NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
AWARD NO. 12, (Case No. 12)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION - IBT RAIL CONFERENCE
(Organization File: D70151712)

vs

CSX TRANSPORTATION, INC.
(Carrier File: 2012-129762)

William R. Miller, Referee and Neutral Member
P. E. Kennedy, Employee Member
R. Paszta, Carrier Member

QUESTION AT ISSUE:

Did the Carrier comply with Rule 25 of the Agreement when it charged S. E. Vargas with violation of Operating Rules - General Rule A, General Regulations GR-1, GR-2 and GR-15 and CSX Code of Ethics (dishonesty) and was substantial evidence adduced at the Investigation June 27, 2012, to prove the charges; and was the discipline assessed in the form of dismissal warranted?

FINDINGS:

Public Law Board No. 7529 finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute.

The Board has thoroughly reviewed the record and will first address the Organization's procedural argument. It argued that the Carrier's postponement of the Hearing from June 20 to June 27, 2012, was not mutually agreed upon and the unilateral postponement implemented by the Carrier violated the Claimant's right to a "fair and impartial" Investigation. Review of Rule 25 Discipline, Hearings, and Appeals, Paragraph (d) reveals in pertinent part:

> **"...A hearing may be postponed for a valid reason for a reasonable period of time at the request of the Company, the employee, or the employee's union representative."**

It was not refuted that the Carrier postponed the Investigation for seven days which was not unreasonable because of a scheduling conflict and its reason for the postponement qualifies as being valid. Additionally, the Agreement does not require mutual consent. The Organization's objection is not persuasive. It is determined that the Carrier complied with Rule 25 of the Agreement and Claimant was afforded all of his "due process" Agreement rights.

On June 5, 2012, Claimant was directed to attend a formal Investigation on June 20, 2012, which was postponed until June 27, 2012, concerning in pertinent part the following charge:

> **"...to determine the facts and place your responsibility, if any, in connection with information received on May 22, 2012 at approximately 07:35 hours, at or near mile post S 653.0, on the Wildwood Subdivision, in the vicinity of S 653.0 Baldwin Yard. It is alleged that you did not report for work May 16 and May 17, 2012 and you falsified payroll records when you reported you were at work and you worked overtime.**
>
> **In connection with the above incident, you are charged with failure to properly perform the responsibilities of our position, and possible violations of, but not limited to, CSXT Operating Rules - General Rule A; General Regulations GR-1, GR-2, and GR-15; as well as, CSX Code of Ethics (dishonesty)."**

On June 17, 2012, Claimant was notified that he had been found guilty as charged and was assessed discipline in the form of permanent dismissal. On July 31, 2012, the Claimant requested expedited handling of his case as provided for in Appendix (N) Expedited Discipline Agreement of June 1, 1999 BMWE/CSXT Agreement.

The facts indicate that on May 15, 2012, Roadmaster, D. A. Bell, instructed the Claimant to perform certain work operating a bulldozer at the north end of Baldwin Yard when he arrived at work on May 16th. It was alleged that the Claimant did not do the work he was instructed to do on May 16 or 17, nor was he seen on either date. Claimant entered his payroll for the week which showed ten hours of straight time and one hour overtime for May 16th and for May 17th five hours straight time and five hours of sick time. Claimant asserted he reported for duty and performed his duties on May 16, 2012, and on May 17, 2012 he worked until 12:00 p.m. before leaving work early account of illness.

The Board also notes that on pages 22 and 23 of the transcript the Carrier suggested that Claimant may have also been in violation of the CLC Lodging Policy. That argument will not be considered as it was not part of the charges and was properly objected to by the Organization.

The question at issue is whether or not the Claimant was at work on May 16 and 17, 2012, and did he perform service and did he request the appropriate monies due. Examination of the transcript reveals that Roadmaster Bell testified regarding May 16th as follows:

> **"Bell: Wednesday, May 16th, stopped, checked the hour meters on it at approximately 0905, and the hour meters stated 3238.2.**

Thursday, I stopped, checked the hour meters on it as 3:05 in the afternoon and the hours meter still stated 3238.2.

Wednesday morning I drove by the bull dozer at 7:58 in the morning and checked to see there was no movement on it, and then also that afternoon at 3:47 I drove by and saw no movement on it.

And Thursday morning drove by it at 7:32 in the morning, saw no movement, and then also the 3:05 when I checked the hour meter saw no movement on it as well." *(Underlining Board's emphasis)*

Foreman Davis and Assistant Foreman Nobles both testified (See pages 55, 56, 60 and 61 of the Transcript) that they noticed the Claimant's bull dozer was in the same exact location at the beginning and end of the work day and neither noticed any evidence of work having been done in the material yard which is consistent with the testimony of Roadmaster Bell who stated he saw no tread marks showing movement of the dozer.

On pages 69 and 70 of the transcript the Claimant testified that on May 16 he began grading the north end of the Yard between 8:30 a.m. and 9:00 a.m. and continued to work until about 2:00 p.m. That testimony conflicts with that of Roadmaster Bell who testified that he visited the Claimant's bull dozer at 9:05 a.m. and read the hour meter and at 3:47 p.m. the previously recorded hours remained the same.

On page 73 of the transcript the Claimant was questioned about the conflict in his testimony versus that of Bell at which time he altered his testimony by stating that he did not begin to use his machine until after Roadmaster Bell had checked the hours on the machine. Claimant had no response for why the hours had not changed when Bell rechecked the machine at 3:05 p.m., Thursday, May 17th, nor could he explain why the hours did not change on the meter that had been found to be in working order. The Claimant also suggested in his questioning of Mr. Bell on page 86 of the transcript that if he had used a back blade movement of the dozer you would not have seen his tracks. Bell responded on pages 86 and 87 to that question as follows:

"Bell: But you would see indication of work being performed.

He say back blade movement, which, the direction of the dozer was facing southbound, so he would have had to back blade driving north, or driving south, pushing a pile, unless you can just barely skin it. Your tracks marks are the last thing that can happen, even if you're blading. If you're driving south your track marks are still gonna be there. Now unless he backed all the way from the material yard to the location where

the dozer was sitting and then completely did a 180 and parked it in a southbound direction, that's the only way I could see that he was back bladed the whole thing and you wouldn't see track marks. But, all of us know you're gonna drive to that location and park it, so you would see track marks from the material yard to the overpass where it was sitting."

The aforementioned testimony was not effectively rebutted and the Claimant's suggestion is not plausible. Claimant has essentially asked the Board to believe that he chose to back blade to the work location and then returned in the same mode to his starting point in an effort not to leave any track marks after which he did a complete 180 with the dozer. The Board does not find that argument persuasive. Assuming for the sake of argument that the Claimant was on the Carrier's property on May 16th and 17th it is clear that he did not do or complete any of the tasks directed by Roadmaster Bell. The only thing the Claimant admitted to doing wrong was that he left work early on May 17 account of illness without informing his immediate Supervisor. The Claimant's testimony was inconsistent and is at best described as being self-serving.

The record reveals that multiple employees testified they saw the work location and the bulldozer on several occasions on both dates and no one saw the Claimant and there was no evidence that Claimant had performed any work. It is determined that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that the Claimant did not report for duty and/or perform any of his assigned duties on May 16 and 17, 2012, and then improperly entered time worked in the payroll system and was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately seven years of service. Countless Boards have determined that theft and/or dishonesty are major offenses for which first time offenders may be dismissed. Review of Claimant's personnel file indicates he had a history of attendance problems and had been guilty of a prior major offense for falsification of FRA Track Inspection Reports and Operating a CSX Vehicle without a license. Claimant's violation was of a serious nature and coupled with his prior offenses the Board finds and holds no reason for mitigating the discipline as it was not arbitrary, excessive or capricious and was in accordance with the Carrier's Progressive Discipline Policy. The discipline will not be set aside and the appeal/claim is denied.

AWARD

Appeal denied.

William R. Miller

William R. Miller, Referee

Dated: January 8, 2013