

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7529  
CASE NO. 40, AWARD NO. 40**

**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. The Carrier’s decision to dismiss Claimant J. Dalzell for the alleged violations of CSX Transportation Operating Rules – General Rules A, G and L; General Regulations GR-2, GR-2A and GR-3A; as well as the CSX Code of Ethics in connection was on the basis of unproven charges, arbitrary, capricious and in violation of the Agreement (Carrier’s File 2013-145923).
2. As a consequence of violation referred to in Part 1 above, Claimant J. Dalzell 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 November 11, 1976; he maintains seniority in the Track Department in an area around Selkirk, NY, where he performs track inspection duties. On March 11, 2013 an anonymous complaint on the Public Safety Hotline reported a CSX employee named Jim filling containers with diesel fuel at the Carrier’s bulk fuel storage facility, transporting the filled containers off property in a CSX vehicle and exchanging them with an outside party for personal gain.

Based on this anonymous complaint, CSX Police conducted surveillance of Claimant between March 17 and March 25, 2013 at the bulk fuel storage facility. The video captures Claimant on four occasions (March 17, March 19, March 21 and March 25) filling containers with diesel fuel. CSX Police reported Claimant exchanging the fuel - - approximately 140 gallons - - for grain with an outside party.

On April 15, 2013 a CSX Police agent informed the Track Foreman (Claimant's supervisor) of the surveillance video. The Track Foreman informed the agent that Claimant's job duties during March 17 through 25, 2013 would not cause a consumption of 140 gallons of fuel. Claimant was arrested on April 17, 2013 and charged with four counts of petit larceny and four counts of criminal possession of stolen property. Upon Claimant's arrest, the agent searched Claimant's body and discovered ammunition (seven millimeter round). A subsequent search of Claimant's truck revealed alcohol on the Carrier's property (eight unopened cans of beer and a clear liquid with the odor of alcohol). Based on the foregoing, the Carrier removed Claimant from service pending investigation.

On May 3, 2013 Claimant received notice of an investigatory meeting which convened on May 23, 2013. After reviewing the record established at the investigative hearing, the Carrier dismissed Claimant from service for violating CSXT Operating Rules, General Rules A, G and L, General Regulations GR-2, GR-2A, GR-3A and the CSX Code of Ethics.

CARRIER'S POSITION:

Claimant received a fair and impartial hearing in accordance with Rule 25(d). The Organization's request to postpone the hearing - - presented thirty minutes prior to the commencement of the hearing - - was appropriately denied as the reason for the postponement (wait for the outcome of Claimant's criminal proceeding) was unrelated to the rules violations.

Claimant was positively identified in the video as the person filling the containers (five gallon hydraulic and oil buckets) with CSX fuel and transporting it off property in a CSX vehicle where he subsequently exchanged it for personal gain with an outside party. General Rule A requires an employee to know and obey rules and instructions. In this regard, General Rule L prohibits unauthorized possession or removal of railroad property or material (fuel) from CSX property. Claimant's unauthorized taking of CSX fuel and transporting it in a CSX vehicle violates GR-2 (prohibition on dishonesty among other items). GR-2A prohibits criminal conduct such as theft of CSX fuel. Claimant violated the Code of Ethics (protect CSX property and resources) when he transported the stolen fuel off property in a CSX vehicle.

Other rules violated by Claimant are General Rule G which precludes an employee from possessing or using alcohol or intoxicants (eight cans of beer) when reporting for duty, on duty or on CSX property and GR-3A prohibiting the possession of firearms or weapons (ammunition) on CSX property.

Claimant has no explanation for his actions. One hundred forty gallons of fuel far exceeds the fuel requirements for performing his duties on March 17 through 25, 2013. His assertion that he spilled fuel in the back of the CSX truck and replenished it is not persuasive; he never reported a fuel spill. Other explanations are based on hearsay as he did not present any witnesses to corroborate his testimony.

Dismissal is a proportional and appropriate penalty because theft is a major offense as is dishonesty. With over thirty-five years of service with the Carrier and predecessor railroads, Claimant knew the rules and Code of Ethics.

ORGANIZATION'S POSITION:

In early 2013 Claimant received directions from his former supervisor to place fuel around the yard for use as needed and to maintain a full tank of fuel in the backhoe. To perform these duties, in addition to performing his regular track inspection duties, Claimant received a key to access the fuel pump.

On May 3, 2013 the Carrier issued notice of a formal investigation to Claimant wherein the Carrier alleges that Claimant "obtained and [used] CSX diesel fuel for your personal gain between March 17 and 25, 2013 by filling containers loaded in the back of vehicle # 94530 assigned to you."

When the investigative hearing convened on May 23, 2013 the Organization requested to reschedule and provided a valid reason as required by Rule 25(d), e.g., wait for the outcome of Claimant's criminal proceeding. The Carrier's refusal to grant the request - - supported by a valid reason - - violates Rule 25(d) and warrants sustaining the claim.

Another violation of Rule 25(d) occurred when the Carrier denied the Organization's request to receive, prior to the hearing, a list of the Carrier's witnesses and documents the Carrier intended to offer as evidence. Without knowing the Carrier's witnesses and evidence, the Organization is precluded from preparing for the hearing with witnesses to rebut the Carrier's witnesses and evidence to rebut the Carrier's arguments. Finally, the hearing officer's comments served to direct Claimant's questioning rather than allowing Claimant to proceed with presenting his defense to the Carrier's theory of the case.

In a claim where allegations involve dishonesty and theft, numerous awards in the Third Division require a higher standard of proof. "With the Carrier's burden in mind, we turn to the allegation that [Claimant] violated the Carrier's weapons policy." Claimant did not carry a weapon onto CSX property so he did not violate any rules; ammunition is not addressed in the rules. As for alcohol, Claimant was not in possession of it and alcohol was not on his body. Claimant ceased use of the unlocked vehicle where the alcohol was found.

Regarding theft of fuel, Claimant testified that his former supervisor directed him to stockpile fuel and to maintain fuel in the backhoe. Claimant spilled fuel which required him to replenish the amount spilled. Claimant denies taking of 140 gallons of fuel as estimated by the Carrier.

Notwithstanding the charges levied against Claimant, he has thirty-seven years of seniority and an exemplary employment record as reflected by only two minor disciplinary infractions (failure to wear seat belt in 2010 and failure to clean CSX truck in 2012) during his career. 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:

Addressing, at the outset, the Carrier's refusal to postpone and reschedule the hearing, the request encompassed an indefinite period of time. That is, the Organization sought to reschedule after disposition of Claimant's criminal proceeding when, at the time of the investigative hearing, there was no timetable or forecast when that court proceeding was to commence. 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." Notwithstanding the Carrier's professed reasons for not rescheduling the hearing, the Organization's and Claimant's request is open-ended which, in the Board's view, exceeds "a reasonable period of time." Rule 25(d) was not breached in the circumstances presented.

Rule 25(d) does not provide for disclosure of witnesses and documents prior to the hearing as sought by the Organization. Even without disclosure, Claimant knew CSX Police agents were involved as they interviewed him about filling containers with diesel fuel during March 17 through 25, 2013; Claimant testified he knew the Carrier installed a surveillance camera in March 2013 at the pump because the "rumor" in the yard was that Claimant was taking fuel. Also, an agent searched Claimant's body and discovered the ammunition. Claimant also knew, based on the notice of charges, that the allegations concerned CSXT Operating Rules, General Regulations and the CSX Code of Ethics. The notice informed Claimant that he could present witnesses at the hearing. Finally, the hearing officer initiated discussion near the conclusion of the hearing whether Claimant and the Organization were requesting a continuance for further presentation of evidence and witnesses. The hearing officer recessed the hearing for the Claimant and Organization to deliberate; when the hearing resumed they answered "no."

There are no particular comments noted by the Organization as showing hearing officer conduct impairing Claimant's right to a fair and impartial hearing. The Board's review of the transcript reveals the hearing officer, in a lenient manner, stating he is "granting as much leeway as possible" to Claimant for questioning witnesses. Claimant received a fair and impartial hearing.

As for the substance of the claim, the Board finds persuasive and applicable the reasoning in Third Division Award 36337:

Employee theft is one of the few offenses for which summary discharge is deemed appropriate. The Carrier is entitled to expect its employees to be honest and to assume responsibility for not stealing, no matter how large or small the value of the item. In this instance, when the Claimant removed the gasoline can from Carrier property, it is clear that his intent was to deprive the Carrier of the gasoline contained therein and convert it to his

own use. On that basis alone, discharge was not an unreasonable or arbitrary action on the part of the Carrier.

[Award at 4]

The Track Foreman (Claimant's supervisor) and the Staff Engineer identified Claimant in the surveillance video. Based on their familiarity and experience through the employment relationship with Claimant, they identified Claimant by physical stature, facial hair, ambulatory mannerisms and the jacket which they noted was worn by Claimant at all times. They identified the vehicle in the video by style and number as the CSX truck assigned to Claimant. There was little, if any, rebuttal to their testimony by Claimant whose first name is Jim as reported in the anonymous complaint.

Claimant's explanations are not persuasive. To name a few, he was not held accountable for reporting fuel because he "worked it out with [his former] supervisor," he states that his current supervisor is a poor communicator compared to his former supervisor, he spilled fuel and replaced it but never files reports on such matters, he laments the anonymity of the person filing the complaint on the Public Safety Hotline but testifies the person lodging it was "spiteful" because Claimant had labeled the tipster a "pedophile." Claimant testified he did not know the rules, after thirty-seven years of service, and had to "look them up."

Having reviewed the record, the Board finds there is more than substantial evidence that Claimant "obtained and [used] CSX diesel fuel for his personal gain between March 17 and 25, 2013 by filling containers loaded in the back of vehicle # 94530 assigned to" Claimant. The proven charge establishes that Claimant violated the CSX Code of Ethics, General Regulation GR-2 and General Rule L. 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 referenced by the Organization. Those awards do not involve theft and dishonesty and, thus, are of limited utility for loosening the penalty imposed in this claim. In view of these findings, the Board will not address other allegations in the charge.

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

AWARD  
Claim denied.

Patrick Halter /s/  
Patrick Halter

Signed on this 31st day  
of January, 2014