

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
CASE NO. 41, AWARD NO. 41**

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

v.

CSX Transportation Inc.

**P.J. Halter, Neutral Member
R.A. Paszta, Carrier Member
A.M. Mulford, Organization Member**

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

1. The Carrier’s decision to dismiss Claimant A. Flowers for the alleged violations of CSX Transportation Operating Rules – General Rule A; General Regulations GR-2, GR-15 and MWI – 105.9 Section 4 Paragraph 4 was on the basis of unproven charges, arbitrary, capricious and in violation of the Agreement (Carrier’s File 2013-146425).
2. As a consequence of the violations referred to in Part 1 above, Claimant A. Flowers 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.

On March 20, 2006 Claimant entered service with the Carrier whereupon he established and maintained seniority as a Track Inspector with regular duty hours 7:30 a.m. to 3:30 p.m. He reported to Assistant Division Engineer Whitaker (also referred to as the Track Engineer) and Roadmaster Justus at his home terminal Indianapolis, IN.

Monday (May 28, 2012) was Memorial Day, a day Claimant would not normally report for duty; however, due to high ambient temperature that day he was to conduct a special track inspection in his territory. For the inspection on Memorial Day, Claimant submitted nine hours overtime to payroll and filed his inspection report on May 29, 2012.

On June 1, 2012 Claimant reported for his regular duty hours. He submitted to payroll eight hours straight time and four hours overtime thereby claiming wages for hours worked until

7:30 p.m. Claimant was off the track by 1:58 p.m. Three days later (June 4) Claimant was off the track at 3:21 p.m.; he claimed wages for hours worked until 5:30 p.m. (straight-time eight hours and overtime two hours).

On June 27, 2012 Track Engineer Whitaker directed Claimant to a formal investigation set for July 13, 2012.

The purpose of this formal investigation is to determine the facts and place your responsibility, if any in connection with information received on June 14, 2012 that you allegedly fell short of complying with corporate rules, instructions and policies for the following reasons:

- On May 28, 2012, you failed to inspect the main track from CP 260 to QI 283.9 and from CP IU to QSC 7.1 for hot weather inspection per instructions from Roadmaster Justus.
- You submitted a timesheet for 9 hours of overtime on May 28, 2012.
- You submitted an ITIS inspection report on May 29, 2012 at 0926 hours indicating a full inspection for the main track territory.
- On June 14, 2012, while explaining the discrepancy in required inspections frequency to Roadmaster Justus, you stated the ITIS inspection report was actually performed on May 28, 2012. You were not issued an EC-1E track authority for track inspection on May 28, 2012.
- Additionally, there were discrepancies between the ITIS reports and the EC-1E on June 1 and 4, 2012.

In connection with the above incident, you are charged with failure to properly perform the responsibilities of your position, and possible violations of, but not limited to, CSXT Operating Rules – General Rule A; General Regulations GR-2, GR-15, and MWI – 105.9 Section 4 paragraph 4.

The investigative hearing did not convene as scheduled on July 13, 2012. In this regard, Claimant entered a treatment program for mental health and substance abuse on June 15, 2012 in Lake Palm, FL. The investigative hearing was held in abeyance until Claimant was medically qualified to attend. Claimant was released from the behavioral health clinic on December 14, 2012 and, thereafter, continued with individual therapy in early 2013.

On or about March 22, 2013, the Organization notified the Carrier of Claimant's availability to attend an investigative hearing whereupon notice was issued to Claimant and the hearing

convened on May 13, 2013. At the time of the hearing the Carrier's medical department had not cleared Claimant for return to duty.

After considering the testimony and exhibits, Division Engineer Thoburn determined on May 31, 2013 that the evidence established Claimant's violations of General Rule A, General Regulations GR-2 and GR-15 and MWI-105.9 (Instruction for Track Inspection). Based on these violations, the Division Engineer dismissed Claimant from employment effective immediately.

On July 7, 2013 the Organization notified the Carrier that the Claimant intended to seek expedited adjudication with the Board.

CARRIER'S POSITION:

Claimant received a fair and impartial hearing. The charge letter identifies the dates of incidents with particulars for investigation; such details afforded Claimant an opportunity to prepare a response and present witnesses. Aside from the charge letter, the hearing was scheduled in a timely manner. Track Engineer Whitaker met with Claimant on June 14, 2012 to obtain his explanation of discrepancies in the frequency of required inspections and his reports filed of inspections as well as payroll submissions claiming wages for hours worked. Based on this meeting, the Carrier suspected Claimant committed rules violations and suspended him from service pending the investigation. On June 27, 2012 the Carrier issued the charge letter and on July 13, 2012 (thirty days from the date management had knowledge of the violations) the Carrier scheduled a hearing.

Any discussions between the charging official (Track Engineer Whitaker) and the hearing official (Staff Engineer Cameron) prior to issuance of the charge letter did not impair Claimant's right to a fair and impartial hearing. In this industry the common practice is for a hearing official to have some knowledge of the incident and rules before the formal investigative hearing commences. This practice is noted in on-property Award 125 of PLB 7163, Third Division Award 35506 and Second Division Award 8147.

Track Engineer Whitaker (the charging official) discussed the case with Staff Engineer Cameron (the hearing official) before the charging official (Whitaker) issued his letter levying certain rules violations by Claimant based on incidents cited in the letter. The charge letter was prepared by the Carrier's field administrative services in Jacksonville, FL; it was not prepared by the hearing official. There were no *ex parte* communications between hearing official and charging official during the hearing or evidence of collusion. There is no violation of Rule 25.

Turning to the merits of the claim, the Carrier directed Claimant to inspect track in his territory from 12:00 p.m. to 6:00 p.m. on Memorial Day (May 28, 2012). For Claimant to perform an inspection, he must have an EC-1 track authority but there is no record such authority was issued to Claimant for May 28. In a recorded telephone conversation between the Claimant and Dispatcher, Claimant states he did not work on the 28th and had not responded to a request to inspect track at a crossing where there had been an accident. Claimant's assertion that the

inspection report he submitted on May 29 was for an inspection he performed on the 28th is without merit.

Claimant's failure to perform his duties on May 28 violates GR-2 (prohibition on dishonesty and willful neglect of duties) and his payroll claim for nine hours of overtime also violates GR-2 as well as GR-15 (prohibition on claiming wages for hours not worked). The false inspection report on May 29 also violates GR-2. Even if Claimant is credited with an inspection on May 28 his filing a late report on the 29th violates MWI-105.9 and General Rule A.

Additional violations of GR-2 and GR-15 by Claimant occurred on June 1 and 4, 2012 when he submitted for overtime hours but left work prior to the conclusion of the hours that he claimed for wages.

Given these violations, Claimant's dismissal is not arbitrary, excessive or capricious. A GR-2 violation is a major offense under the IDPAP which may lead to dismissal for a first time infraction. In Claimant's situation, the GR-2 violation is his third major offense within one year. "The Carrier commends the Claimant for seeking treatment but notes that no evidence was presented that he sought treatment prior to removal from service [June 14, 2012]." [Br. at 5]

Claimant's personal circumstances do not mitigate his culpability for numerous rules infractions. Theft and dishonesty always are bases for dismissal in the railroad industry. The claim should be denied.

ORGANIZATION'S POSITION:

Claimant did not receive a fair and impartial hearing as required by Rule 25. The record shows that the Hearing Official was directly involved with the pre-investigation of Claimant through his discussions with the Charging Official and also directly involved with the decision to charge Claimant. Despite this involvement, the Hearing Official presided over the hearing. Although the Hearing Official attempted to diminish his involvement in the pre-investigation by stating the charge letter was written by the Field Administration Office in Jacksonville, FL, the Charging Official's testimony confirmed the substantial role of the Hearing Official. When the Hearing Official is not fair and impartial, the discipline must be set aside. See Third Division Awards 30601, 32297, 41224, Second Division Award 6795, PLB 6302 Awards 194 and 195 and SBA 986 Award 204.

Aside from the procedural infirmities evidenced in Charging Official Whitaker's testimony, Claimant's mental state and substance abuse (including post-traumatic stress disorder) contributed to his conduct. In this regard Claimant was involved in an on-duty accident in 2008 wherein a third-party vehicle collided with the Carrier's vehicle driven by Claimant. The next year (2009) Claimant was involved in a boating accident nearly causing his death and leading to seven surgeries on his legs; Claimant was off duty for ten months. In 2011 Claimant was involved in another accident resulting in bodily injury to a child. These accidents led Claimant to fall into the abyss of substance abuse and mental health despair. He recognized the depth of

his issues on June 11, 2012 and contacted the behavioral health clinic in Lake Palm, FL. He was accepted for treatment on June 13 and admitted on June 15, 2012 for medical diagnosis, counseling and treatment.

The cumulative effect of the traumatic events in 2008-2011 directly impaired Claimant's ability to perform his duties. Prior to those events he had a clean employment record and performed satisfactorily. Even after Claimant testified in an honest manner at the hearing about the causation of his downward spiral and subsequent treatment, the Carrier imposed dismissal. With continued treatment and support, Claimant could control his mental health and substance abuse. He is ready to resume his career with the Carrier.

Claimant's rehabilitation shows that his dismissal is unjustified and constitutes a violation of the Agreement. See PLB 7529 Awards 2, 5, 7, 13 and 16. The Organization requests that the claim be allowed.

CONCLUSIONS:

Addressing, first, the charge letter and investigative hearing, the Board concludes that the letter contains adequate particularity of events, dates and locations to place Claimant on notice of the alleged infractions and rules violations. Prior to determining whether to issue a formal charge letter, Track Engineer Whitaker met with Claimant on June 14, 2012 to obtain his explanations. After that meeting the Carrier set a hearing for July 13, 2012 which is within thirty days "from the date management had knowledge of the employee's involvement."

The Organization asserts that the Carrier did not provide a "fair and impartial hearing" because Charging Official Whitaker discussed the incidents and evidence with Hearing Official Cameron. According to the Organization, the Hearing Official's direct involvement in the pre-investigation and decision to charge Claimant with rules violations are dual roles that contravene his function as the presiding official to gather facts and evidence. This precluded Claimant from receiving a "fair and impartial hearing" as required by Rule 25, Section 1(a).

Noted in Second Division Award 6795 is the Carrier's "serious responsibility of assuring an accused employee a fair and impartial hearing. This responsibility is ignored only at the peril that serious and prejudicial procedural defects may prove fatal to [the] Carrier's substantive case." [Award 6795 at 3]

Allegations of partiality and pre-judgement arise when an official engages in or performs several functions thereby serving in multiple and overlapping roles of accuser, prosecutor and judge. Third Division Award 32297 addresses multiple roles.

The issue of multiple roles by one officer in discipline proceedings in this industry has been the subject of numerous Board Awards over the years. While these Awards generally caution against this practice because of the obvious due process risks involved, the majority of these Awards also provide that in the absence of

any Agreement language specifically prohibiting one officer from serving in multiple roles, the circumstances of each case must be reviewed to determine if the employee's due process rights were actually compromised or prejudiced in any way by the multiple roles of one officer.

[Award 32297 at 4]

Thus, multiple roles is not a *per se* violation since "the circumstances of each case must be reviewed to determine" whether Claimant's right to a fair and impartial hearing was impaired or prejudiced. When the multiple roles are performed by the hearing officer, that official must act in such a manner to "[avoid] not just the reality of partiality, but also the appearance of bias, either for or against any party or witness." [Third Division Award 41224 at 5]

In considering the circumstances of this claim, the Board finds that on May 29, 2012 the Dispatcher and a Track Inspector informed Track Engineer Whitaker of their concerns whether Claimant inspected track on May 28. Track Engineer Whitaker proceeded to collect documents and information about Claimant's inspection, report and payroll submission. During this pre-investigation he discussed the situation with Staff Engineer Cameron and Roadmaster Justus.

Specifically, on or about June 12 or 13 Track Engineer Whitaker informed Staff Engineer Cameron about the audio recording of Claimant's telephone conversation with the Dispatcher on May 28 and the discrepancy in Claimant's inspection report for May 28 dated May 29. According to Track Engineer Whitaker "the reason we do that is we don't want to do this, and be in a situation where we file on folks without cause. And Mike [Cameron] understands regulations very well." [Tr. 45] The Board finds the testimony showing the Track Engineer (charging official) seeking clarification if not confirmation from the Staff Engineer of the applicable regulations for Claimant's circumstances is within the parameters of the practice articulated in PLB 7163, Award 125 whereby a hearing official (Staff Engineer Cameron) "needs to have some idea as to the substance of the investigation." On June 14, 2012 the Track Engineer met with Claimant to obtain his responses. Thirteen days later (June 27, 2012) the charge letter issued to Claimant setting the hearing for July 13, 2012.

Given the time line of events and parameters of the discussions between the charging official and hearing official, the Board finds that Claimant's right to a "fair and impartial hearing" under Rule 25 was not compromised. Even if the hearing official determined or identified the rules to cite in the charge letter, he did not lead or direct the pre-investigation in a manner for it to inevitably serve as a self-fulfilling prophecy that Claimant violated rules. The hearing official's thread of questions at the hearing were open-ended and not leading or suggestive of answers from the charging official. Liberal grants of time for recesses to obtain and digest documents was observed throughout the hearing. Unlike the situations where one official issued the notice of investigative hearing, conducted the hearing and dispensed the discipline, the hearing official in this claim did not have a role in assessing the evidence for purposes of determining the discipline dispensed and imposed on Claimant. There is a distinct demarcation in the responsibilities and functions between the hearing official and deciding official. The Board

concludes that Claimant received a "fair and impartial hearing" in accordance with Rule 25, Section 1(a).

As for the merits of the claim, there is substantial evidence that on May 28, 2012 Claimant did not conduct the special track inspection and that he requested payment of wages for hours not worked on that date. As for June 1 and 4, 2012 there is substantial evidence of discrepancies in Claimant's inspection reports and the required frequency of inspections along with wages requested for hours not worked. The evidence is the absence of an EC-1 for the relevant days, time and attendance records compared to payroll submissions, inspections reports and frequency of required inspections and the audio recording. The evidence supports the findings that Claimant violated General Rule A, General Regulations GR-2 and GR-15 and MWI-105.9, Section 4, Paragraph 4.

The Board has considered Claimant's testimony that at some point during 2012 he informed Roadmaster Justus and Assistant Roadmaster Webb he was changing his medication; Roadmaster Justus testified he could not recall any such notice. [Tr. 102] Claimant also testified that on June 11, 2012 (Monday) he recognized "circumstances in my life were clouding my judgment" and initiated contact with the behavioral health clinic in Florida whereupon it informed him on the evening of June 13 (Wednesday) "that arrangements had been made to fly out Friday, June 15th. On June 14th I had intentions of informing my supervisor that I would be going on sick leave" but "given my physical and mental state at the time, I really don't remember a conversation that transpired." [Tr. 104-105]

Claimant's testimony is considered in the context of the Organization's representation that Claimant "will make a good employee if the railroad would grant him some leniency and allow him to come back." [Tr. 107] The Organization's request for leniency cannot be entertained by this Board. As stated in Second Division Award 11687 at 2, "[l]eniency is granted at the sole discretion of the Carrier, and we may not review the Carrier's decision to deny it (see Second Division Awards 8572, 10538)."

Since the charge is proven and is not arbitrary or excessive as it is Claimant's third major offense within one year, there is no violation of the Agreement. Consequently, the claim will not be allowed.

AWARD

Claim denied.

Patrick Halter /s/

Patrick Halter

Signed on this 31st day
of March, 2014