

AWARD NO. 503

Case No. 503

LCAT File No.: 19-82893

TFA No.: 334397

Organization File: DRA833439719

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) imposed upon Mr. D. Williams, by letter dated September 16, 2019, in connection with allegations that he was in violation of CSX Transportation Rules 103.1, 103.2, 103.3, 104.2, 104.4, 104.7 and CSX Code of Ethics was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File DRA833439719/19-82893 CSX).

2. As a consequence of the violation referred to in Part 1 above: ‘... the Carrier must exonerate the Claimant and give remedy per Rule 25 Section 4 to include loss of overtime and double-time pay. Failure of the Carrier to provide exoneration during this on-property appeal, the Organization makes claim to the following remedy: clear all mention of the matter from Claimant’s personal 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 pay or other Carrier provided compensation lost as a consequence of the discipline to include, but not limited to, retirement service accrual and pension payments, healthcare, credit rating, investment, banking, mortgage/rent or other financial loss suffered because of the improper discipline, none of which are to be reduced by outside earnings gained by the Claimant while not compensated by the Carrier during the discipline period.’ (Employees’ Exhibit ‘A-2’).”

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, D. Williams, had been employed by the Carrier since 2007. At the relevant time, he was employed as an equipment operator. On September 16, 2019, following an investigation, the Carrier found Claimant had committed numerous Rules and policy violations in connection with an incident that occurred on or about July 22, 2019, at approximately 1045 hours, at or near Glasgow, VA, when a CSX Special Agent received a report of his transporting switch ties, which he did not have proper authorization to possess or remove, to his home. The Carrier also found that when questioned Claimant was dishonest and concealed facts when he stated that the ties were transported using a coworker's personal vehicle when in fact he had used a Carrier truck, on Carrier time, to do so. The Carrier dismissed him from service.

On or about July 22, 2019, the Carrier's Public Safety Coordination Center notified Carrier Police Agent A. Sellars of a complaint from Claimant's next door neighbor; Mr. Sellars testified at the investigation that he spoke with the neighbor by phone, and he informed Agent Sellars that Claimant had unloaded a 16 foot wooden railroad tie onto his property from a Carrier dump truck. On July 24, 2019, Agent Sellars went to the neighbor's home, and he provided video footage and photographs confirming the information. Agent Sellars then went to Claimant's home, where he observed the railroad tie in the yard, as well as 12 other ties apparently brought there earlier.

Agent Sellars testified Claimant acknowledged that he removed the tie, which he maintained was scrap, from a worksite and initially told him that a coworker had brought it there

in his personal vehicle. Claimant, Agent Sellars testified, told him he had a manager's permission to remove ties from the jobsite and gave Mr. Sellars his contact information. Mr. Sellars contacted Mr. McKenzie, a new Roadmaster on the territory, who told him he had not given Claimant permission to remove the tie, nor should he have taken his work vehicle home. Mr. Sellars prepared a detailed statement concerning the incident, which was entered into the hearing record.

Carrier Director of Track R. Carter testified at the investigation that Mr. Sellars contacted him on July 25, 2019 and he and Roadmaster G. McKenzie met with Claimant, who admitted he took the crosstie home in a Carrier vehicle. They removed him from service pending an investigation. He subsequently received Mr. Sellars' statement and the supporting documentation. The Carrier also determined that Claimant had been at his home unloading the tie at 14:45 hours, when his workday ended at 1530.

Mr. Carter testified that Claimant did not have permission to take the tie home, nor did he have authority to use the Carrier vehicle for personal use. He also noted that Claimant had been dishonest in initially claiming that his coworker delivered the tie in his personal vehicle. He pointed to the Carrier's Code of Ethics, which specifically states that employees are not to take scrap from Carrier property for personal purposes.

Roadmaster J. McKenzie, Claimant's supervisor, testified at the investigation that he did not give Claimant permission to take the tie home, nor did he allow him to use a Carrier truck to do so. He also testified that Claimant did not have permission to leave work early on the day at issue.

Claimant acknowledged at the investigation that Agent Sellars came to his home and told him they needed to discuss a railroad tie in his yard. He stated that he told Mr. Sellars it was scrap

left after track cleanup. He stated that he told Agent Sellars he had had permission from every Roadmaster he had ever worked with to take ties home after cleanup.

Claimant explained that he was nervous that a special agent had come to his home and acknowledged that he initially gave him a “different” account of how the tie was transported to his home, stating that a coworker had driven it there in his personal vehicle. He stated that as soon as Mr. Sellars left, he wanted to get in touch with him to correct this account and acknowledge that he drove it there in his Carrier truck, but he had no contact information. He added that he tried to talk to Mr. McKenzie first thing the next morning but he was busy, but he gave the true account of events when he met with Mr. McKenzie and Mr. Carter that afternoon.

Claimant acknowledged at the investigation that his work hours were 7 a.m. to 3:30 p.m. He acknowledged that, as shown on GPS data from his Carrier vehicle, he was at his home at approximately 2:45 p.m. He acknowledged that he did not have permission to take the truck home but maintained that he was on his way back to the office, needed to use the restroom, and had the tie on his truck, so he decided to stop at his home. He acknowledged that he passed gas stations and convenience stores where he could have stopped to use a restroom but stated that his home was as close.

Claimant testified that although he did not have permission from Mr. McKenzie to take the tie, and had not requested it, every Roadmaster he had worked with had allowed employees to take scrap ties. The Organization entered into evidence an email from Steve Bennett, a former Roadmaster Claimant explained he had worked with approximately six years earlier. The email stated that it was common practice for the Carrier to give away ties to individuals who requested them, and the Carrier maintained a form to document such occurrences.

The email stated that Claimant had, in the past, requested and been granted permission to take scrap ties in accordance with Carrier guidelines. Claimant stated that he understood the situation to be that he had permission unless informed otherwise, which had not happened. Claimant stated that there had been several Roadmasters after Mr. Bennett, and he had not personally received permission from all of them, but he had overheard other Roadmasters' conversations with other employees in which such permission was granted.

Claimant maintained that he had not broken any Carrier Rules because he was authorized to use its dump truck on a daily basis and had not stolen anything. He acknowledged that he had been untruthful with Mr. Sellars but attributed that to what he described as a brief lapse to nerves.

Claimant also explained that he enters his own time and had worked a full eight hours on the day in question because he had only stopped to use the restroom and the Carrier did not require employees to document such stops. He added that he is entitled to a 30-minute lunch break, which employees also do not document unless they work through lunch. He did not indicate on his time records that he had done so that day. The camera shots entered into the hearing record showed that Claimant was at his home for approximately six and one-half minutes, about 21 seconds of which showed him inside the house, when, he stated, he was using the restroom.

At the outset, the Organization asserts numerous procedural violations of Rule 25 of the parties' Agreement, which, it contends, deprived Claimant of his right to a fair and impartial investigation and requires that the dismissal be overturned. The Organization bears the burden of proof on such issues.

The Organization raises largely the same procedural objections addressed in Award No. 457 of this Board. As in that case, we have considered these allegations carefully and find them

without merit. They are either not supported by reasonable factual conclusions or have been rejected in previous arbitration awards. We therefore proceed to consider the matter on the merits.

The Carrier contends that it has proven Claimant's guilt by substantial evidence, and that the penalty of dismissal is justified. The facts are not in dispute. Claimant admitted that he lied to Agent Sellars, that he left work early, that he took the tie without permission from his supervisors, and that he used a Carrier vehicle to transport the tie. As was held in First Division Award 26753, the Carrier points out, these admissions are sufficient to satisfy the Carrier's burden of proof.

Moreover, numerous Carrier Rules clearly prohibit Claimant's conduct, and his explanations for why his admitted conduct did not violate any Rules must be discounted, the Carrier urges. Whether Claimant previously received permission to take ties is irrelevant; he did not request permission from current supervisors and was not authorized to take the Carrier property in question. Even the evidence presented by the Organization, in the form of an email from a previous Roadmaster, indicated that employees had to request and be granted permission to take ties, in accordance with Carrier guidelines. There was no evidence that Claimant had blanket permission to take ties.

Moreover, the Carrier states, although Claimant stated that his trip to his home followed Carrier practice because he could stop to use a restroom, he admitted that there were numerous locations at which he could have stopped, and it is apparent that the real reason was to deliver the tie. He also lied to Agent Sellars, a police officer, about his use of the Carrier vehicle to deliver the tie to his home.

With respect to the penalty of dismissal, the Carrier notes that Claimant's offenses, stealing and lying, are properly classified as major/dismissible offenses. Numerous arbitration awards,

including Award Nos. 412 and 423 of this Board, have upheld dismissal in such circumstances, even for a first offense, and this case involves the additional circumstance of lying to a police officer. The Organization's arguments amount to a request for leniency, but it is well established that such is the province of the Carrier, not an arbitration board. Therefore, the claim must be denied.

The Organization states that the Carrier failed to meet its burden of proof, and, even if it had, the penalty of dismissal is excessive and unwarranted. The Organization asserts that it has proven that Claimant had permission, never revoked, to take scrap ties home, and that he cannot therefore be guilty of stealing. It also stresses Claimant's testimony that he was taking a bathroom break at his home, in the usual manner, when he dropped off the tie, and that his failure to accurately answer Agent Sellars' questions was due to understandable nervousness and quickly corrected. Therefore, he committed no Rules violations.

Even if the Carrier had established some violations, the Organization urges, dismissal is an excessive penalty and cannot stand. Claimant is a 12-year employee with an unblemished work record and was honest and forthright, at the hearing, about what occurred. There is simply no basis for this level of discipline. The claim should be sustained.

We have carefully reviewed the record in its entirety. As the Carrier states, Claimant admitted the essential facts upon which this discipline is based. He took the tie home without asking for or receiving permission, he used his Carrier vehicle to do so, on Carrier time, and he lied to Agent Sellars about another employee's involvement in the matter.

Notwithstanding the Organization's contrary arguments, these admitted facts are sufficient to satisfy the Carrier's burden of proving the asserted Rules violations. Claimant's contention that he had essentially blanket permission, until revoked by the Carrier, to take ties because six-years

earlier a supervisor had granted, and documented, such authority on occasion when requested is not compelling, and it is well established that taking Carrier property without permission is theft. That offense is compounded by the fact that he also used his Carrier vehicle without permission, and we also find unconvincing his explanation that his trip home was motivated by a desire to use the restroom rather than for the purpose of delivering the tie. He also clearly violated Carrier Rules by lying to Agent Sellars. The Carrier has met its burden of proof.

As for the penalty, it is well established that theft justifies dismissal, even for a first offense and in a relatively small amount. As we stated in Award No. 412:

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. . .

Here, Claimant's guilt is compounded by the unauthorized use of the Carrier vehicle and time to commit the theft, and by the fact that he implicated an uninvolved coworker in an attempt to excuse his conduct. The Organization's arguments on his behalf are essentially a request for leniency, but it is well established, as noted in our Award No. 412, that the granting of leniency is the province of the Carrier, not this Board. We see no basis for overturning the Carrier's determination that dismissal is warranted.

AWARD: Claim denied.



Jacalyn J. Zimmerman
Neutral Member



Ross Glorioso
Organization Member



John Nilon
Carrier Member

Dated: 3/14/2023