PUBLIC LAW BOARD NO. 7529
CASE NO. 106
AWARD NO. 106

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION – IBT RAIL CONFERENCE	)	
(Organization File: D13909815)	)	**PARTIES TO THE DISPUTE**
vs.	)	
CSX TRANSPORTATION, INC.	)	
(Carrier File: 2015-194262)	)	

STATEMENT OF CLAIM:
"It is my desire to appeal the discipline assessed to me and to obtain a decision as quickly as possible. Therefore, I hereby elect to have said discipline submitted to Public Law Board No. 7529. I understand that the Neutral Member of Public Law Board No. 7529 will base his/her decision on the transcript of my hearing, my prior service record, the notice of my hearing, the notice of discipline and the discipline rule of the Maintenance of Way Agreement."

FINDINGS:
The Board, upon consideration of the entire record and evidence herein, finds that the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Agreement, as amended, that this Board is duly constituted by Agreement dated February 15, 2012, that this Board has jurisdiction over the dispute involved herein, and that the parties were provided due notice of the instant proceedings. The parties have been unable to resolve this issue and they have placed the issue before this Board for adjudication.

After a thorough review of the record, and a hearing on this matter held on September 26, 2016, the Board concludes that the Claimant in this case was a Maintenance of Way employee on the dates in question in this claim.

The Carrier hired the Claimant on October 24, 2011. Roadmaster Kyle Chafin testified he conducted a review of track inspections on July 22, 2015, and identified discrepancies with Claimant's FRA inspection reports. In particular, Mr. Chafin testified the review indicated Claimant didn't conduct certain track inspections on Saturdays, but he claimed pay for in the months of June 2015 through July 2015. Mr. Chafin submitted copies of the inspection reports and testified Claimant claimed time/pay for the inspections, but didn't receive any EC-1 authority to occupy the track. Additionally, after the Organization questioned him about conducting the inspections under a rule not requiring EC-1 authority, Mr. Chafin testified it would be nearly impossible for the Claimant to conduct the inspections under Rule 705 because of the distance he would've been required to walk.

The Claimant testified and admitted that he failed to complete heat inspections as required.

The Claimant further testified that he was working on the Saturdays in question, but could not remember what he was doing and did not complete any reports on the dates in question. After a review of the evidence and testimony presented during the hearing, the Carrier determined the Claimant violated CSX Transportation Operating Rule 100.1, CFRA 213.241, MWI 2006-01 and FRA Rule FR 213.118. By letter dated September 4, 2015, Claimant was dismissed from service.

The Organization appeals that decision to this Board.

POSITION OF THE ORGANIZATION:
The Organization contends that the Carrier failed to comply with Rule 25 of the CBA. They say that there is nearly a decade of the Carrier putting in the Rule numbers, alleged to have been violated, in the Notices of Investigation. They say that the Hearing Officer failed to allow this evidence into the record and that, in itself, is a violation of a fair and impartial hearing. They also say that the Carrier was out of time on the charges since the events were alleged to have occurred in June and July, yet the Notice of Investigation did not issue until August 5, 2015.

With respect to the charge of a violation of Rule 100.1, they point out that this Rule was not entered into evidence, and thus this allegation is invalid.

They say that the Carrier failed to meet its burden of proof and that the discipline assessed was excessive.

POSITION OF THE CARRIER:
The Carrier says that the Notice of Investigation was sufficient. The Carrier does not dispute that they have some history of putting Rules into Notices of Investigations on this portion of the property. However, they say that there is evidence of an award by Ann Kenis approximately 10 years ago upholding the lack of need for such Notices. This, they say, indicates that the practice did not occur 10 years ago. They also say that they have not put this information in Notices for over a year now.

With respect to the Hearing Officer failing to allow certain evidence in, they say that any procedural irregularities are cured by the admissions of the Claimants on the merits. They did, at the hearing before this Board, agree to drop the Rule 100.1 charges.

With respect to the other infractions, they pointed this tribunal to the admission in the record. Thus, they say, their burden of proof has been met.

With respect to the quantum of discipline, they say that dismissal is appropriate given the breach of trust of the Claimant.

RESULT:
In respect to the Notice of Investigation, this Board finds that it was sufficient. The Claimant was given enough information to know the case to be met. That is all that is required in such cases, absent a specific CBA provision to the contrary. The parties did not point the Board to any such CBA provision. With respect to the practice argument, a past practice does not get

elevated to an unwritten (and yet enforceable) term of the CBA unless it can be proven to have existed for an extended period of time, consistently across the property. The facts before this tribunal show a mixed practice. Thus, the Carrier has introduced sufficient evidence to overcome the past practice argument. The Hearing Officer did refuse to allow evidence of the past practice in, when it was tendered by the Organization. This is a dangerous practice. The Carrier is NOT correct that an admission on the merits overcomes any procedural defect. When the parties bargain for procedural safeguards, those that ignore them do so at their peril. In any case with a substantial procedural defect, an arbitration panel should not get to the merits of a case. To do so is to exceed their authority and lays them open to an application to vacate an award. However, as explained in this case, even if this Board were to have received and accepted evidence of 9 years of practice of putting Rules in Notices, this still would not have changed the Board's procedural ruling on the requirement to include Rules in Notices.

Turning to the timeliness of the Notice, the Board accepts that, while the actions of the Claimant occurred in June and July, they were not discovered by the Carrier until late July. The Notice was issued in early August. This is in compliance with the CBA.

As a result, this Board dismisses all procedural objections.

Turning to the merits of the case, the Board finds that there is sufficient evidence for the Carrier to have met its burden of proof, based on the admissions of the Claimant and the evidence in the transcript.

The Board finds no reason to interfere with the quantum of discipline assessed in these circumstances.

AWARD:
The claim is denied.

Roger K. MacDougall
Chair and Neutral Member

Feb 17, 2017 Chicago, IL