

PUBLIC LAW BOARD NO. 7529

Brotherhood of Maintenance of Way)	
Employees Division - IBT Rail)	
Conference)	
)	
and)	Case No. 65
)	Award No. 65
)	
CSX Transportation, Inc.)	

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

1. The Carrier's dismissal of Claimant J. Canty 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 D21000614/ Carrier File 2014-165645).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Canty shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement."

Background

On February 19, 2014, the Carrier issued a notice of investigation to Claimant stating:

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 11, 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 March 31, 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 2, 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 shows there is substantial evidence that he violated the charged rules. That is, Claimant did not perform service during all of the hours (straight time and overtime) for which he requested payment between January 5, 2014 and February 12, 2014. The Roadmaster reviewed payroll and GPS records for Claimant which show multiple occasions where Claimant ceased working before 1730 hours (end of scheduled workday) but reported ten (10) hours' actual work and, at times, overtime for hours not worked.

Claimant does not dispute the validity of the GPS data and payroll records which support a finding of rules violations as actual hours worked by him were substantially below the hours reported for payroll. For example, Claimant claimed ten (10) hours of service to the Carrier on February 4, 2014; however, he actually worked only six (6) hours as captured in GPS records. The Roadmaster testified Claimant was present for that briefing; he did not request early departure. Even if he was the "extra driver" and drove his vehicle back to the start location (Claimant's assertion), the Roadmaster testified that would consume one (1) hour which brings the total to seven (7) hours of service. In other words, Claimant still received three (3) hours' pay for hours not worked.

Claimant acknowledges that the team's practice was to end the workday before 1730 hours and claim ten (10) hours actual work for pay. He followed the foreman's instructions. Claimant did not seek clarification or inquire with the Roadmaster during morning briefing about the team's practice. As the Roadmaster testified, "everyone ... knows they should not be leaving before their normally scheduled hours of duty." Each employee is accountable for his service and confirming the accuracy of actual hours worked submitted to payroll.

Claimant signed the document submitted to payroll; the Roadmaster testified the foreman inputs the data, but just in case he does not accurately enter the information to reflect the individual member's pay each member of the team has the opportunity to review their payroll transmission and either accept or request a payroll correction. Claimant's signature means he verified the time as correct. Behavior in violation of the rules is not sanctioned by the Carrier. As noted in Award 3 of this Board and Award 15 of Special Board of Adjustment No. 1112, Claimant is individually responsible.

Theft of time is a serious offense and warrants dismissal even for a first time offense. Claimant received training on the rules and Code of Ethics. He testified to understanding the rules and charged violations. Nevertheless, Claimant showed a pattern of repeatedly violating the rules. In this context, dismissal is not excessive or punitive but warranted. In on-property Third Division Award 31839, the Board upheld the dismissal of an employee for unauthorized credit card use: "This Board has established a consistent record of viewing any form of theft as a serious breach of trust between employee and employer." Dismissal should be sustained.

Organization's Position

In January 2014 - February 2014 Claimant was assigned as a machine operator to Surfacing Team 5T08. He was the "extra" operator and floated to other gangs as needed to fill in. With Surfacing Team 5T08, Claimant worked alongside other machine operators and reported to the foreman and Roadmaster. Award 1 of this Board establishes precedent that any factual disputes must be resolved in Claimant's favor.

At all times during the period of January 5, 2014 - February 12, 2014, Claimant acted in accordance with his foreman's instructions as it was the foreman directing the team. Claimant had no reason or basis to conclude that the foreman's directives were inappropriate or invalid. Thus, there is no basis for the Carrier's charge that Claimant acted without permission or authority. Instead, and in accordance with First Division Award 24759 and Award 10 of Special Board of Adjustment No. 1122, Claimant acted on the basis of a reasonable and proper directive.

Claimant left the tracks only when the 3:00 p.m. track curfew time approached. He returned to the hotel but understood that he remained on call until the conclusion of the scheduled work day (1730 hours). On a daily basis the foreman, not Claimant, discussed the team's work with the Roadmaster. Therefore, the foreman's order to leave and return to the hotel prior to 1730 hours and receive pay for the scheduled 10-hour workday had to be appropriate. In this regard, Claimant did not record the hours claimed as actual work for purposes of payroll; the foreman handled the weekly payroll records. Thus, Claimant did not charge for time not worked.

Claimant is a fifteen (15) year employee with "essentially a positive discipline history." By following his foreman's reasonable instructions, Claimant did not attempt to defraud or steal from the Carrier. Should there be a technical violation of the rules by Claimant, the Board "is left with little choice but to find that any discipline was unwarranted." The Board can reduce or revoke his dismissal as reflected in its awards. Claimant's dismissal is unwarranted because the foreman - - a third party - - was at fault and not Claimant. Within that context, First Division Awards 24894 and 25085 show that Claimant's dismissal is unwarranted.

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.

Although the notice of investigative hearing states that Claimant is charged with receiving pay for hours not actually worked on "multiple days between January 5, 2014 and February 12, 2014" the Roadmaster testified that the only dates pertinent to the charges against Claimant are February 2, 3 and 4, 2014.

Regarding February 2, 2014, Claimant was working on the "southern territory" that day which is outside Roadmaster Pettit's territory. Claimant did not ride in the CSX truck with the team on that date and he testified to working the hours claimed. The hearing officer responded "alright" without further inquiry. Claimant's un rebutted testimony is credited. The charged rules violations are unproven for February 2.

For February 3, 2014, Claimant's payroll shows ten (10) hours work for pay whereas the Roadmaster states Claimant actually worked only eight (8) hours and fifteen (15) minutes. The Roadmaster's calculation is based on the GPS tracking the movement of the CSX truck assigned to the team. On February 3 the dispatcher directed the team to "get off the track" by 1500 hours whereupon the foreman instructed the team "to load up" and they returned to the hotel. Claimant was at the hotel prior to 1730 hours; he testified to understanding, based on the foreman's representations, that the Roadmaster had authorized the team's return to the hotel given the track curfew.

The hearing officer inquired whether maintenance work could have been performed on the equipment from the time the team was directed off the track until 1730 hours, the Claimant's un rebutted testimony is that team's tools had been stolen and there was no mechanic present.

Unlike other members assigned to the team, Claimant was a relief operator with "3 to 4 different foremen I work under, 3 to 4 different rules, 4 different ways how they run a gang. When I come here I comply with what my foreman says and to my knowledge the foremen and the Roadmasters do their thing while we're on the track." Claimant could be expected to rely on instructions from his foreman in view of the testimony by the Roadmaster and Claimant that the foreman and Roadmaster spoke daily about the team's work and schedules and the Roadmaster's general awareness of track curfew.

Contrary to the broadly worded charge in the notice that "on multiple occasions" Claimant left the worksite without permission, the Board finds that February 3 is a single occurrence and constitutes a technical rules violation. That is, a violation committed without intent to defraud or steal from the Carrier given the foreman's representation to Claimant that time was appropriately accounted for on February 3, 2014.

On February 4, 2014, the team arrived at the West Palm Beach (WPB) depot (Roadmaster Pettit's territory). At 12:30 p.m. the Roadmaster instructed the team to move from the team's hotel in Hollywood (FL) to a hotel in WPB. The Roadmaster informed the team there was sufficient time that day (February 4) to complete this mid-week move by the end of the scheduled workday (1730 hours). In other words, no overtime.

After receiving the Roadmaster's instructions, the foreman and team members proceeded in the team's CSX truck from WPB to their hotel in Hollywood. The team decided to leave the CSX truck at the hotel in Hollywood while each member drove his personal vehicle to WPB that afternoon (February 4); they would meet in WPB and proceed to search for a hotel. After they secured lodging in WPB, Claimant

(scheduled for vacation on February 5) would transport a member back to the hotel in Hollywood where that member would drive the CSX truck to WPB and Claimant would continue to his residence in Miami. In accordance with the Roadmaster's instructions, the team proceeded in the CSX truck from the depot in WPB to Hollywood to gather their personal items. Once in Hollywood some of the members decided to have lunch. Claimant, however, left immediately to return to WPB.

Late in the afternoon on February 4 the team met in WPB; the foreman was unable to find a hotel with available rooms. Claimant: "Now I'm sitting, I'm up there waiting on them, we all get up there ... Now you're going into my time because I got vacation tomorrow. I got things to do, so I'm ready to go. I wasn't fixin to wait all night for them to try to so they had to come up with a decision and a plan. The plan was they would move [the next day February 5] in the morning [from Hollywood to WPB]. They would all get up early and do their thing the way there were going to do it. My plan [was] to go home [February 4], that's how the 2 hours were generated."

Further testimony from Claimant: "I sat around waiting on them to see what's going to happen, what room are they going to be in, what hotel. ... They couldn't find an open room to the hotels we usually stay at... then the time started getting close to getting dark, I'm ready to go. When I left up there it was about 5:00, I went on ahead and come home [Miami]. That's my drive time from the hotel back to this hotel because I'm still on duty, I get paid for it." Claimant testified traffic can cause the drive to consume two (2) hours; Claimant's un rebutted testimony addresses the two (2) hours overtime on February 4. The Board notes the hearing officer's recognition of the problematic nature associated with a midweek move such as the one directed by the Roadmaster in this claim.

The Roadmaster testified that the foreman explained the overtime i.e., no available rooms for the evening of February 4 in WPB and team's return to Hollywood. Claimant testified the foreman represented to him that the Roadmaster had agreed with the foreman how to handle time for February 4. The Roadmaster testified that he witnessed Claimant sign payroll for February 4; the form clearly depicts two (2) hours overtime for February 4; it was not obscured from the Roadmaster's view. When Claimant signed it, the Roadmaster expressed no concern about the overtime. Given the testimony and sequence of events, the Board finds insufficient evidence that Claimant committed a rules violations.

In short, the Carrier charged Claimant with multiple violations beginning January 5, 2014 and continuing to February 12, 2014. The record shows (i) no evidence presented by the Carrier of any violations in January 2014, (ii) insufficient evidence of rules violations on February 2 and February 4 and (iii) an isolated technical violation on February 3. Given this evidentiary record, the penalty of dismissal is excessive. A five (5) day actual suspension is a corrective disciplinary measure proportional to the rules infraction for February 3.

Award

Claim sustained in accordance with the findings.

Patrick J. Halter /s/

Patrick J. Halter
Neutral Member

Dated on this 2nd day of
December, 2015