

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
CASE NO. 38, AWARD NO. 38**

**Brotherhood of Maintenance of Way
Employees 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 dismiss Claimant B. Clark for the alleged violations of CSXT Operating Rules – General Rule A; General Regulations GR-2 and GR-5 and MWI G025 in connection with a vehicle accident on January 17, 2012 was on the basis of unproven charges, arbitrary, capricious and in violation of the Agreement (Carrier’s File 2013-144696).
2. As a consequence of the violation referred to in Part I above, Claimant B. Clark 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’s date of hire is June 27, 2005; he maintains seniority in the Maintenance of Way Subdepartment. On January 17, 2012 Claimant was operating a truck and towing a brush cutting machine as part of a system production gang that was traveling to different work locations.

On February 3, 2012 the Carrier notified Claimant to attend a formal investigation “to determine the facts and ... your responsibility, if any, in connection with an incident that occurred at approximately 1245 hours, on Tuesday, January 17, 2012 at or near mile post 00J 42.3, on the Chattanooga Subdivision, in the vicinity of Christiana, Tennessee.”

As detailed in the notice - -

It has been reported that the specific incident occurred while you were operating CSXT Vehicle N2166D (a Danella rental) traveling north on Christiana – Fosterville Road when the backhoe trailer (R1738D) you were towing slid down an embankment, resulting in extensive damage to the John Deere 333D cutting machine, as well as damage to the trailer and truck. ... the purpose of this investigation is to develop the facts and place your responsibility, if any, in connection with your apparent failure to maintain appropriate log books in the vehicle that you were operating. It is alleged that subsequent to the above incident, no log books, pre-trip inspection books, or post-trip inspection books could be found in the vehicle.

In connection with the above, you are charged with failure to properly and safely perform the responsibilities of your position, failure to properly maintain control of the vehicle you were driving and the towed unit, neglect of your assigned responsibilities, car[e]less operation of a motor vehicle, and possible violations of, but not limited to, CSXT Operating Rules – General Rule A; General Regulations GR-2, GR-5, GR-16, CSX Safeway Rule GS-1 and GS-3; as well as, MWI G025.

The February 3, 2012 investigatory hearing eventually convened on May 7, 2013. Based on the record established at the hearing, the Carrier dismissed the Claimant for violating CSXT Operating Rules as in General Rule A, General Regulations GR-2 and GR-5 and MWI G025.

CARRIER'S POSITION:

On January 17, 2012 Claimant was operating a stakebed truck and towing a cutting machine loaded onto a large trailer when the truck slid off the road. The truck, trailer and cutting machine incurred damage as a result of Claimant's accident. When Claimant's supervisor arrived at the scene, Claimant stated that the truck and trailer slipped down the embankment. A resident in the area witnessing the accident stated the cause was slippage on the truck's front tire and noted no other vehicles on the road.

Five weeks after the accident, Claimant changed his story and stated that a "recklessly driven" ATV approaching his truck caused him to swerve. Gang members in the CSX vehicle immediately in front of Claimant's observed no ATV vehicle on the road; the Assistant Roadmaster investigating the accident did not find any signs such as tire marks indicating a swerve. The Assistant Roadmaster concluded that Claimant's vehicle gradually exited the roadway.

Claimant violated General Rule A (know and obey the rules), GR-2 (prohibition on willful neglect of duty, endangering life or property) and GR-5 (exercise care and economy in use of CSX property and return in good order) by failing to control his equipment, endangering life and property and damaging property assigned to him.

Claimant is required to complete a daily driver log book, pre-trip inspection book and post-trip inspection book. On the morning of the accident, Claimant's supervisor advised Claimant to complete the books. A search of the truck did not yield any of the books. This violates General Regulation A, GR-2 and MWI G025 (Vehicle Inspection and Driving Safety).

Although Claimant's accident report alleges that he informed his supervisor of unsafe equipment assigned to him for operation and, Claimant asserts, the supervisor instructed him to carry on, the supervisor testified that Claimant inquired only about the tax stamp on the vehicle and relayed no safety concerns. Claimant also testified that the cutting machine was not secured and moved or bounced on the trailer thereby contributing to the accident; however, Claimant's responsibility as the vehicle operator is to ensure the equipment is properly secured. In this situation, there should have been five chains used to secure the brush cutter to the trailer but only one was used.

Claimant received all of his "due process" rights under Rule 25. Although the Organization objected to the Carrier not providing evidence prior to the hearing, there is no such requirement for disclosure under Rule 25 as noted in Award 1 of this tribunal.

Dismissal is appropriate as this is Claimant's third major violation in four years. This accident is evidence that during Claimant's short tenure of service with the Carrier he cannot be rehabilitated. Arbitral boards, such as Second Division Award 11687, are unanimous that leniency is the sole prerogative of the Carrier. The claim should be denied.

ORGANIZATION'S POSITION:

On the day of the accident (January 17, 2012) Claimant operated the rental vehicle towing a trailer with brush cutting machine on an overcast, rainy day occasioned by severe thunder and rain storms. Claimant encountered a recklessly driven ATV as he operated the rental vehicle on a narrow, uneven road. The ATV forced Claimant onto the road's shoulder and down the embankment which caused damage to the truck, trailer and machine as well as injuries to Claimant. Local law enforcement reported to the scene; no citations were issued.

The Carrier bears the burden to prove the charged misconduct is justification for Claimant's dismissal. Where there is insufficient evidence to support the Carrier's position, the Board must set aside the dismissal. The Carrier's charging officer testified that Claimant must have been inattentive, distracted, negligent or careless in operating the vehicle otherwise the accident would not have occurred. An accident or injury, standing alone, is not evidence of a rule violation. See Third Division Award 35747 and PLB 6402 Awards 127 and 187.

There is no evidence that Claimant operated the vehicle unsafely - - excessive speed, erratic operation, distraction - - in violation of Carrier rules. Furthermore, County and State law enforcement officials at the scene did not issue a citation to Claimant. Unrebutted is the property owner's letter that the road's condition has contributed to numerous accidents; this corroborates Claimant's testimony that the road is narrow and uneven. Also, the Carrier does

not contest the weather conditions or address the recklessly driven ATV as causing the accident.

As for the Carrier's conclusion that the Claimant failed to maintain the three log books, the books and other materials were missing from the truck or became missing shortly after the accident. As Claimant testified, he filled out the log book and inspection book prior to leaving the motel on the morning of January 17, 2012. He placed the books in a box on the transmission hump inside the truck and he did not remove the books at any time. [Tr. 119-120]

The accident occurred due to circumstances beyond the Claimant's control. The Carrier, moreover, failed to consider all the circumstances when it dismissed the Claimant from service. In this regard, Claimant's prior infractions are unrelated to driving or safety and his employment history reflects a reliable and dedicated employee. When there is a failure to consider mitigating facts, this tribunal has lessened the penalty. See Awards 2, 7, 16 and 22. Since the Carrier did not comply with the Agreement, the claim should be sustained.

CONCLUSIONS:

The Board's decision is based on a review of the hearing transcript, Claimant's prior service record, the notice of hearing with the charged misconduct and alleged rules violations and the Carrier's and Organization's submissions. Having reviewed the record, the Board finds that Rule 25 has been followed by the Carrier and Claimant received all due process protocols called for under the rule.

As for the claim itself, the Carrier's charging official asserts that Claimant must have been inattentive, distracted, negligent and \ or careless otherwise this accident would not have occurred. As pointed out by the Organization, arbitral awards have established a longstanding principle to follow in this kind of situation which is an accident or injury, standing alone, does not equate to evidence of a rule violation. See Third Division Award 35747 and Public Law Board 6402, Awards 127 and 187.

In the cited awards, the discipline was mitigated or rescinded as the reenactment of the accident by management officials did not replicate the accident, the management official testifying at the hearing did not have first-hand knowledge of the situation regarding the injury, there never no instructions how to perform the work and the only witness to the accident corroborated the injured employee's testimony. These items are not of favorable assistance to Claimant in this accident.

There is an outside party witness (Mr. Thompson). He heard Claimant's truck, did not hear or see any other vehicles on the road, and was the first person to assist Claimant at the accident whereupon Claimant told him the tire slipped off the road. This led to the truck, trailer and brush cutter machine heading down the embankment. In the words of the local law enforcement report, Claimant failed to maintain his lane.

Although Claimant asserts five weeks after the accident that a “recklessly driven” ATV caused him to swerve which caused the accident, the witness as well as gang members in the truck immediately in front of Claimant’s never saw or heard any ATV. Pictures of the accident scene do not show any type of tire marks indicating a swerve. Local law enforcement (deputy sheriff) did not issue a citation because no other vehicles were involved. [Tr. 112] At the time of the accident there was no inclement weather in effect and the law enforcement report does not remark weather as a contributing concern or cause of accident.

Claimant is familiar with operating this truck; he reported no safety deficiencies other than a missing tax stamp. Evidence shows that the equipment on the trailer was not secured with the appropriate number of chains; only one chain rather than the required five was in use to secure the brush cutter. There is no dispute that Claimant’s responsibilities included securing the equipment for stability and safety.

On the morning of January 17, 2012 Claimant’s supervisor discussed with Claimant and gang members the need to maintain the log books and inspection records. Claimant asserts he completed the log book and inspection records prior to leaving the motel with the truck on the morning of January 17; however, a thorough search of the truck produced completed books by James Sparks and Eric Rausch but no book for Claimant. [Tr. 33, 116, 138] A letter from the third-party vendor recording the log book data and inspection reports states that it has no data or reports from Claimant. In the Board’s view, this is persuasive circumstantial evidence that Claimant was not maintaining the three books.

There is substantial evidence to support the Carrier’s charged misconduct levied against the Claimant. The penalty remains in place given this is Claimant’s third major offense in four years. Since the Carrier complied with the Agreement when it dismissed Claimant, the claim will be denied.

AWARD

Claim denied.

Patrick Halter /s/

Signed on this 31st day
of January, 2014