

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7163**

**Brotherhood of Maintenance of Way
Employees Division, IBT**

vs.

CSX Transportation, Inc.

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Case No. 92

Statement of Claim

“Claim of the System Committee of the Brotherhood that:

1. The ninety (90) day suspension and disqualification from all positions requiring a Commercial Driver’s License (CDL) imposed upon Truck Operator T. P. Smith for violations of CSXT Environment Policy, CSX Transportation Operating Rules – General Rules A, F and General Regulations GR-2, GR-14 and GR-16, as well as CSX Safe Way – General Rules GS-1, GS-5 and ES-4 in connection with his alleged failure to properly and safely perform his duties while operating a fuel truck on April 2, 2008 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (Carrier’s File 2008-020303).
2. As a consequence of the violation referred to in Part I above, Mr. Smith shall have the disqualification rescinded and be compensated for all earning opportunities and other benefits deprived him and that his record be cleared of the charges and results therefrom.”

Background

On August 30, 1999 Claimant entered on duty with the Carrier and established seniority as a Vehicle Operator. Beginning January 2007 he served as the Vehicle Operator for the T1 Tie Gang, a System Production Team. While operating the fuel truck in support of the gang on April 2, 2008 Claimant noticed that four 5-gallon buckets of hydraulic fluid had fallen from the truck’s rear with the fluid spilling on the street in Talladega, AL.

Claimant retrieved the buckets but he did not have equipment or supplies to mark off the area or clean the spill. Around 1:00 p.m. Claimant left the scene to obtain the supplies at the gang’s worksite and then return to the spill to clean and control it; however, while driving to the worksite he received a telephone call from his supervisor and the gang’s foreman inquiring about the fuel and oil. Without informing them or other authorities about the spill, Claimant decided the priority was to deliver the fuel and oil prior to cleaning the spill.

At 4:00 p.m. Claimant returned to the scene; present were authorities from state and Federal environmental agencies and emergency management. The Carrier's vendor for hazardous material cleanup was onsite controlling the fluid although a minute amount entered a storm drain. When contacted by his supervisor at 5:30 p.m. Claimant acknowledged the spill and his presence at the scene but he did not inform the supervisor that the spill occurred at 1:00 p.m.

On April 22, 2008 the Carrier charged Claimant with numerous violations of CSXT rules such as conduct unbecoming a CSXT employee and failure to properly and safely perform his duties as well as violations of CSXT environmental policies. The investigative hearing convened on April 30, 2008 and, following a review of the record, the Carrier suspended Claimant on May 20, 2008, for ninety (90) days and disqualified him from positions requiring a commercial driver's license (CDL).

Following a timely appeal by the Organization and a denial of the appeal by the Carrier, as well as conference in June 2009, this claim is before the Board for final adjudication.

Carrier's Position

The Organization raised no procedural allegations on appeal and any presented after the appeal have been waived.

Claimant failed to notify his supervisor or local authorities when the spill occurred at 1:00 p.m. and, when contacted by his supervisor at 5:30 p.m., did not disclose that the incident occurred earlier in the day. An article in the newspaper identified the Carrier as responsible for the spill and an eyewitness cited in the article stated that a Day Care Bus drove through the fluid and skidded into the curb thereby causing a horrifying experience for the children. According to the supervisor, a spill kit should be on the fuel truck and Claimant's responsibility is to notify the supervisor or timekeeper when kits need to be purchased. Claimant could have obtained a kit in the community within one (1) hour and or placed cones around the area to ward off drivers until he returned to the scene.

Substantial evidence shows that Claimant violated CSXT Operating Rules – General Rules A and F, General Regulations GR-2 (a major offense under the IDPAP), GR-3, GR-14 and GR-16, and CSX Safe Way - General Safety Rules GS-1, GS-5 and ES-4. Claimant acknowledged many of the violations levied against him. This acknowledgement is sufficient proof establishing the rules violations.

The discipline is appropriate and not excessive, arbitrary or capricious. Under the IDPAP, a violation of GR-2 is a major offense whereby an employee may be dismissed on the first offense. Claimant's failure to rectify the situation by contacting Carrier officials or other appropriate authorities subjected the public to "severe jeopardy and violated Federal Department of Transportation laws." [Br. at 7] By attempting to escape any responsibility for his actions, Claimant exposed the Carrier to violations of local and Federal statutes in addition to his acknowledged culpability of work rules and environmental policies.

Organization's Position

Under Rule 25(b) an employee may be withheld from service prior to an investigative hearing only when a major offense occurs. There was no property damage or injuries due to the spill and Claimant was not cited by state or Federal authorities. Since there was no major offense in connection with the spill, the Carrier's removal of Claimant from service prior to his hearing violates Rule 25(b). Numerous awards support the Organization's position that the Carrier violated the Agreement in this situation. [Br. at 9-10] Therefore, the instant claim must be sustained.

Notwithstanding the violation of Rule 25(b), the Claimant "does not deny some degree of culpability for his failure to follow certain Carrier rules" but there are mitigating circumstances to warrant a lesser penalty. At the hearing Claimant was candid and straightforward in his responses and never deceived the Carrier about the spill on the street. Claimant maintains a spill kit on the fuel truck but, pursuant to his supervisor's instructions, Claimant distributed all of the kits to the gang and notified the timekeeper to order more kits. Since there was no kit available for Claimant's fuel truck, he was precluded from cleaning the spill when it occurred. Moreover, Claimant's judgment or decision-making was directed to complying with the supervisor's and foreman's instructions to deliver the fuel and oil to the gang's worksite instead of remaining at the scene to control the spill. As soon as Claimant delivered the fuel and oil to the gang he returned to the scene to clean and control the fluid.

Given the supervisor's instructions to deliver the oil and fuel and distribute all spill kits to the gang thereby leaving none for the fuel truck, the Organization asserts there is a shared responsibility for the incident on April 2, 2008. Finally, Claimant has over ten (10) years of service with no similar discipline. These mitigating circumstances - - cooperating fully with the investigation, acknowledging some fault, shared responsibility, 10 years of service - - show that the discipline imposed is excessive and a more favorable outcome for Claimant is warranted.

Findings

Public Law Board No. 7163, upon the whole record and all the evidence, finds that (1) the parties to this dispute are Carrier and Employees within the meaning of the Railway Labor Act as amended, (2) the Board has jurisdiction over this dispute and (3) the parties to this disputes were accorded due notice of the hearing and participated in this proceeding. The Board recognizes its role and authority is circumscribed and does not encompass a *de novo* review of the proceeding. Within that framework, the Board addresses the issues presented by the Carrier and Organization in their submissions.

The Organization's assertion that the Carrier violated Rule 25(b) when it removed the Claimant from service prior to the investigative hearing was not presented during the on-property proceedings. The Board finds this assertion is not properly placed before it and, therefore, will not be considered at this late stage in the proceedings.

As for the substance of the claim, the Board finds substantial evidence in the record to support discipline of Claimant. In this regard, Claimant acknowledged that he did not comply with certain rules. For example, General Rule A (know the rules and obey them and special instructions relating to duties); General Rule F ("promptly report by the quickest means to the proper authority ... [a]ny unusual condition that may affect the safe, efficient operation of the railroad"); GR-2 (must not willfully neglect duties, endanger life or property); GR-14 (an employee "observing any condition that could endanger persons or property must" correct the condition, if feasible, or report it to the proper authority); GR-16 (perform assigned duties in the most efficient manner consistent with safety); GS-1 (observe local, state and Federal laws and regulations related to job duties); GS-5 (immediately report to the train dispatcher or supervisor all incidents involving equipment and any other incident involving loss or damage to CSX property); ES-4 (comply with Material Safety Data Sheet instructions when handling any hazardous material by clearing the area and notifying proper authorities).

The Organization asserts there is a shared responsibility between Claimant and the supervisor as the supervisor instructed Claimant to (i) deliver the oil and fuel and (ii) distribute all spill kits to the gang thereby leaving no kit on the fuel truck. The asserted shared responsibility is assessed in the context of real-time events. That is, Claimant decided not to disclose the spill to the supervisor when the supervisor inquired about the fuel and oil delivery and Claimant could have obtained a spill kit in the Talladega area within one (1) of the spill (1:00 p.m.) thereby obviating the drive back to the gang's worksite (where there were no spill kits) which delayed his return by three (3) hours (4:00 p.m.) to the scene.

Given the evidence supporting rules violations that encompass a major offense in job performance and safety and, in turn, broach Federal, state and local laws as well as tread on the public's safety, the 90-day suspension is not arbitrary, capricious or excessive.

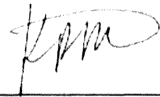
The disqualification from positions requiring a CDL, however, is excessive. Aside from Claimant's errant judgement displayed in this claim, his employment history shows adherence to the Carrier's work expectations and norms and capable of corrective learning from this incident. Barring a 10-year employee from operating vehicles requiring a CDL for the duration of his career or service time with the Carrier is void of corrective design and subjects Claimant to continuing punishment rather than rehabilitation. Therefore, the disqualification is rescinded.

Award

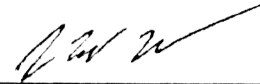
The claim denied in part and sustained in part. That part of the claim addressing the suspension is denied but the part of the claim regarding the CDL disqualification is sustained. The CDL disqualification is rescinded effective the date this Award is signed.

PLB 7163
Case 92, Award 92
Claimant T. P. Smith

Patrick J. Halter /s/
Patrick J. Halter
Neutral Member
Award No. 92



Rob Miller
Carrier Member



Andrew M. Mulford
Organization Member

Dated on this 20th day
of August, 2014