

**PUBLIC LAW BOARD NO. 7529**

Brotherhood of Maintenance of Way	)	
EmploYES Division - IBT Rail	)	
Conference	)	
	)	
and	)	Case No. 64
	)	Award No. 64
	)	
CSX Transportation, Inc.	)	

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's dismissal of Claimant C. Illescas for the alleged violation of CSXT Operating Rules 100.1, 104.2, 104.7 and 104.10 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File D21000714/Carrier File 2014-165643).
2. As a consequence of the violation referred to in Part 1 above, Claimant C. Illescas shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement."

Background

On February 19, 2014, the Carrier issued a notice of hearing to Claimant stating as follows:

The purpose of this formal investigation is to determine the facts and place your responsibility, if any, in connection with GPS location data, in the vicinity of West Palm Beach, Florida, received February 12, 2014 for your CSX Team Vehicle (A9586D), when it is alleged that your team departed your assigned work area prior to the end of regularly scheduled work hours, without permission, on multiple days between January 5, 2014 and February 12, 2014. Additionally, the payroll claims submitted for these days indicate that you claimed pay for time not worked.

In connection with the above incident, you are charged with failure to properly perform the responsibilities of your position, dishonesty, leaving work without permission, claiming pay for time not worked, and possible violations of, but not limited to, CSXT Operating Rules 100.1, 104.2, 104.7, and 104.10.

Rule 100 – Application of Rules and Special Instructions, requires employees to know and comply with rules, instructions and procedures governing their duties and to take the safest course but, should there be a need for clarification on that course, to contact a supervisor (Rule 100.1).

Rule 104 – Employee Behavior, states employees "must not be ... dishonest" (Rule 104.2), employees "must have the permission of a supervisor to [l]eave work before designated off-duty time" (Rule 104.7) and "[p]ay must only be claimed [f]or actual time or work performed" (Rule 104.10).

On March 12, 2014, the investigative hearing convened wherein Claimant and his representative were afforded the opportunity to present witness testimony, cross-examine Carrier witnesses and introduce into the record information or exhibits pertinent to the matter under investigation.

On April 1, 2014, the Division Engineer notified Claimant as follows:

A review of the evidence, testimony, and all other documents associated with the hearing demonstrate that the charges against you were proven[.]

Based upon my finding of guilt, coupled with the serious nature of the offenses, it is my decision that the discipline to be assessed is your immediate dismissal[.]

On April 7, 2014, Claimant elected to proceed with a review of the imposed discipline (dismissal) by submitting a claim to this Special Board of Adjustment No. 7529. In doing so, Claimant acknowledged that the decision of the Neutral Member of the Board is based on the notice of investigative hearing, transcript of hearing, notice of discipline, Claimant's prior service record and Rule 25 of the Agreement.

#### Carrier's Position

Claimant received a fair and impartial investigative hearing which produced substantial evidence that Claimant violated the charged rules. That is, Claimant did not perform work during all of the hours (straight time and overtime) for which he requested pay during January 5, 2014 - February 12, 2014. Claimant and the Organization do not dispute the validity of the GPS data and payroll records which constitute substantial evidence of his wrongdoing.

Claimant was the foreman for Surfacing Team 5T08; he and three (3) machine operators comprised the team. Workdays were Sunday through Wednesday with scheduled hours 0700 – 1730. His team's practice was to end work prior to the regularly scheduled 1730 hours, return to the hotel and report a 10-hour workday for payroll purposes. The Roadmaster testified that he never authorized or permitted early release and he was unaware of Claimant's practice. When Claimant discussed the work performed during the day with the Roadmaster, he states the Roadmaster responded "I appreciate it, have a good day" or "see you tomorrow" which Claimant assumed permitted or authorized early departure from the worksite; however, Claimant never clarified such statements with the Roadmaster during the morning job briefing or daily telephone conversations. Claimant acknowledged he was required to seek clarification for the proper application of the rules.

Claimant further asserts that the team worked through their forty-five (45) minute meal period and he did not report all time that he worked such as when the Roadmaster would call him on his rest day. If true, that is not a basis to conclude that Claimant did not record all time at the direction of the Roadmaster. Claimant was not directed to violate the rules. The Roadmaster testified that he never directed Claimant to work through his forty-five (45) minute meal period. Claimant's dubious assertion is without credibility.

Behavior in violation of the rules is not sanctioned by the Carrier. As stated in Third Division Award 25491, Claimant is individually responsible. Awards 12, 30 and 40 of this Board are precedent establishing dismissal for theft of time as it is a serious offense even for a first time offender such as Claimant with fourteen (14) years of seniority.

### Organization's Position

In January and February 2014 Claimant served as foreman for Surfacing Team 5T08. At all times he acted in accordance with his understanding of the Roadmaster's direction and instructions. Award 1 of this Board establishes precedent that any factual disputes must be resolved in Claimant's favor. Under that precedent, there is insufficient evidence by the Carrier for the charged violations.

Although the Carrier charges Claimant with leaving the worksite without permission, Roadmaster Pettit consented to the team's early departures. When the Roadmaster stated to Claimant "I appreciate it, have a good day" or "see you tomorrow" Claimant assumed that was permission for early departure. Consequently, Claimant returned to the hotel where he remained on standby until the end of the scheduled workday (0700 - 1730). The Roadmaster, according to the Organization, directed and allowed teams to act in the same manner as the Claimant directed Surfacing Team 5T08.

Since Claimant followed what he understood to be reasonable and proper directives, under precedent in First Division Award 24759 and Award 10 of Special Board of Adjustment No. 1122, he cannot be found to have acted without authority in violation of the rules. Therefore, Claimant did not charge time not actually worked as the Carrier alleges. Claimant, moreover, did not record all of the time that he worked such as when the Roadmaster would call him on his rest day. Also, early return to the hotel filled in or made up for the team foregoing its forty-five (45) minute meal period. Although Claimant could have raised questions with Roadmaster Pettit at morning briefing or safety meetings, the Carrier failed to establish he should have done so in this situation.

Dismissal is arbitrary and unwarranted for a 14-year employee with "essentially a positive discipline history." Awards 16 and 35 of this Board establish its authority to revoke and lessen the penalty imposed. Rather than follow progressive discipline, the Carrier issued a punitive penalty of dismissal.

### Findings

Public Law Board No. 7529, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

A decision by this Special Board of Adjustment No. 7529 is based on the notice of investigative hearing, transcript of hearing, notice of discipline, Claimant's prior service record and Rule 25 of the Agreement. Within that evidentiary framework, the Board renders these findings.

There is substantial evidence that Claimant inserted hours in payroll for himself which encompassed time claimed but not actually worked. This occurred on January 5, 6, 7, 19, 20, 21, 23, 24 and February 2, 3, 4 and 5, 2014. On each of those dates, Claimant was scheduled for a 10-hour day of actual work, not standby. He represented to the Carrier that he actually worked 10 hours on each of those dates when he did not actually work 10 hours. He actually worked anywhere from 6 hours (February 4) to 9.5 hours (January 6). The GPS data and payroll records are not disputed.

Claimant testified that he assumed the Roadmaster's comments - - "I appreciate it, have a good day" and "see you tomorrow" - - were permission to leave early but he never discussed his assumption with the Roadmaster and never told the Roadmaster that he was leaving early and returning to the hotel. Claimant's 14-year tenure with the Carrier and "essentially positive discipline record" are considerations but his explanation and rationale are disingenuous in the context of his position (foreman) and experience (knowledge of rules).

Precedent in Award 37 of this Board establishes that "[t]heft encompasses knowingly receiving compensation for time away from work that was not authorized as well as claiming and receiving compensation for time not worked." Applying this precedent to the findings in this claim, the Board concludes that Claimant knowingly was "claiming receiving compensation for time not worked." In other words, Claimant committed theft of time and, in doing so, violated Rule 100.1 (know and comply with rules, instructions and procedures governing duties and seek clarification from the supervisor to ensure the safest course is followed), Rule 104.2 (prohibits dishonesty), Rule 104.7 (requires supervisor's permission to leave work prior to end of scheduled workday) and Rule 104.10 ("[p]ay must only be claimed [f]or actual time or work performed").

With proven charges, the Board considers whether the penalty of dismissal is arbitrary, unwarranted or excessive. Precedent in on-property Third Division Award 36337 is instructive:

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 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.

Further support for dismissal as the appropriate penalty for theft is on-property Third Division Award 31839:

This Board has established a consistent record of viewing any form of theft as a serious breach of trust between employee and employer. Although Claimant's disingenuousness at the Hearing is admirable, as is his elicited willingness to repay Carrier, his admissions were the result of having been caught. He did not step forward to reveal his actions. Rather, it was not until the Carrier's Accountant discovered the charges in mid-July that Claimant made any offer of repayment or expression of contrition. Under the circumstances, we see no reason to disturb Carrier's assessment of discipline.

Based on the precedent in the on-property Third Divisions Awards 36337 and 31839, this Board finds that Claimant's dismissal is not arbitrary, unwarranted or excessive. This claim is denied.

Award

Claim denied.

Patrick J. Halter /s/  
Patrick J. Halter  
Neutral Member

Dated on this 4th day of  
December, 2015