

NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7529

Brotherhood of Maintenance Way	)		
Employes Division – IBT Rail	)		
Conference	)		
	)		
and	)	Case No.	31
	)	Award No.	31
	)		
CSX Transportation, Inc.	)		

**STATEMENT OF CLAIM:** “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s decision to impose discipline in the form of dismissal upon employe G. Lemmon for the alleged violations of CSX Transportation Operating Rules - General Rule A, General Regulations GR-2; On-Track Worker Rules and Qualifications - Rules 713 Part D. 720 and 722 in connection with an on-track vehicle collision on February 3, 2013 was on the basis of unproven charges, arbitrary, capricious and in violation of the Agreement (Carrier’s File 2013-142203).
  
2. As a consequence of the violation referred to in Part 1 above, Claimant G. Lemmon shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement.”

**Findings:**

Public Law Board 7529, upon the whole record and all the evidence, finds that (1) the parties to this dispute are Carrier and Employes within the meaning of the Railway Labor Act as amended, (2) the Board has jurisdiction over this dispute and (3) the parties to this dispute were accorded due notice of the hearing.

On February 22, 2013, the Roadmaster issued to Claimant a notice of hearing that set forth an alleged incident and related rules violations scheduled for investigation on March 5, 2013.

Specifically - -

The purpose of this formal investigation is to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 1040 hours, on Sunday, February 3, 2013 at or near milepost QD 78.7, on the Erie West Subdivision, in the vicinity of Harborcreek, PA. More specifically, while you were inspecting track in high rail truck # 094309, it is alleged that the vehicle you were operating slid into the crossing at Davison Road striking an outside party vehicle causing approximately \$500 worth of damage to CSX vehicle # 094309 and approximately \$3,000 worth of damage to the outside party vehicle. Moreover, when you were

questioned about this incident by Mr. R.A. Baer, it is further alleged that you admitted to failure to comply with controlling your on-track equipment, failing to be able to stop within one-half the range of vision and stopping short of a public highway grade crossing.

In connection with the above, you are charged with failure to properly and safely perform the responsibilities of your position, carelessness, failure to control your equipment, and possible violations of, but not limited to, CSXT Operating Rules General Rule A; General Regulation GR-2; On-Track Worker Rules and Qualifications; as well as Rules 713 part D, 720 and 722.

On March 25, 2013, the Division Engineer notified Claimant of the investigative findings and result:

A review of the transcript and all the documents associated with the hearing demonstrate that the charges against you were proven and that sufficient evidence confirms that your actions, on the date at issue, were in violation of CSX Transportation General Operating Rules – General Regulations GR-2; On-Track Worker Rules and Qualifications Rules 713 part D, 720 and 722.

Because all the information, evidence and testimony associated with this hearing prove that you violated company rules, coupled with your admission of fault, your apparent lack of concern for the motoring public, company rules, property, your well being, as well as your previous record regarding your inability to control the vehicles that you are assigned to operate, in addition to your prior discipline record, it is my decision that the discipline to be assessed for your actions in this matter is your immediate dismissal in all capacities from CSX Transportation.

Rules cited by the Carrier as breached by Claimant are summarized below.

General Regulation GR-2: forbids an employee from willful neglect of duty or endangerment of life or property.

On-Track Worker Rules and Qualifications:

Rule 713 - requires the gradual application of the brake by the employee operating on-track equipment;

Rule 720 - permits operation of on-track equipment at maximum speed permitting a stop within one-half the range of vision or five (5) miles per hour over public crossings at grade;

Rule 722 - requires an employee, upon approach to a highway grade crossing when operating on-track equipment, to prepare to stop short of the crossing and not to proceed unless the way is observed as clear.

On March 27, 2013, the Organization informed the Carrier of the Claimant's intent to seek expedited adjudication of this claim. The Board has reviewed the record established by the Organization and the Carrier in this expedited proceeding.

As required by the Agreement under Rule 25, Discipline, Hearings and Appeals, Section 1 - Hearings, the Claimant received "a fair and impartial hearing" with advance written notice of the allegation and time to prepare for the hearing. Furthermore, and in accordance with the Agreement's Side Letter 22, the "hearing [was] scheduled to begin *within* thirty (30) days from the date management had knowledge of the employee's involvement." [Emphasis added.]

In Award 16 this Board interpreted and applied "*within*" in Side Letter 22 as starting the count to day thirty (30) on the day after the alleged incident. In this claim the Carrier "had knowledge of [Claimant's] involvement" on February 3, 2013, which activated the count to day 30 beginning the next day (February 4) followed by the hearing's occurrence on day 30 (March 5, 2013). The Organization's assertion during on-property processing that the hearing was held on day thirty-one (31) because the count to day 30 begins on February 3, 2013 (incident date) is not supported by this Board's precedent or practice. Thus, there was no procedural miscalculation by the Carrier's scheduling the hearing on March 5, 2013.

The Carrier asserts there is substantial evidence of Claimant's culpability. Specifically, Claimant acknowledged operating the hy-rail vehicle and not stopping short of, or prior to, the crossing but sliding through it and colliding with an outside party vehicle. Prior to the collision, Claimant operated the hy-rail vehicle across twenty-five (25) crossings in weather conditions causing a damp, slick rail and he slid on three (3) occasions. When the rail is wet with moisture the Claimant is expected to exercise additional care. Claimant's acknowledged wrongdoing is proof that he violated General Regulation GR-2 and On-Track Worker Rules and Qualifications at Rules 713, 720 and 722.

Dismissal is appropriate. Claimant's culpability is a major offense under the IDPAP Policy where a solo infraction for a major offense warrants dismissal. In this situation, however, Claimant's major offense is his third infraction in 3 years. In 2010 Claimant incurred his first major offense with a ten (10) day suspension. The second major offense occurred in October 2012 when Claimant's operation of on-track equipment in adverse weather conditions led to a collision with other on track-equipment. Claimant received a sixty (60) day suspension (October 9 - December 12, 2012); this Board affirmed the suspension in Award 25 (May 20, 2013). Less than two (2) months after returning to service from the 60-day suspension, Claimant incurs a third major offense on February 3, 2013. The Carrier recognizes the Claimant's thirty-six (36) years of service; however, the third major offense shows that the 60-day suspension did not rehabilitate the Claimant.

The Organization maintains that mitigating factors favor a penalty short of dismissal. Those factors are, in brief order, weather (overcast, snow and slush) causing a damp and slick rail. Claimant attempted to stop the hy-rail vehicle one hundred (150) feet prior to the crossing; the Organization finds support in Third Division Award 11556 for the point that a hy-rail vehicle slides "great distances" on a damp rail. The weather conditions contributed to the accident because the slush and snow rendered the outside party unable to traverse the crossing.

Claimant performed his duties as safely as possible and in accordance with General Regulation GR-2 and On-Track Worker Rules 713, 720 and 722. Given the conditions, however, "the only reason the incident happened was due to circumstances beyond his control and the control of the outside party[.]" The Carrier failed to consider these mitigating circumstances as well as

Claimant's service as a long-term employee. In this regard, the Board can consider mitigating circumstances when assessing the penalty as occurred in Third Division Award 20578. Also, Third Division Awards 31299, 33141, 36324, 36325 and 38958 address other on-track collisions involving this Carrier resulting in discipline but not dismissal. Since the Carrier did not consider all relevant circumstances, Claimant's dismissal is unjust, unwarranted and excessive.

Having considered the Carrier's and Organization's arguments, the Board finds that Claimant's dismissal is not unjust, unwarranted or excessive. On February 3, 2013, Claimant encountered 3 instances prior to the collision where the hy-rail vehicle he operated slid uncontrollably. Weather and rail factors are common working conditions and Claimant is familiar with operating a hy-rail vehicle which is known for sliding "great distances." An employee must compensate for these working conditions when operating the hy-rail vehicle in the performance of duties. There is no indication in this record that Claimant calculated the damp, slick rail and uncontrollable sliding prior to his approach at the grade crossing where this incident occurred.

Claimant's safe performance of duties includes an expectation to accommodate the weather and that includes reasonable anticipation of problems. Weather conditions compounded the hy-rail vehicle's sliding. This was a circumstance known to Claimant as recently as October 2012 when he incurred his second major offense for a collision. A known circumstance is not irreversibly beyond an employee's control when a calculated accommodation is established; however, that did not occur with this incident.

According to BMW, Third Division Awards 31299, 33141, 36324, 36325 and 38958 address incidents where the Carrier assessed discipline short of dismissal for employees operating on-track equipment involved in a collision. The Board observes that those employees received suspensions of short duration but the distinguishing and dispositive difference between those incidents and the incident herein are the disciplinary records. In the Third Division Awards cited by BMW, none of the employees are aligned in the disciplinary queue with Claimant. That is, Claimant has 3 major infractions in 3 years whereas the comparables do not. For example, employees in Third Division Awards 33141, 36324 and 36325 are first time offenders.

Aside from the disciplinary queue, the Third Division Awards do not support a finding to sustain this claim on other bases. Third Division Award 31299 affirmed discipline because the employee "did not exercise sound judgment" in weather conditions impairing visibility. In other words, the employee (as with Claimant) did not establish a calculated accommodation for the weather in the performance of duties. Third Division Award 33141 involved a reckless act by the outside party motorist that could not be reasonably anticipated whereas Claimant collided with a motorist in view at the crossing. Finally, Third Division Award 38958 reduced a 30-day suspension due to hydraulic fluid leaking onto the rail from the on-track equipment which was compounded by the improper performance of duties by a crew member. None of those conditions are present in Claimant's incident.

In Award 25 this Board affirmed the Carrier's imposition of a 60-day suspension on Claimant for his second major offense (October 9, 2012) and stated that its purpose was "corrective in nature" as in designed to rehabilitate the Claimant. Incurring a third major offense (February 3, 2013) in real-time proximity to the second major offense (October 9, 2012) is not indicative of rehabilitation. The Carrier recognized Claimant's 36 years of service when it issued the 60-day suspension; considering Claimant's longevity of service in this claim does not lessen the penalty imposed.

Since the alleged incident is proven by substantial evidence and establishes violations of General Regulation GR-2 and On-Track Worker Rules and Qualifications - Rules 713 Part D, 720 and 722, the Carrier did not engage in an arbitrary and capricious act when it dismissed the Claimant. As there is no violation of the Agreement as stated in Part 1 of the Organization's Statement of Claim, this claim is denied.

**Award:**

The claim is denied.



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Patrick Halter  
Neutral Member  
PLB 7529 Case No. 31

Dated this 30<sup>th</sup> day  
of August, 2013