

PUBLIC LAW BOARD NO. 7529

Case No. 141

PARTIES
TO THE DISPUTE

Brotherhood of Maintenance of Way Employes
Division of the International Brotherhood of Teamsters
System File: D70412616

VS.

CSX Transportation, Inc.
Carrier File: 2016-214222

Referee: Sherwood Malamud

FINDINGS

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.

By letter dated November 23, 2016, Claimant, Track Foreman J.C. Wadlow requested that this disciplinary matter be processed by Public Law Board 7529 (Special Board of Adjustment) for expedited handling.

FACTS

The Carrier hired J. C. Wadlow on December 8, 2008. By letter dated October 4, 2016, Roadmaster N.R. Hahn notified Claimant of an investigatory hearing concerning allegations that he left work without permission on September 20, 2016, and on September 22, 2016, he falsified a switch tie report and recorded the repair of a defect, FRA 213.9b which had not been performed. After an investigatory hearing on October 20, 2016, Great Lakes Division Engineer J.S. Hess, by letter dated November 8, 2016 determined that the appropriate penalty for Claimant's conduct was dismissal.

During the hearing, the charging officer Roadmaster Hahn withdrew the charge that Claimant left work early on September 20, 2016. At the hearing, he charged Claimant with violating Operating Rule 104.2(a) dishonesty and 104.3d, Carelessness, incompetence, or willful neglect of duties.

On September 22, 2016 toward the end of the work day, Roadmaster Hahn in passing, asked Claimant the Foreman of a switch tie crew, how many ties he put in on this day. Claimant responded-12. Then the Roadmaster encountered a member of the crew in the parking lot. The

Roadmaster asked the same question. The crew member Miller said that zero ties were put in on September 22. The Roadmaster called Hicks to ascertain if a FRA 213.9b rail defect had been repaired on September 22. Hicks indicated that it had not been repaired that day. The Roadmaster then notified Claimant to report to an investigatory hearing that was held on October 20, 2016.

The Carrier Argument

The Carrier argues that Claimant received a fair hearing. Claimant reported on the CSX ITIS System 12 ties been put in, and that a FRA rail defect had been repaired on September 22, 2016. Claimant claims that he had “banked” the installation of 12 ties from the prior day, and that he could not remember when the rail defect had been repaired. The Carrier met its burden of proof that Claimant falsified documents.

It is Claimant who had the burden to establish the existence of the practice of banking ties. Other employees were asked about the practice, none confirmed its existence. With regard to the repair of the defect, Claimant was dishonest in reporting that work was done that had not been done.

Dismissal is the appropriate penalty. This is Claimant’s second major offense within a 1-year period.

The Organization Argument

Claimant was not dishonest with regard to putting in 12 ties. The work was done. The evidence establishes a practice of banking welding work. The Carrier did not meet its burden of establishing that Claimant was dishonest. Work is banked, when the amount of work performed on one day is under reported, to permit reporting on occasion, when there is less to report.

Board Findings

Procedural Objection

At the on property hearing on October 20, 2016, the Organization objected to the October 4, 2016 notification letter’s failure to set out the Rules allegedly violated by Claimant that would form the basis for the investigation. This Board determined in Awards 106 (MacDougall) and 114 (Malamud); NRAB Third Division Award No. 35022, BMW v. BNSF (Kenis) that it was not necessary to specify the Rules allegedly violated. Under Rule 25, the Carrier had to provide sufficient information to alert Claimant of the conduct that is the subject of the investigation. The Carrier did so in the October 4, 2016 notification letter.

The Organization argued that the factual specificity with regard to accurate mile post markings was lacking. The Carrier need only provide sufficient factual allegations as to alert the

employee as to the conduct that is the subject of the investigation. The Notice meets this test.

Claimant received a fair hearing.

Merits

The Carrier bears the burden of proof of establishing that Claimant was dishonest. The Carrier must establish that Claimant deliberately falsified entries he made on the Carrier's ITIS system so as to mislead that work that was not performed would appear in the Carrier's system as work performed.

The discrepancy between work claimed to have been performed and the work in fact performed came to light in an off handed manner, a passing question from Roadmaster Hahn to Claimant about what work had been performed on September 22.

The Carrier established through the testimony of switch tie crew members Miller and Hicks that 12 ties of varying sizes were not put in on September 22, 2016. However, Miller testified on cross examination that there were occasions, when the work performed did not appear on the list of jobs to be done. He did not testify, nor is there any evidence that this crew had not put in 12 ties while under Claimant at a time proximate to and prior to September 22.

The Carrier did establish that the work did not occur on September 22. It did not establish that the failure to accurately report that ties were put in on September 22, when none were put in, was entered by Claimant to deliberately deceive and/or mislead the Carrier. The Roadmaster did not enter evidence that this work was not performed immediately prior to September 22 or that he had to assign the work to another crew to put in the ties on the track in the yard. For its part, the Organization failed to establish the existence of a practice of "banking ties."

Claimant did not recall nor did he provide any useful evidence concerning the repair of the FRA 213.9b defect. However, Roadmaster Hahn did not have photos of the defect. He did not recall who and when the defect was repaired, except that it was repaired after September 22. Again the overriding charge is dishonesty. Nonetheless, the record evidence supports a finding by Great Lakes Division Engineer Hess that the defect had not been repaired prior to September 22. In cases which call for the evaluation of conflicting testimony, the determination of the decision maker, Hess in this case, should not be disturbed so long as there is evidence to support the decision maker's determination. NRAB Second Division, Award No. 12804 (Wesman) and NRAB Second Division, Award No. 12808 (Wesman). The defect was repaired by a crew assigned by Roadmaster Hahn after September 22.

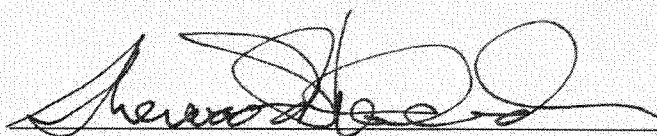
The Board concludes that the Carrier did not establish that Claimant was dishonest with regard to the manner in which he reported putting in the switch ties. It did establish that Claimant was dishonest concerning the repair of the FRA 213.9b rail defect. Further, this is the second

Award 141
PLB 7529

major violation in a period of 15 months. The other involved an at fault accident. Since the Carrier established one violation that involved intent, the repair of the 213.9b rail defect, when considered that this is the second major in 15 months, the Board denies this claim.

AWARD

Claim denied.



Sherwood Malamud
Neutral Member

Date: 2/27/2018