

**PUBLIC LAW BOARD NO. 7163**

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

**vs.**

**NMB Case No. 509  
Award No. 509  
Organization No.  
Carrier No. 19-10592**

**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) of Mr. C. Cleary, by letter dated August 30, 2019, in connection with allegations that he violated CSX Transportation Rules 712.29 and 712.17 was on the basis of unproven charges, arbitrary, capricious, unnecessary and excessive (System File 19-10592 CSX).
2. As a consequence of the violation referred to in Part 1 above:  
  
‘... the Organization are (sic) hereby requesting the (sic) Mr. Cleary be returned to work, these charges dropped and removed from him (sic) record, and he receive full back pay from his time lost including any and all overtime received under his Bid in Position. \*\*\*’ (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 C.W. Cleary (248229) (“Claimant”) on June 11, 2021. Claimant was a track inspector in the Midwest Division. Information received by the Carrier on May 1, 2019, revealed that at approximately 1500 hours, in the vicinity of Milepost QSC 42.72, Claimant was hi-railing westward on the Crawfordsville branch and failed to stop short of the road crossing. This failure resulted in Claimant’s Carrier vehicle striking an outside party’s vehicle (a tractor trailer). Damage was caused to both the CSX vehicle and the

outside party's vehicle. The investigative hearing for this incident was held on August 13, 2019. By letter dated August 30, 2019, Claimant was found culpable of violating CSX Transportation Rules 712.17 and 712.29 the Carrier dismissed him. The Organization appealed Claimant's dismissal on September 24, 2019. Thereafter, the dispute was handled according to the ordinary and customary on-property handling process, including the parties discussing the matter on January 28, 2020. The parties were ultimately unable to resolve the dispute and the matter now comes before this Board for final adjudication.

The incident was investigated, and it was determined that Claimant violated the following rules:

In reaching its decision the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. The Board finds substantial evidence in the record to uphold the Carrier's position regarding the charges against Claimant.

As to the hearing procedure, the Organization contends that the behavior of the hearing officer undeniably placed the Claimant and his representative at a disadvantage and illustrated a distinct bias towards a ruling in favor of the Carrier as well as adjourning the investigation hearing and postponing it for an unreasonable period of time. While the Board is not clear why it took over two (2) months to reconvene the investigation, it appears there was concern on the Carrier's part with proceeding with Vice Chairman Perry Rapier as Claimant's representative. That aside, once the matter proceeded, there was no apparent prejudice to Claimant. He was provided representation of his choosing. And the delay did not prevent him from calling any witnesses needed to defend his case.

On the merits, Claimant was dismissed for violating the following rules:

Rule 712.17 states, "When operating on-track equipment, operate at a speed that permits stopping within one-half the range of vision. Do not exceed the speed authorized for trains on the same track or listed in the table below, whichever is less...Rail-Highway vehicle less than 10,001 GVW, Forward – 40MPH...." Rule 712.29 states,

When approaching a highway-rail crossing at grade;

1. Be prepared to stop short of the crossing
2. Do not operate on-track equipment over the crossing unless the way is known to be clear, and
3. If necessary, use a flagman wearing a lime yellow or orange vest to stop highway traffic.

Kevin Vosburgh, a Professional Engineer (P.E.) of Dynamic Safety LLC., who provided expert analysis in crash reconstruction, issued a report reflecting Claimant was responsible for the accident based on the police report and review of data from Claimant's vehicle which showed he was traveling over sixty miles an hour 20 seconds prior to impact. According to the timetable instruction, the speed limit was 40 miles per hour. Nor did Claimant stop in half the range of vision as required by rule 712.29. The GPS data showed the brakes were applied 5 seconds before the collision decreasing the velocity of the car from 35.4 mph to 7.5 mph at time of impact. This was in excess of the speed permitted.

Claimant defends that he had wheel slippage that day due to the rainy conditions confirmed in the police report. Claimant also stated that the truck he drove was ill-equipped in that it should have been equipped with a toggle switch to lower the crossing gates. Despite Claimant's defenses, the police report also indicates he failed to yield, causing the collision. The police report is consistent with the GPS evidence obtained about Claimant's speed at the time just before he struck the trailer and the schematic of the accident showing Claimant struck the rear of the tractor trailer that had control of the lane.

While circumstantial, there is sufficient evidence to conclude Claimant caused the accident due to speeding. "See NRAB, Third Division, Award 39873 (Kenis) ("[T]he circumstantial evidence and the reasonable inferences to be drawn there from provide substantial evidence that the Claimant was the responsible party...."); PLB 7584, Award 32 (MacDougall) (Board found the Carrier met its burden of proof based solely on circumstantial evidence); PLB 7879, Award 1 (Kohn) (circumstantial evidence sufficient to establish Carrier's burden where Claimant submitted fraudulent certification of ongoing illness form)." Here, the weight of the evidence leads to the conclusion that it was more likely than not that Claimant caused the accident due to exceeding the speed limits. This was a violation of the charged rules.

The Carrier argued before this Board that Claimant was dishonest in his reporting of the matter during the investigation. Claimant was not charged with dishonesty in the discipline letter. Therefore, the Board will not address this argument as a separate rule violation.

That leaves the determination as to whether the penalty was reasonable. In this case, Claimant had an 8-year employment history and unblemished disciplinary record at the time of the offense. As referenced above, the Carrier argued that Claimant changed his story during the investigation. The Board notes the record contains sufficient evidence that Claimant was not the beacon of clarity during the investigation. Perhaps it was due to his confusion about advice from his representative. Regardless, the lack of consistent

candor exacerbated the entire incident and serves as an aggravating factor in the assessment of the appropriate penalty. Accordingly, the penalty is modified to a time-served suspension. The Claimant shall be reinstated with all his rights and benefits unimpaired. No back pay is awarded.

**AWARD**

Claim sustained in accordance with the above Findings. The Carrier is directed to comply with this Award on or before thirty (30) days following the Award date below.



Jeanne Charles  
Chairman and Neutral Member



John Nilon  
Carrier Member



Ross Glorioso  
Labor Member

Dated: 1-11-2023