

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7529  
CASE NO. 39, AWARD NO. 39**

**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. The Carrier’s decision to dismiss Claimant J. Watkins for the alleged violations of CSX Transportation Operating Rules – General Rule A; General Regulations GR-2 and GR-2A; as well as the CSX Code of Ethics in connection with a third party check that was made out to and cashed by Claimant was on the basis of unproven charges, arbitrary, capricious and in violation of the Agreement (System File D70163513/2013-145703).
2. As a consequence of violation referred to in Part 1 above, Claimant J. Watkins 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.

Following Claimant’s retirement from county government, he entered on duty with the Carrier on April 12, 1999. Over the years of his employment with the Carrier, Claimant held positions as Foreman, Timekeeper, Track Inspector, Machine Operator and Vehicle Operator. In January 2013 Claimant oversaw the installation of shelving in boxcars by a vendor. The vendor’s employee caused a fire that damaged CSX property (safety vests). Claimant informed the vendor that a \$500.00 payment was due for the damage and instructed the vendor to submit payment by check payable to Claimant. On March 14, 2013 the vendor delivered a check to Claimant whereupon Claimant cashed it on March 15, 2013.

On March 19, 2013 the Carrier removed Claimant from service pending investigation.

On April 2, 2013 the Carrier issued a notice of investigative hearing to Claimant.

The purpose of this formal investigation is to determine the facts and place your responsibility, if any, in connection with information received on Monday, March 18, 2013, when Director of Ties, R. J. Spatafore was made aware that without authorization, you allegedly accepted and cashed a check for \$500.00 from an outside vendor, Auto and Truck Ambulance, Inc. of LaGrange, Georgia for damage caused to safety vests that were damaged by them. A Company check was made out to you, dated March 14, 2013 and the returned check was signed and cashed by you on March 15, 2013 at 1207 hours.

In connection with the above incident, you are charged with failure to properly perform the responsibilities of your position, dishonesty, conduct unbecoming a CSX employee, and possible violations of, but not limited to, CSXT Operating Rules – General Rule A; General Regulations GR-2 and GR-2A; as well as, the CSX Code of Ethics.

Based on the record established at the investigative hearing held on May 9, 2013, the Carrier dismissed Claimant from service for violating the aforementioned rules.

CARRIER'S POSITION:

Claimant received a fair and impartial hearing in accordance with Rule 25(d). The Organization's argument that the hearing convened outside the 30-day time limit specified in the Agreement (Side Letter 22) is without merit. The Carrier had "knowledge" of Claimant's rules violations on March 18, 2013; the hearing was scheduled on April 16, 2013 which is within the 30-day time limit. The Carrier's rescheduling the hearing to May 9, 2013 was consistent with Rule 25(d) which does not require the mutual agreement of the Organization and Claimant when rescheduling.

There is substantial evidence to affirm the Carrier's dismissal of Claimant. In this regard, Claimant never informed his supervisor about the property damage or the reimbursement from the vendor until the Carrier removed Claimant from service on March 19, 2013. Claimant instructed the vendor to make the check payable to Claimant and not payable to CSX and Claimant acknowledged accepting the vendor's check and depositing it in his personal account. This constitutes violations of General Rule A (know and obey the rules), General Rule GR-2 (forbids disloyalty, dishonesty or false statements), GR-2A (prohibits criminal conduct which may damage the Carrier's reputation) and the CSX Code of Ethics (prohibits unethical behavior such as fraud and theft).

The Organization argues that Claimant's actions were appropriate but the Carrier did not afford sufficient time for Claimant to produce a check payable to CSX; however, Claimant testified he did not know the check was payable to him until March 14, 2013 (date he received it) thereby negating the Organization's argument that Claimant's actions were appropriate. Rather than

notifying his supervisor that he received the vendor's check, the Claimant deposited it. He asserts that once the check cleared his account he would remit payment to the Carrier. This is not credible.

Dismissal is a proportional and appropriate penalty because theft is a major offense as is dishonesty. Arbitrators in the railroad industry routinely affirm dismissal of employees engaging in this prohibited conduct as it destroys the trust and integrity in the employment relationship. On-property Award 103 under Public Law Board 7120 reflects the prevailing arbitral view.

ORGANIZATION'S POSITION:

The investigative hearing was scheduled for April 16, 2013; however, on April 15, 2013 the Carrier unilaterally rescheduled the hearing to May 9, 2013. Rule 25(d) requires a "valid reason" when rescheduling but no reason was extended by the Carrier and the Organization did not agree to reschedule.

Another violation of Rule 25(d) occurred when the Carrier did not schedule the investigatory hearing within thirty days of the "date management had knowledge of the employee's involvement" with the alleged fraudulent activity. On March 14, 2013 Carrier Officers Stewart and Piccirillo knew that the vendor would draft a check payable to Claimant, thus, the Carrier had "knowledge" as required under Rule 25(d) and the 30-day period to schedule a hearing commenced. The Carrier scheduled the hearing for April 16, 2013 which is thirty-three (33) days past March 14, 2013.

Turning to the merits of the claim, Claimant was dismissed "because the Carrier believed it had proven that he attempted to defraud and/or steal from the company." Numerous Third Division Awards hold that dishonesty and theft require a stringent or higher standard of proof than applied in other disciplinary matters. Unrebutted is Claimant's testimony where he believed the vendor provided the check to Claimant in error and having received the check in error, he deposited it as a means to provide payment to the Carrier as he believed this was the proper manner for handling this situation. Claimant never intended to steal, defraud or violate any rules. In the absence of guidelines or regulations for this kind of situation, the Claimant "simply [did] what he thought was best and, in the absence of guidelines or regulations, used his own judgment."

Notwithstanding the charges levied against Claimant, he has fourteen years of seniority reflecting exemplary service and performance. His disciplinary record has one infraction in 2011. When the Organization has shown that discipline imposed is excessive, capricious, improper and unwarranted, numerous awards of this tribunal lessen the discipline. See Awards 2, 7, 16, 22.

CONCLUSIONS:

As the party alleging a violation of Rule 25(d), the Organization accepts the responsibility to present sufficient evidence to establish its allegation that the Carrier breached the rule when the investigatory hearing was rescheduled from April 16, 2013 to May 9, 2013. In that context, the Board observes the following exchange.

The Carrier notified the Organization by letter dated April 15, 2013 that “[a]t the Company’s request and in agreement with the Vice Chairman ... a postponement has been granted. This investigation will be held on ... May 9, 2013[.]”

By letter dated April 23, 2013 the Organization responded with “strong exceptions to the Carrier[’s] postponement being unreasonable and the Organization did not agree with the Carrier[’s] request as stated in the carrier[’s] postpone letter dated April 15, 2013[.]”

At the investigatory hearing on May 9, 2013 the hearing officer stated “I myself spoke with you [Vice Chairman] about postponing the date for the investigation to today and it was due to scheduling conflicts that you were not able to ... hold it on the original day [April 16, 2013] and it was my understanding that you did agree to the postponement to today” whereupon the Vice Chairman replied “I never, never agreed to the postponement date that day I said the only thing I would agree to is putting my date in schedule with yours at the hearing. But I object to having it prolonged that long. We could have got here and done before this time.”

Rule 25(d) states that “[a] hearing may be postponed for a valid reason for a reasonable period of time at the request of the Company, the employee, or the employee’s union representative.” The exchange of letters and statements at the investigative hearing are the evidence of record and, as such, constitute insufficient evidence to find a violation of Rule 25(d) when the hearing was rescheduled from April 16, 2013 to May 9, 2013.

Another item in Rule 25(d) raised by the Organization is that the Carrier must set the investigatory hearing within thirty days “from the date management had knowledge of the employee’s involvement.” According to the Organization, the Carrier “had knowledge of the [Claimant’s] involvement” in the alleged fraudulent activity on March 14, 2013 when “Carrier officers learned that the outside vendor would draft a check and make it payable to Claimant.” [Br. at 3] Notwithstanding this “knowledge” on March 14, 2013 the Carrier set the hearing date thirty-three days thereafter (April 16, 2013).

The charged misconduct encompasses dishonesty, theft and fraud among others. This misconduct, if proven, implicates prohibited conduct of a criminal nature. Numerous awards cited by the Organization - - including Third Division Awards 16064, 16154, 21122, 23977, 25532 - - - apply a more exacting standard of proof for this kind of prohibited conduct. On March 14, 2013 Carrier officers received information from the vendor that, standing alone and viewed with a sinister intent, suggested impropriety by Claimant with his instruction to the vendor to pay for the CSX property damage with a check payable to Claimant. In assessing the

Claimant's instruction to the vendor, the Board recognizes Claimant's testimony that he intended to remit payment to CSX after the check cleared his personal account in five to seven days. As of March 14, however, Claimant's asserted intention for handling the vendor's check and his remittance of payment to CSX were unknown. Claimant's conduct on March 14 is suggestive but not determinative of misconduct.

On March 18, 2013 the vendor submitted to a Carrier official a hard copy of the vendor's check which confirms that the vendor made it payable to Claimant, confirms the vendor's testimony that Claimant accepted it on March 14, 2013 (Thursday) and cashed it on March 15, 2013 (Friday). With hard copy evidence of Claimant culminating the transaction on March 18, 2013 (Monday), the 30-day period commenced. Scheduling the investigatory hearing for April 16, 2013 meets the 30-day time limit in Rule 25(d). Discussion initiated by the vendor with Carrier officers on March 14, 2013 suggests "employee involvement" in theft or fraudulent activity but is not determinative of "management ... knowledge" about the charged misconduct until the Claimant concludes the transaction on March 18, 2013.

As the Carrier did not breach Rule 25(d), the Board's focus is on the substance of the claim where the Board reviews the record to determine whether there is a reasonable basis for the Carrier's conclusion that Claimant engaged in misconduct. Where there is a reasonable basis supporting the charged misconduct, the penalty is assessed to ensure it is proportional for the rules infractions rather than excessive, punitive or otherwise improper.

The evidentiary record shows that on March 19, 2013 Claimant was removed from service pending an investigation into the charged misconduct. Upon his removal from service, he disclosed for the first time to his supervisor, upon the supervisor's inquiry, that the vendor's employee caused damage to CSX property in January 2013. Claimant informed the vendor in March 2013 that payment for CSX property damage was due by check. The vendor's testimony establishes that he inquired to Claimant about a check payable to CSX but Claimant instructed the vendor to submit a check payable to Claimant. Thereafter, Claimant instructed the vendor to deliver the check in an envelope to Claimant at a motel in Georgia where Claimant was lodging while on CSX duty. The vendor delivered the check in the envelope to the motel on March 14, 2013. Upon Claimant's arrival at the motel in late afternoon or evening hours on March 14, 2013 he accepted the envelope with the check. The next day (March 15, 2013) Claimant cashed the vendor's check.

Claimant testified that he deposited the vendor's check in his personal account and intended to write a check payable to CSX as soon as the funds were available; Claimant testified that an official at his bank told him the vendor's check would clear in five to seven days. Claimant's testimony does not align with his actions and hard copy evidence. In this regard, a hard copy of the check that Claimant offered at the investigatory hearing as evidence of his intent to remit payment to CSX is drawn from Claimant's account at his bank in Alabama and the hard copy of the vendor's check that the Claimant cashed on March 15 is from the vendor's account at a bank in Georgia.

As the vendor testified, "[w]e bank at a different bank which is Pine Mountain, Georgia; which is about 20 minutes from here. So the following day he [Claimant] made a B-line down there and cashed it that day." In other words, while on CSX duty in Georgia Claimant received the vendor's check on Thursday and cashed it at the vendor's bank on Friday.

Since Claimant cashed the vendor's check at the vendor's bank on March 15 while Claimant was in Georgia, Claimant did not deposit the vendor's check in Claimant's account at his bank in Alabama. The hard copy documents and testimony show there is no basis for crediting Claimant's assertion that an official at his bank in Alabama informed him it would take five to seven days for the vendor's check to clear when, as the record shows, Claimant executed the vendor's check in Georgia for cash.

The foregoing testimony and evidence support the Carrier's decision to dismiss the Claimant. The penalty of dismissal will not be disturbed for this proven charge of theft and dishonesty. In finding the penalty proportional to the proven misconduct, the Board reviewed Awards 2, 7, 16 and 22 of this tribunal as referenced by the Organization. Those awards do not involve theft and dishonesty and, thus, are of diminished value for loosening the penalty imposed in this claim.

Since the Carrier complied with the Agreement when it dismissed Claimant, the claim is denied.

AWARD

Claim denied.

Patrick Halter /s/

Patrick Halter, Neutral Member

Signed on this 31st day  
of January, 2014