

PUBLIC LAW BOARD NO. 7529

Case No. 142

PARTIES  
TO THE DISPUTE

Brotherhood of Maintenance of Way Employees  
Division of the International Brotherhood of Teamsters  
System File: D70413116

VS.

CSX Transportation, Inc.  
Carrier File: 2016-214223

Referee: Sherwood Malamud

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**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 29, 2016, Claimant, Vehicle Operator P.B. McPheeters requested that this disciplinary matter be processed by Public Law Board 7529 (Special Board of Adjustment) for expedited handling.

**FACTS**

The Carrier hired Claimant, P. B. McPheeters on May 21, 2007. By letter dated October 12, 2016, the Roadmaster T. H. Jensen notified Claimant to attend an investigatory hearing concerning his alleged failure on October 6, 2016 to immediately report damage to the vehicle he drove. Allegedly, he delayed notifying his supervisor of the damage until 8:45 a.m. on October 7, 2016. The investigatory hearing was held on November 3, 2016. By letter dated November 22, 2016, Division Engineer C. D. Ramsey determined that Claimant had violated the Operating and Safety Rules as charged. He determined that dismissal was the appropriate penalty.

At the hearing, the Carrier charged Claimant with violating Operating Rules 104.1, 104.2, and Safety Rules GS-24, and GS-33, which provide:

**Employee Behavior**

104.1 When on duty, employees must:

4. Promptly report violations of the rules or special instructions to a supervisor.

104.2 Employee behavior must be respectful and courteous. Employees must not be any

of the following:

a. Dishonest, or . . .

#### General Safety Rules

##### GS-24 Riding in Motor Vehicles

A. Ensure the motor vehicle is safe. Before riding in or operating a motor vehicle, to the extent possible, inspect the vehicle's equipment and safety devices for unsafe conditions.

##### GS-33 Operating Motor Vehicles

B. Employees operating commercial vehicles (CDL required) must complete all required pre— trip inspections.

Claimant is the Vehicle Operator for gang 6k10, which is comprised of Foreman Vickers, Machine Operator Hartman and Claimant. He asked Roadmaster Jensen to observe the damage to the truck on the morning of October 7. Claimant noticed the damage at the end of his shift at 3:00 p.m. on October 6. He noticed the damage to the storage door on the driver's side of the vehicle, while putting away tools in that compartment of the truck. A Post-trip inspection book was not available. He did not complete one for October 6.

Since the truck weighed in excess of 54,000 pounds, Claimant had to perform a post trip inspection. He did a walk around the truck at the end of his shift. Claimant failed to document the damage to the truck on the Carrier's Vehicle Inspection Report, nor did he inform the Roadmaster of the damage at the end of his shift on October 6. When Jensen asked Claimant why he had failed to notify him, Claimant gave as his reason that he had been in trouble previously; he did not want to get in further trouble.

He failed to note the damage on the Vehicle Inspection Report at the very beginning of his work day on October 7. Although the bent door closed, unless a little additional effort were employed in closing the door to the truck's tool compartment, the damage might allow it to open when in transit. The damage to the vehicle did not prevent its operation. At the time of the hearing, the door had not been repaired.

The other members of this crew did not observe any damage to the truck operated by Claimant on October 6. Machine Operator Hartman observed the damage at 7:30 a.m. on October 7. Foreman Vickers did not, because he drove a different truck on October 7.

When Claimant did a walk around the truck on the morning of October 7, he did not observe the damage to the door in the low light prior to 7:00 a.m. However, when Hartman remarked to Claimant about the damaged door, it reminded Claimant of the damage, and he brought the damage to Roadmaster Jensen's attention at between 7:30 and 8:30 a.m.; between the time Hartman noticed the damage to the door and called it to Claimant's attention and the

time requested by Claimant that he wrote the statement requested by the Roadmaster.

Roadmaster Jensen had Claimant write a statement on October 7 without providing him an opportunity to contact an Organization representative. The Roadmaster drove down with Claimant to the location of the October 6 assignment to ascertain what obstacle Claimant struck with his truck the previous day. Roadmaster Jensen surmised that Claimant's truck struck a bundle of crossing ties at that location on October 6.

Roadmaster Jensen believed that Claimant was dishonest, when he failed to note the damage to the truck's door on the October 7 pre-trip Vehicle Inspection Report. However, the damage did not require taking the truck out of service. It was safe to operate. The charges Roadmaster Jensen brought against Claimant stemmed from his failure to notify the Roadmaster sooner of the damage. Since it is not clear how the truck damage occurred, the charges are not related to the truck damage itself.

### **The Carrier Argument**

The Carrier maintains that Claimant received a fair hearing. Claimant was aware of the damage, yet he failed to inform his supervisor or note the damage on the Vehicle Inspection Report.

The Carrier met its burden of proof. Claimant deliberately withheld information when he did not complete the Inspection Report to show the damage to the door to the truck's tool storage compartment.

The Carrier maintains that the level of discipline is appropriate. The Carrier followed a course of progressive discipline. This is the third serious level offense in a 2-year period. These are not major violations, but it is a third offense that warrants discipline. Dismissal is appropriate.

### **The Organization Argument**

At the on property hearing, the Organization objected to the Notice in its failure to employ language, "you are charged with" or "you are accused of." Previously, the Carrier had employed such language to put the employee on notice as to the exact charge that will serve as the subject of the investigatory hearing. The Organization produced 23 notification letters previously employed by the Carrier, when bringing charges against its employees. The Organization objected, as well, to the omission from the notification letter of any reference to specific rules allegedly violated by Claimant. In addition, the Organization charged the letter lacked sufficient factual specificity. The Organization argues that the omission reflects that the Carrier had an agenda to assess discipline, despite its duty to conduct this investigation in a fair and impartial manner. The Organization charged that the Roadmaster did not provide Claimant with the opportunity to consult with an Organization representative before he wrote the October 7, 2010 statement.

As to the merits, the Organization argues that the Carrier failed to meet its burden of proof. The Carrier charges Claimant with dishonesty. It failed to present substantial evidence in support of that charge. No prior suspension. The Carrier attempts to go straight to a dismissal. The Organization argues that the discipline should be overturned.

### **Board Findings**

At the on property hearing on November 3, 2016, the Organization objected to the October 12, 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 (Kennerly) 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 12, 2016 notification letter.

The Organization argued that the Notice lacked factual specificity, such as, accurate mile post markings. 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. The Board finds that the above objections were properly overruled.

During the on property hearing, the Organization argued that the Roadmaster did not allow Claimant to contact an Organization representative before he wrote his October 7 statement. The Hearing Officer should have excluded the statement from the record of the hearing that was transmitted to the Division Engineer who determined that dismissal was the appropriate penalty, in this case. The statement was not removed. In the balance of this analysis, the Board determines whether there is sufficient evidence to support the dishonesty charge.

With or without Claimant's statement, Roadmaster Jensen learned of the damage to the door at approximately 8:30 a.m. on October 7. Machine Operator Hartman noticed the damage that morning and informed Claimant, who within an hour informed the Roadmaster. There is no evidence that the Carrier suffered any loss as a result of when Claimant informed the Roadmaster of the damage.

The Roadmaster took disciplinary action, because Claimant failed to include the damage in his pre-trip Vehicle Inspection Report. Even if the testimony of Claimant, a 25 year veteran and reserve from the Marine Corps is discredited, there is no showing of a negative consequence for the Carrier as a result of Claimant's failure to note the damage in the written report. The Roadmaster learned of the damage no more than an hour after Claimant inaccurately completed the Vehicle Inspection Report. There is insufficient evidence of an intent to deceive.

The inclusion of Claimant's written statement in this record changes the time line. Claimant knew of the damage at the end of his shift on October 6, after he put his tools away. However, there is no evidence that it has a practical impact on the sequence of events, or any negative impact on the Carrier. It does not support a finding that Claimant intended to hide or deceive the Carrier about the damage to the truck. The Carrier failed to meet its burden of proof.

It failed to provide substantial evidence of Claimant's dishonesty.

**AWARD**

Claim sustained in its entirety.

A handwritten signature in black ink, appearing to read 'Shervod Malamud', is written over a horizontal line.

Shervod Malamud

Neutral Member

Date: 7/27/2018

**PUBLIC LAW BOARD NO. 7529**

**New Case No. 168; Old Case No. 142**

**PARTIES**

**TO THE DISPUTE**

**Brotherhood of Maintenance of Way Employes  
Division for the International Brotherhood of  
Teamsters  
System File: D70413116**

**VS.**

**CSX Transportation, Inc.  
Carrier File: 2016-214223**

**Referee: Sherwood Malamud**

**INTERPRETATION TO AWARD NO. 142 (Case No. 168)**

**FINDINGS OF THE BOARD:**

**On February 27, 2018, the Board determined that the Carrier failed to meet its burden of proof and establish that Claimant, Mr. McPheeters, with an intent to deceive, delayed reporting to his Roadmaster damage to the Carrier's vehicle assigned to and operated by him. Pursuant to Award 142, the Carrier reinstated Claimant and paid him \$10,326.06 in back pay. The Carrier asserts that it fully complied with the Board's Award.**

**The Organization argues that: 1. The Carrier included the earnings of Claimant's spouse in the offset it took in calculating the amount of back pay due Claimant under the Award; 2. The Carrier failed to provide the Organization with records that would permit the calculation of the number of straight time hours Claimant would have worked had the Carrier not removed him from service; 3. The Carrier did not include pay for lost overtime opportunities suffered by Claimant as a result of the Carrier's removal of Claimant from service; 4. The Carrier refused to reimburse Claimant for his expenditures for medical expenses covered under the National Health and Welfare Plan (Attachment 8 to Employees' Exhibit C-4, sheet 2).**

## ANALYSIS

### 1. Spousal Income

In the course of the on property exchanges, the Carrier acknowledged it had no intention to include Claimant's spouses' income in the calculation of the offset to back pay. The Board examined the record and identifies the amount of the offset that should be applied, here. That amount is reflected in the back pay calculation, below.

### 2. Overtime

The gravamen of this dispute over remedy is whether back pay should be limited to straight time hours or whether it should include overtime. The Organization argues that it should include overtime. It points to the remedy accorded a reinstated employee, Black, by the Carrier, in a case between these very parties. The Carrier included overtime in its calculation of the amount of back pay to be paid to Black.

The Carrier argues one instance does not establish a practice. The payment to Black was a gratuity.

In Award 1081 of Public Law Board 6392 between the Brotherhood of Railway Carmen, Division of Transportation Communications Union and CSXT, Referee Gerald Wallin observed:

“Because of the number of intangibles that arise from human behavior over a long period of time, reconstructing the past in terms of lost overtime opportunities is not an exact science. This is particularly imprecise simply because the employees involved have the right to accept or decline each overtime opportunity for a wide-variety of reasons. Therefore, it is not reasonable to assume that claimant would have worked every overtime opportunity. Similarly, it is not reasonable to assume that he would not have accepted any of them. It is reasonable to assume that some opportunities would have been declined. It is also reasonable to assume that employees would miss some overtime opportunities due to illness, vacation usage, or perhaps use of

personal leave time. Accordingly, resorting to some means for estimating the loss is therefore unavoidable.

Justice requires that the means of estimating the loss be reasonable even though it is recognized that an estimate is just that; it is not precision. Nonetheless, a reconstruction of this kind must be rationally based and be directly derived from the available hard evidence.”

On the property, the Carrier argued that in this case the best measure of the amount of back pay is the “bobj.” The “bobj” tool yields a daily rate. The calculation of the “bobj” looks back 365 days from the date Claimant McPheeters was removed from service. The calculation of the “bobj” includes straight time pay, and all premiums including overtime paid to the Claimant for the backward looking 365 days beginning with the day Claimant was removed from service. The total amount paid is divided by 365 to yield the daily rate. The daily rate is then multiplied by the number of days Claimant was held out of service.

The Board concludes that the “bobj” is a reasonable method of calculating back pay. It includes overtime and pay premiums. Of necessity, the calculation of back pay represents an approximation of what Claimant would have received. Since Claimant was removed from service, it is difficult to ascertain with certainty what he would have worked during the period in question. Any calculation results in an approximation. The “bobj” approximation is a reasonable measure for calculating back pay.

In addition, the Carrier shall pay Claimant General Wage Increases (GWI) that may have occurred during the period of his removal from service that had not already been paid to him. The Carrier should reimburse Claimant for the fee(s) he paid to renew his CDL license, if the renewal occurred during the period he was out of service.

### **3. Medical Expenses**

The National Health and Welfare Plan, Attachment No. 8 to Employees' Exhibit C-4 Sheet 2 of 2, states:

**“If you are awarded full back pay for all time lost as a result of your suspension or dismissal, your coverage will be provided as if you had not been suspended or dismissed in the first place.” (Emphasis added)**

**The Board directs that the Carrier reimburse Claimant for payments he made to maintain coverage during the period of his removal from service. During most of the period Claimant was out of service, his health insurance coverage was provided by his interim Employer.**

**On the property, the Organization claimed that the Carrier should reimburse Claimant for his out-of-pocket medical expenses such as, prescriptions. The Carrier argues that the Organization kept changing the monetary remedy it sought.**

**In the on property give and take on this issue of remedy, the parties dispute over the calculation of back pay includes an exchange in which the Carrier mistakenly included Claimant’s spouse’s income in the earnings offset. The record developed on the property included the claim for out-of-pocket medical reimbursements. There is no clear evidence that the Organization waived this medical reimbursement contractual claim.**

**In BMW and BNSF, Third Division Award No. 41529, Referee Richard Mittenenthal sustained the claim. In the Interpretation Referee Elizabeth Wesman directed the Carrier to reimburse Claimant for medical outlays that resulted from a lapse in coverage. In this case 142 (168), there is no evidence of a lapse in coverage.**

**In this sub-section, the Board directs the Carrier reimburse Claimant for medical outlays: \$161 for the difference in premiums Claimant paid for medical insurance at the interim employer and what he would have paid under the National Health and Welfare Plan during the period he was removed from service; and, \$480.18 for the difference in co-pays between the two plans.**

### **Summary**

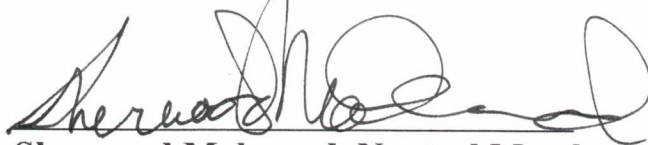
The Organization originally proposed that Claimant's earnings in 2016, 2017 and 2018 totaled \$64,923.43. This amount should serve as the offset against his back pay claim. The Organization later lowered the amount it claimed should be offset, but did not indicate why.

The "bobj" calculation for the period of days Claimant was out-of-service totals \$96,129.88. The Carrier paid Claimant \$10,326.06. The "bobj" amount that remains outstanding after taking into account Claimant's interim earnings from his employment during the period of his removal is \$20,880.39. The Board directs that the Carrier pay Claimant \$20,880.39 plus unpaid GWI and reimbursement for CDL renewal fee(s) had it occurred during the period he was out of service.

In addition, the Carrier shall reimburse Claimant for the outlays he made under the National Health and Welfare Plan during the period of his removal, as detailed above.

**INTERPRETATION OF AWARD NO. 142 (CASE NO. 168):**

The Carrier shall implement the remedy as stated above. The Carrier is directed to comply with this Award on or before thirty (30) days following the Award date below.



Sherwood Malamud, Neutral Member

Date: February 9, 2021