

**PUBLIC LAW BOARD NO. 7529**

**Case No. 115**  
**Carrier File: 2015-198396**  
**System File: D29306615**

**PARTIES  
TO THE DISPUTE**

**Brotherhood of Maintenance of Way Employes  
Division of the International Brotherhood of Teamsters**

**VS.**

**CSX Transportation, Inc.**

**Arbitrator: Sherwood Malamud**

**Decision: Claim Sustained, in Part**  
**Employee: B. Cassady**

**Statement of Claim:**

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

*1. The Carrier's dismissal of Claimant B. Cassady for the alleged violation of CSXT Operating Rules 100.1, 104.3, 104.4, 401.3, 712.36, 1000.1 and CSXT Safeway Rule GS-28 was without just and sufficient cause and in violation of the Agreement (System File D29306615/2015-1 98396 CSX).*

*2. As a consequence of the violation referred to in Part 1 above, Claimant B. Cassady shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement."*

Claimant submits this Claim to this Board by stating:

*It is my desire to process the discipline assessed to me and to obtain a decision as quickly as possible. Therefore, I hereby elect to have said discipline submitted to Special Board of Adjustment No. 7529. In so electing, I understand that the Neutral Member of Special Board of Adjustment 7529 will base his decision on the transcript of my hearing, my prior service record, the notice of my hearing, the notice of discipline and Rule 25 of the Maintenance of Way Agreement.*

**Findings of the Board:**

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

On November 20, 2015 Division Engineer M.D. Ramsey dismissed Claimant B.D. Cassady from his employment with the Carrier based on the evidence and testimony produced at an investigative hearing held on November 5, 2015. Division Engineer Ramsey concluded that Claimant violated CSXT Operating Rules 100.1, 104.3, (D, E), 104.4 (A), 1000.1, 401.3, and 712.36; as well as CSXT Safe Way Rule GS-28 for his conduct on July 31, 2015. Claimant began his employment as a Track Inspector on April 5, 2010. He successfully bid for the Foreman position six months prior to this incident.

On July 31, 2015, Claimant piloted a Loram Rail Grinder through a switch causing \$4800 damage to the switch. It was his first time on a Rail Grinder. The Rail Grinder is operated by the contractor's employee who drove the Grinder, a rail car designed to grind track, over the switch. The track was not aligned for movement of the Rail Grinder. Claimant could see from his position in the Rail Grinder that the switch was aligned against movement. Movement of the Rail Grinder violated Rule 401.3.

The contractor's operator had been at this location. He was aware of the sequence that was supposed to occur. What was supposed to happen at the time the Rail Grinder was to move was the following. The Rail Grinder was to come to a complete stop. Claimant should have climbed down off the Grinder to hand throw the switch, since the machine was coming off the siding to the main track.

Assistant Road Master Pelfrey supervised the operation of the Rail Grinder. He observed movement of the machine from the rear windows. Claimant monitored the forward movement of the machine. Due to a family crisis that day involving a custody dispute related to his daughter, Claimant monitored his cell phone. After the damage was done, Pelfrey examined Claimant's phone. He found no evidence that Claimant was on his phone while piloting the Rail Grinder. If he were on his phone he would have violated Rule 1000.1.

**Procedural Objections:**

The Organization argues that Claimant was denied a fair and impartial hearing when the Carrier's investigating supervisor who filed the charges, Assistant Division Engineer D.D. Wheatley, failed to specify in the charging letter dated August 5, 2015 the Rules Claimant was alleged to have violated. This Board has previously stated that the Agreement does not compel inclusion of the Rules violated in the charging letter. In two awards issued by this Board, PLB 7529 Award No. 106 issued February 17, 2017, Arbitrator MacDougall ruled that the evidence supported a finding of a mixed practice relative to a mandate to the Carrier to include reference

to the rules violated in the charging letter. Accordingly, this Arbitrator in PLB 7529 Award No. 114, citing First Division Award No. 26604, Arbitrator Lisa Kohn rejecting this very argument.

In the record of this case, the Organization included many awards that reflect that the Carrier did set forth the Rules violated in the charging letter. The Organization attempts to establish a practice by showing that the Carrier for some years had included reference to the Rules allegedly violated by the Claimant's alleged conduct. The reference to the Carrier's past conduct standing by itself does not necessarily establish a past practice. The Organization must demonstrate that the Carrier would withdraw the charges, when the Organization called its attention to the failure to include the Rules in the charging letter. The Organization asks the Arbitrator to dismiss the case for the failure to set out the Rules as the deciding factor to establish that Claimant was not accorded a fair hearing. The Organization's evidence does not establish the existence of a mutually recognized practice. There is sufficient detail in the notice of charges as to alert Claimant as to the basis of the investigation.

The Organization states Claimant was denied a fair hearing in this case, due to the investigating supervisor's refusal to provide the evidence he had collected to the Organization, when it requested that information. The charging supervisor responded; he was not compelled to do so. As a result, the Carrier's hearing officer had to take recesses to allow the Organization's representative the opportunity to review the evidence submitted by the Carrier at the on property investigative hearing.

The statement, "I am not required to do so," particularly, in this case when the evidence had been collected and there was no demonstrable reason for refusing its production is supported by the absence of a contractual provision compelling the production of such evidence before the hearing. However, at a minimum, such a response may result in delay. The denial of the request does not support a finding of a denial of a fair hearing.

### **The Level of Discipline:**

D.D. Wheatley states in the charging letter that:

The purpose of this formal investigation is to determine the facts and place your responsibility, if any, with an incident occurring on July 31, 2015 at approximately 1650 hours in the vicinity of EE Big Sandy switch, you were piloting a loram rail grinder while you were using your cell phone, ran through a mainline switch, concealed facts under investigation, and all circumstances related thereto.

Claimant admitted he was responsible for the movement of the Rail Grinder over the switch. He acknowledged he should have exercised closer supervision over the contractor's operator (Rule 712.36). He saw the switch was aligned against the movement to the main track. The activity that failed to occur, his climbing off the Rail Grinder and hand throwing the switch, is not just an oversight. It represents a major action and responsibility.

He denies he was talking or texting on his phone in violation of Safety Rule GS-28. The evidence supports that denial. Pelfrey immediately checked Claimant's phone for activity. However, his phone was on contrary to the safety rule. He was checking it to ascertain if his wife had sent him a text. His phone did serve as a distraction, contrary to the Rule. The violations of these Rules contributed to the incident of driving the Grinder over the switch.

The Carrier charges Claimant attempted to cover-up the movement over the switch and the damage it caused. The Carrier's charge is based on the transcription of Claimant's contemporaneous statement when the incident occurred. He said, "There are too many motherf— on here to hide it." He then called Steve Gibson, the bid Operator to notify him that the Rail Grinder ran through a switch. Subsequently, Claimant fully cooperated with the investigation, and he took responsibility for what occurred. The above quote does not constitute substantial evidence of concealment. It represents an utterance just after the incident. Claimant did not act to implement what he said. The evidence establishes he did not engage in any conduct to conceal what had occurred. The Carrier failed to meet its burden of establishing that Claimant took any action to conceal this incident.

If there were substantial evidence of concealment, the Board would have sustained the discipline. Since the evidence is so clear that claimant did not conceal the incident, the appropriate discipline is a 30-day suspension.

**Award:**

The claim is denied in part and sustained in part. The Carrier established by substantial evidence that Claimant violated Rules 100.1, 104.3, (D, E), 401.3, and 712.36; as well as CSXT Safe Way Rule GS-28. The Carrier failed to establish that Claimant violated Rules 104.4 and 1000.1. Within 30 days of this Award, the Carrier shall reinstate Claimant to his former position with back pay and benefits, less the 30-day suspension, all calculated in accordance with Rule 25 Section 4(d).

Date: June 22, 2017



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Sherwood Malamud  
Neutral Member

PUBLIC LAW BOARD 7529

Brotherhood of Maintenance of	)	Award No. 115
Way Employees, Division of the	)	Carrier File: 2015-198396
International Brotherhood of Teamsters	)	System File: D29306615
	)	
and	)	
	)	
CSX Transportation, Inc.	)	

**CARRIER MEMBER'S DISSENT**

**I. BACKGROUND**

On July 31, 2015, Claimant piloted a Loram Rail Grinder through an improperly lined mainline switch causing approximately \$4800 in damage and subjecting the entire team to safety risks. It was discovered after reviewing the inward facing cameras Claimant was utilizing his personal cell phone which caused a distraction and ultimately lead to the incident. Immediately after the incident, Claimant was asked by his supervisor whether he was on his cell phone and Claimant advised he was not on his phone. Claimant also provided a witness statement and discussed the incident with his manager; on each occasion Claimant never mentioned he was on his cell phone. In fact, it was not until Claimant saw the video footage at the investigation did he take responsibility for the incident. At the investigation, Claimant explained he was monitoring his phone because of an urgent family issue and admitted to violating Carrier Rules 100.1, 401.3, 712.36, and 1000.1. Claimant did not admit to concealing the fact he was on his cell phone during the incident.

On April 5, 2017, Public Law Board ("PLB") 7529 heard Case Number 115 concerning the dismissal of Track Foreman BD Cassady (Claimant), ID No. 232968. On June 22, 2017, Sherwood Malamud, Neutral Member of PLB 7529, issued Award Number 115, which compromised Claimant's dismissal to a 30 day actual suspension. The result afforded Claimant

back pay for all time held out of service over 30 days. Neutral Malamud found the Carrier established by substantial evidence Claimant violated Rules 100.1, 104.3, (D, E), 401.3, and 712.36; as well as CSXT Safe Way Rule GS-28, but the Carrier failed to prove Rules 104.4 and 1000.1.

## **II. ARGUMENT**

The Carrier opposes and is concerned by Neutral Malamud's decision for two reasons: first, based on Claimant's work history and the instant rule violations proven by the Carrier, dismissal was not arbitrary or excessive. Second, the Carrier did prove by substantial evidence Claimant was on his personal electronic device and concealed facts related to the incident. For those reasons, the Carrier respectfully dissents.

### **A. The instant rule violations coupled with Claimant's prior work history support dismissal.**

At the outset, Neutral Malamud held many facts were not in dispute and found Claimant violated numerous rules including failure to properly pilot the grinder (Rule 712.36) and committed behavior that endangers life and property (Rule 104.3). Indeed, Claimant's admitted conduct was extremely dangerous for himself and others on the machine. Running through an improperly lined switch poses a risk of derailment and injury. Doing so onto a mainline track further puts lives at risk of collisions with other mainline traffic. Further, Claimant was disciplined in 2014 when he put his hi-rail vehicle on a mainline track without authority and another train was lined for that track. In the same breath holding Claimant's carelessness "represents a major action and responsibility," Neutral Malamud describes dismissal as excessive discipline.<sup>1</sup> It is unreasonable the Carrier should be forced to employ someone with Claimant's egregious safety

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<sup>1</sup> Award 115, pg. 3.

record. Even so, it is unconscionable such an employee should be rewarded for his efforts with back pay. Claimant actions in the instant case amount to major rule violations and considering his prior major, dismissal was appropriate. Neutral Malamud substituted his judgment for that of the Carrier and Claimant's return puts lives and property in further jeopardy. There is no reason Claimant's job is worth more than those he works with and will undoubtable put at risk.

**B. The Carrier proved by substantial evidence Claimant used his personal electronic device and concealed facts under investigation.**

Neutral Malamud found Claimant did not violate Rule 1001.1 which provides, "[n]o individual shall use an electronic or electrical device if that use would interfere with the employee's or a railroad operating employee's performance of safety-related duties."<sup>2</sup> Neutral Malamud makes a distinction between being "on" a phone and "monitoring" a phone, holding Claimant was only monitoring his phone during the incident and therefore did not violate the rule.<sup>3</sup> Such a distinction does not comport with reality. If someone is "monitoring" their phone, the phone is turned on and the person is focused on what is displayed. That person is "using" their phone for all practical and logical purposes and is exactly the type of conduct contemplated by the rule. In fact, the entire purpose of the rule is to prevent the exact dangerous situation that occurred here. Neutral Malamud's ruling obliterates Rule 1000.1's application and would allow employees to "monitor" a game or some other event being viewed on a personal electronic device. Neutral Malamud's

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<sup>2</sup> Award 115, pg. 2.

<sup>3</sup> While Carrier witnesses did testify there were no outgoing calls or texts from Claimant's phone just prior to the incident, there are numerous activities Claimant could have been conducting on his phone such as gaming, internet surfing, or watching videos. Neutral Malamud accepted Claimant's self-serving explanation he was monitoring a family issue at face value and without supporting evidence.

discussion on this issue is astounding and wrong. It is even more troubling considering Claimant specifically admitted to violating Rule 1000.1 during the investigative hearing.<sup>4</sup>

Neutral Malamud further held Claimant did not conceal facts under investigation. Carrier Rule 104.4 (a) provides: “The following behaviors are prohibited at all times: a. Concealment of facts under investigation.” As argued in the Carrier submission, Claimant concealed the fact he was on his personal cell phone during the incident. Specifically, when questioned immediately after the incident by his manager, Claimant indicated he was not on his cell phone. Further, Claimant provided a witness statement of the incident and again never discussed he was distracted by or using his phone. Had there not been inward facing cameras, the Carrier never would have discovered Claimant’s misconduct. Neutral Malamud failed to consider it was only after confrontation with video evidence Claimant “fully cooperated with the investigation, and... took responsibility for what occurred.”<sup>5</sup> Claimant’s act of failing to advise in his written statement he was on his cell phone, and deliberately lying to his manger constituted concealment of facts under investigation. That argument was stressed by the Carrier in its submission.

Rather than look to Claimant’s written and verbal statements to managers regarding cell phone usage, Neutral Malamud found no violation because Claimant did not attempt to conceal the run through switch.<sup>6</sup> Neutral Malamud stated, “[t]he Carrier charges Claimant attempted to cover-up the movement over the switch and the damage it caused.”<sup>7</sup> However, the Carrier did not argue Claimant actively attempted to hide the incident. Rather, Claimant attempted to minimize or completely eliminate his responsibility for the incident by lying about being distracted with his

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<sup>4</sup> Everyone, including Claimant believed he was on his cell phone in violation of the rule; save Neutral Malamud.

<sup>5</sup> Award 115, pg. 4.

<sup>6</sup> Award 115, pg. 4.

<sup>7</sup> Award 115, pg. 4.



cell phone. Natural Malamud found Claimant's "phone did serve as a distraction" and "contributed to the incident of driving the Grinder over the switch."<sup>8</sup> Claimant was charged for concealing those facts and Claimant's conduct demonstrates his untrustworthy character. Neutral Malamud failed to consider the relevant facts of Claimant's blatant concealment in his ruling.

Without question, Claimant violated rule 1000.1 when he used his phone to monitor personal communications, and violated Rule 104.4 when he lied about his conduct and failed to notate it in his witness statement.

### **III. CONCLUSION**

Claimant is careless and dangerous. The current incident and Claimant's work history confirms that fact. Moreover, when confronted with the instant situation, Claimant tried to hide the fact he was distracted by his personal electronic device. In a practical world ruled by logic and a healthy conscience, employers do not have to employ such people, especially on the railroad where such mistakes can have deadly consequences. This case should have been denied in its entirety. Concealment aside, it is simply miraculous the Carrier could prove Claimant committed a second major violation in two years and then be forced to compensate Claimant for committing such a violation. Fortunately no one was hurt here. However, Claimant now has a position to continue his behavior and has been rewarded with back pay. PLB 7529, Award 115 sends a troubling message to the Carrier workforce that rules are optional, and one will have multiple opportunities to endanger the lives of their co-workers. It is the Carrier's hope Claimant does not continue in the pattern he has set.

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<sup>8</sup> Award 115, pg. 4.

Accordingly, for the reasons set forth above, the Carrier respectfully dissents from PLB 7529, Award Number 115.

Respectfully submitted,

A handwritten signature in cursive script that reads "Macon Jones".

Macon Jones  
Carrier Member  
June 30, 2017