

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
CASE NO. 33, AWARD NO. 33**

**Brotherhood of Maintenance of Way
Employes Division – IBT Rail Conference**

v.

CSX Transportation Inc.

**Patrick Halter, Neutral Member
Robert Paszta, Carrier Member
Andrew Mulford, Organization Member**

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

1. Carrier’s decision to impose discipline in the form of a thirty-five (35) day actual calendar suspension beginning Monday, March 11, 2013 and ending Sunday, April 14, 2013 upon Claimant A. Thompson for the alleged violations of CSXT Operating Rules – General Rule A, General Regulations GR-15 and MWI-105.9, Section 4, Paragraph 4 in connection with track inspection reports, time sheets and EC1 on August 8, 2012 and statements to the Engineer of Track on August 28, 2013 (System File D70502713/2013-143649).
2. As a consequence of violation referred to in Part 1 above, Claimant shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement.”

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 this dispute.

Claimant entered on duty with the Carrier on June 16, 2003, and maintains seniority in the Track Department where he is a Track Inspector with a ten (10) hour workday. On August 8, 2012, Claimant submitted track inspection reports showing that he inspected approximately forty (40) miles of track by hi-rail vehicle and walking. Claimant did not have track authority in the 40-mile area. The next day (August 9), the supervisor approved Claimant’s track inspection reports and a co-worker (senior track inspector) inserted Claimant’s 10 hours into payroll for compensation.

On September 11, 2012, the Carrier directed Claimant to a formal investigation to address discrepancies in his track inspection reports, time sheet and track authority form (EC1) for August 8, 2012. A formal investigative hearing convened on February 19, 2013.

Based on the record established at the investigative hearing, the Carrier imposed on Claimant a thirty (30) day suspension, in addition to a five (5) day overhead suspension from a prior incident, for violating General Operating Rules – General Rule A, General Regulation GR-15 and MWI-105.9 (Instruction for Track Inspection). After the Claimant received notice of the discipline on March 8, 2013, the Organization informed the Carrier this was an expedited appeal.

CARRIER'S POSITION:

Claimant received a fair and impartial hearing that established he violated General Rule A (know and obey rules), General Regulation GR-15 (prohibition on claiming time or wages except for time actually worked), MWI-105.9 (frequency for performing track inspections and filing inspection reports on day of inspection).

In late August 2012, the Carrier questioned Claimant about the work he recorded as having been performed on August 8, 2012, when he did not have track authority for the 40-mile area. Claimant could not recall any particulars of his work. At the investigatory hearing, Claimant acknowledged that he could not walk forty (40) miles in one (1) day and intimated he may have performed the inspection with his personal vehicle by accessing the right-of-way. In this regard, most of the 40 miles is not accessible by right-of-way. Claimant also suggested he may have conducted the inspection with his co-worker (senior track inspector) but the co-worker, as with Claimant, did not have track authority. Claimant testified that he was "banking" reports. In other words, he performed the inspection on one day and reported it the next day. Claimant, however, did not have track authority for any location during the period of August 7 through August 11, 2012. Banking an inspection report, as Claimant asserts, is an acknowledgement that he improperly performed inspections because it is not sanctioned by MWI-105.9 (Instruction for Track Inspection). In short, Claimant violated MWI-105.9 as well as General Regulation GR-15 and General Rule A.

The incident of August 8, 2012, is Claimant's second major offense in less than six (6) months and warrants the 30-day suspension coupled with a 5-day overhead suspension for a prior incident. Also, Claimant was disqualified as a Track Inspector for 365 days. Under the IDPAP policy, a suspension up to 30 days may be assessed for a second serious offense occurring within three (3) years of the first offense. Claiming compensation for work not performed and submission of erroneous inspection reports - - required by Federal law and regulation - - is a serious offense.

ORGANIZATION'S POSITION:

On August 8, 2012, Claimant reported for duty as scheduled and performed his duties related to track inspection. Following completion of these duties, he accessed the online database and recorded the data from inspecting the track. Thereafter he performed other duties to complete his 10-hour workday.

Claimant's supervisor approved the track inspection reports and Claimant's co-worker (senior track inspector) inserted Claimant's actual work hours (10 hours) in the payroll system. The review and approval of Claimant's reports by his supervisor and the inclusion of 10 hours for compensation for actual time worked on August 8, 2012, is proof that Claimant inspected the track during his workday. There is no direct evidence from the Carrier proving that Claimant did not inspect track and did not work 10 hours. Thus, the Carrier has not proven the charge levied against the Claimant.

As for MWI-105.9 (Instruction for Track Inspection), Section 4, Paragraph 4 cited in the investigatory notice, there is no Section 4, Paragraph 4 in MWI-105.9 so Claimant did not violate this non-existent provision. With respect to General Rule A, it is a "catchall" requirement for employees to know and obey the rules and to ask for direction or guidance when needed. The Carrier has not established that Claimant failed to know or obey rules. Also, the Carrier did not charge Claimant with dishonesty or lying although the Engineer of Track argued that Claimant did not "adequately answer" questions during the investigation. Finally, the Board may consider mitigating circumstances in assessing the discipline imposed by the Carrier. In that respect, this claim must be sustained because the discipline is unwarranted, unjust and excessive.

CONCLUSIONS:

The burden of proof resides with the Carrier to establish the facts that support the discipline imposed on Claimant and to show that the discipline is appropriate for the alleged violations of rules.

Based on the record the Board concludes that there is substantial evidence that Claimant violated General Rule A and General Regulation GR-15 as well as MWI-105.9. Claimant testified he was familiar with the process or system for recording his work time (GR-15) and track inspection requirements (MWI-105.9). In other words, he knew the rules that applied to the day in question (August 8, 2012).

As demonstrated by the Carrier, Claimant's explanations do not withstand scrutiny. For example, Claimant acknowledged he could not walk 40 miles on August 8, 2012; walking, by itself, did not accomplish the inspection. Coupled with the acknowledged limitation related to walking, there was no right-of-way for most of the 40 miles so accessing the track with Claimant's personal vehicle does not support Claimant's assertion that he completed a 40-mile inspection. Along with walking and limited right-of-way access by vehicle, Claimant professes

no recall of any particulars for the work he performed during his 10-hour day on August 8, 2012. During the period of August 7 through August 11, 2012, Claimant did not have track authority; the absence of track authority is not disputed and it undermines his explanation he was "banking" his inspection reports by performing the inspection on one day and recording it the next day. The Carrier's indirect evidence and Claimant's unpersuasive explanations constitutes substantial evidence and establishes the charge levied on Claimant.

As for the Organization's argument that Claimant cannot have violated Section 4, Paragraph 4 in MWI-105.9 because that section and paragraph does not exist, MWI-105.9 (Instruction for Track Inspection) does exist and addresses the procedure and frequency for reports and filing thereof. Citation to MWI-105.9 was sufficient notice to Claimant of the charged violation as it relates to conducting track inspections and filing reports. Also, the supervisor's review and approval of Claimant's reports and the senior inspector's inserting 10 hours compensation into the payroll system for Claimant does not preclude the Carrier from conducting an audit of records and where, as here, there are discrepancies, investigating and correcting the record.

The erroneous track inspection reports and recording 10 hours compensation is a serious offense. The discipline imposed by Claimant is consistent with the IDPAP policy and appropriate for this serious offense that follows within 6 months of a prior serious offense.

Since the charge is proven and is not arbitrary or excessive, there is no violation of the Agreement. Consequently, the claim will be denied.

AWARD

Claim denied.

Patrick Halter /s/

Patrick Halter

Signed on this 13th day
of December, 2013