CSX).
2. As a consequence of the violation referred to in Part 1 above, Claimant R. Dunn shall be ‘\*\*\* exonerated of all charges, returning him to service immediately, striking this incident from his record, and be compensated for all lost wages and benefits due in his absence.’ (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 R. Dunn (“Claimant”) on March 5, 2012. The investigative hearing for an incident that took place on August 12, 2019, was held on September 4, 2019. Subsequent to the investigation, by letter dated September 24, 2019, the Carrier found Claimant culpable of violating CSX Transportation Rules 104.3 and 700.10 and dismissed him. Specifically, Carrier determined that on August 12, 2019, at approximately 1112 hours, in

the vicinity of CP Park on the Trenton Line, Claimant failed to move vehicle 476302 out of the foul of the track causing it to be struck by the Q032 resulting in damage to the vehicle. The Organization appealed Claimant's dismissal on October 2, 2019. Thereafter, the dispute was handled according to the ordinary and customary on-property handling process, including the parties discussing the matter on October 11, 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 104.3(d & e), state:

The following behaviors are prohibited while on duty, on CSX property, or when occupying facilities provided by CSX:

d. Carelessness, incompetence, or willful neglect of duties[.]

Rule 700.10, states:

All parked or secured equipment and vehicles must remain a minimum of seven feet from the nearest rail of any track unless protected by the appropriate track protection.

The Organization makes several procedural arguments. First, the Organization argues that the Carrier violated Rule 25, Section 1 (a) because the Carrier had no right to remove the Claimant from service pending the outcome of a hearing. Rule 25, Section 1 (a) states, in pertinent part, that "employees shall not be suspended nor dismissed from service without a fair and impartial hearing...." The Organization contends that removing Claimant from service equated to the issuance of discipline without the benefit of a hearing, as required, and is a clear indication that the matter had been predetermined as to Claimant's guilt. The Carrier counters, citing other awards on this Board, that withholding a claimant from service pending a hearing is permissible under the agreement and does not amount to prejudgment. PLB 7163 Awards 325 and 326 (Simon). Thus, there was no violation of Rule 25, Section 1 (a), the Carrier argues.

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 this argument was not alleged by Claimant but instead by the Organization only in closing argument. Additionally, Carrier asserts that arguing the issue without getting facts on record from the witnesses is not sufficient to lay the evidentiary foundation for a flaw. Even if it were a flaw,

the only remedy is to exclude the statements. However, other statements provided at the time of the incident corroborate Carrier witness statements, it is argued.

Third, the Carrier further violated Rule 25, Section 1(c), was compounded when the Carrier failed to provide the Organization with a copy of the Claimant's written statement. The Organization raised issue with this fact during the formal investigation and during the on-property handling which remained unrefuted by the Carrier. The Carrier contends that the Organization is not entitled to pre-hearing discovery under the agreement. Additionally, the Organization was provided opportunities to recess and review the evidence during the hearing. The Organization also agreed, after being given time to recess and review the evidence, that they did not need additional time to review the evidence and prepare a defense. Therefore, this argument lacks merit according to the Carrier.

Lastly, the Organization contends that the Carrier violated Claimant's express due process rights when it failed to comply with Rule 25, Section 1(d), which states that employees who are accused of an offense shall be given reasonable prompt advance notice of the exact offense of which he is accused. The Organization takes exception to the fact that the Carrier's August 16, 2019 charge letter did not state the exact work rules with which Claimant was being charged which undermines the requirement for conducting a fair and impartial hearing, in its view. The Carrier contends that several Boards have held that the Carrier is not required to list specific rules in the charge letter on this property. Under Rule 25, the Carrier had to provide sufficient information to alert Claimant of the conduct that is the subject of the investigation. The Carrier asserts it did so in the charge letter.

On the merits, the Organization argues that Claimant was not properly instructed by the foreman/backhoe operator Joseph Laporte (LaPorte) as to exactly what track the approaching train was traversing. As stated in testimony, Laporte was the foreman in charge of the workgroup and was the only one in communication with Ronald Bates (Bates) who was the Employee in Charge (EIC). Laporte stated in testimony that he thought the train Q032 was approaching on the #2 track. Ultimately, Laporte was the individual responsible for the safety of the employees working on the tracks and to ensure that all men and equipment are clear prior to giving a train permission through the work area. The Organization asserts that it was Laporte who failed to properly perform these duties as required, resulting in the work truck being struck by the passing train. The Organization notes that not one of the four (4) employees involved were aware that the train was approaching on track #1. Only employee

Laporte was in contact with EIC Bates and assuming the train was on track #2, LaPorte relayed the information incorrectly to the workgroup.

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 no procedural violations that warrant disturbing the decision of the Carrier. On the merits, the Board finds substantial evidence in the record to uphold the Carrier's position regarding the charges against Claimant. Claimant admitted that he was in the foul of track #1. (Hearing Transcript, pg. 70). However, the record is replete with confusion about the communications that occurred on the day of the incident.

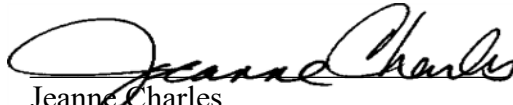
Laporte was the backhoe operator on tie team 6Q14 and in radio contact with EIC Bates on the backhoe's radio. Laporte testified that Bates contacted him when a train would come through and say, "I got a train. You guys need to clear up." Carrier Exhibit A (Hearing Transcript) at 59. Laporte testified that his understanding of *clear* is, "That we're clear, equipment is clear and men are clear of the tracks and it's ok for trains." *Id.* Laporte testified that Bates called and said, "Get clear for a train," and did not specify which track. *Id.* at 63. Employee David Wambold's statement made a specific mention of track #2; however, in testimony he stated Laporte said "There's a train coming, you need, we need to clear." *Id.* at 51 and Carrier Exhibit 10. Wambold testified, "...cause we were working on 2 track, so I assumed we're clearing on the 2 track. I didn't know what track the train was coming in on." (Hearing Transcript, pg. 53). Wambold testified that he was in the passenger seat of the truck when the train hit. Employee David Byrne testified that he was told, "Clear the track. We have a train coming." Carrier Exhibit A (Hearing Transcript) at 56. This testimony corroborated Byrne's written statement.


There is a question as to what information was communicated to Claimant. As a result of this confusion, Claimant made certain incorrect assumptions about the location of the moving train. While Claimant has a

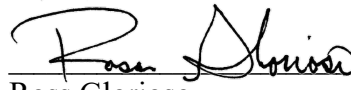
responsibility to not assume but to be clear on instructions, the Board finds confusion surrounding the communication from the foreman to be a mitigating factor sufficient to reduce the penalty imposed. The Board takes note that this is Claimant's third operational offense within one (1) year, and he is on notice that this is a last chance to correct his mistakes and perform his duties in a safe manner. Accordingly, the relief sought by the Organization is sustained, in part. Claimant shall be reinstated with time served. No back pay is awarded. The Carrier is ordered to make the Award effective on or before 30 days following the date the Award is transmitted to the parties.

**AWARD**

Claim sustained, in part.

  
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Jeanne Charles  
Chairman and Neutral Member

  
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John Nilon  
Carrier Member

  
\_\_\_\_\_  
Ross Glorioso  
Labor Member

Dated: 1/18/2022