

PUBLIC LAW BOARD NO. 7529

Brotherhood of Maintenance of Way)	
Employes Division - IBT Rail)	
Conference)	
)	Case No. 73
and)	Award No. 73
)	
CSX Transportation, Inc.)	

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

1. The Carrier's dismissal of Claimant J. Odom for the alleged violation of CSXT Operating Rules 100.1, 104.1, 104.2, 104.3 and 104.4 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File D17909914/Carrier's File 2014-175219).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Odom shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement."

Background

On June 25, 2014, Claimant's assigned duties as a Track Inspector involved the use of a "hi-rail" truck, a CSX vehicle designed for operation on the rails as well as public and private roads. At approximately 4:00 p.m. on that date the Carrier received a "How's My Driving" report from a retired police officer asserting the uneven operation of a CSX vehicle at a high rate of speed headed south on Interstate 95 (I-95). Riding in the same vehicle with the retired police officer was an off-duty police officer; the off-duty officer reported this matter to the Carrier's "911" dispatch center. One of the reports provided the number from the license plate for the truck which matched the "hi-rail" truck assigned to Claimant. The private party individuals included their names and contact numbers with their reports.

On July 10, 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 an incident that occurred at approximately 1611 hours on June 25, 2014 in the vicinity of I-95. While investigating a "How's My Driving" incident for erratic driving and speeding with CSX vehicle# 094334, you were dishonest with company officials.

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 - 100.1, 104.1, 104.2, 104.3 and 104.4.

Rule 100.1 requires employees to know and comply with rules, instructions and procedures governing their duties as well as comply with supervisory instructions; employees are to contact a supervisor

should there be uncertainty about the safest course to follow. Rule 104 - Employee Behavior, states on-duty employees are to perform their duties in a safe and efficient manner with employees opting for the safest course when conditions are not addressed by a rule (Rule 104.1); the rule prohibits dishonesty (Rule 104.2) and careless behavior that endangers life or property (Rule 104.3) and it forbids employees from concealing facts under investigation or engaging in criminal conduct which may damage the reputation of the Carrier, employees, customers, public or property (Rule 104.4).

On July 28, 2014, an investigative hearing convened wherein Claimant and his representative cross-examined Carrier witnesses and presented testimony and evidence.

On August 15, 2014, the Division Engineer notified Claimant as follows:

Based on the evidence presented during the course of hearing, sufficient proof exists to demonstrate you are guilty of violating CSXT Operating Rules 100.1, 104.1, 104.2, 104.3, and 104.4.

Upon my analysis of all the factors related herein, and based upon my finding of guilt, it is my decision that the discipline to be assessed consequent to your proven actions is your immediate dismissal in all capacities from CSXT Transportation.

On August 22, 2014, Claimant elected to proceed with a review of the imposed discipline 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

CSX afforded Claimant a fair and impartial hearing in accordance with Rule 25(c) in the controlling Agreement. At no time did the Carrier deny union representation for Claimant. In this regard, Claimant's right to union representation prior to providing a written statement was set forth on the form the Carrier provided to Claimant for his use in writing his statement. PLB 7120, Award 9 states that providing a copy of Claimant's written statement to Claimant and the Organization at the hearing satisfies Rule 25(c).

The Carrier met its burden of proof on the charged violations. Claimant testified that he was untruthful when he professed he did not travel on I-95 during his interview with officials and wrote that in his written statement. Claimant acknowledged his dishonesty. Dishonesty is a major offense and warrants dismissal for a singular occurrence. Nine (9) years of service with CSX, a difficult work day and family issues are insufficient reasons to mitigate or lessen the penalty of dismissal.

Award 9 of this Board is applicable in this claim:

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately eight years of service. Many Boards have determined that theft and/or dishonesty are major offenses for which first time offenders may be dismissed.

Aligned with Award 9 of this Board are Third Division Awards 31839, 31917 and 32490.

Based on the evidence establishing Claimant's culpability as well as arbitral precedent, this claim should be denied.

Organization's Position

BMW asserts that the Carrier violated Rule 25(c) as it denied Claimant a fair and impartial investigative hearing when the three (3) CSX officials met with Claimant without a union representative present, did not afford Claimant an opportunity to contact a union representative prior to writing his statement and or provide a copy of the written statement to Claimant and a union representative. Arbitral precedent in Awards 29 and 30 of PLB 7104, Award 2 of PLB 7288 and Award 37 of this Board establish that a violation of Rule 25(c) warrants sustaining the claim.

CSX failed to carry its burden of proof. Claimant acknowledged he was not "fully honest" when questioned, without union representation, by the Assistant Division Engineer, Roadmaster and CSX Police Special Agent. The only first-hand evidence is Claimant's testimony that establishes he did not operate the truck in an erratic or reckless manner and did not drive at a high rate of speed. CSX submitted no evidence such as the "911" or "How's My Driving" recordings or reports; the complaints are not subject to cross-examination. Despite allegations of reckless driving from persons not testifying, law enforcement did not issue a citation to Claimant. Fact determinations in these type of matters tilt in favor of Claimant as shown in Award 1 of this Board and Award 76 of PLB 7163.

Ample arbitral precedent, such as Award 29 of this Board, confirm the Board's authority to lessen the penalty imposed on Claimant and this includes situations, such as here, where not all of the charged rules violations are proven by the Carrier. Favorable for allowing this claim are Claimant's nine (9) years of service and his relatively discipline free record.

Findings

Public Law Board No. 7529, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee 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.

Addressing, first, whether the Carrier complied with Rule 25(c), that rule states, in part, as follows:

RULE 25 DISCIPLINE, HEARINGS, AND APPEALS

Section 1 - Hearings

* * * *

(c) An employee who is required to attend an investigation and or make a statement prior to a hearing in connection with any matter which may eventuate in the

application of discipline to any employee shall be offered the opportunity to contact his accredited union representative before a statement is reduced in writing. A copy of his statement, if reduced in writing and signed by him, shall be furnished him and his union representative.

[Emphasis added.]

In this claim the Carrier directed Claimant to an interview wherein the Assistant Engineer informed him of the "How's My Driving" and "911" reports alleging Claimant operated the "hi-rail" vehicle on I-95 in an erratic manner at a high rate of speed. The interview was to inform Claimant of the reports and obtain his response to the reports from the private parties. Claimant denied the allegations. That is, he did not operate the truck in an erratic manner or at a high rate of speed and he did not drive on I-95. This fact-gathering interview occurred prior to a determination by the Carrier to charge Claimant with rules violations. Rule 25(c) does not require the Carrier to afford Claimant the right to a union representative during this kind of pre-charge, fact-gathering interview.

Following the interview, CSX directed Claimant to write a statement; Rule 25(c) requires the Carrier to offer Claimant the opportunity to contact a union representative before writing his statement. CSX interprets the rule in the same manner because it included that written notice on the top of the form it provided to Claimant for his use in writing the statement. As the Assistant Engineer testified, the written notice is "put on all statement forms to make sure everybody that has something happen that has to fill out a statement is aware of what their right is as an employee."

BMW cites Awards 29 and 30 of PLB 7104 for its assertion that CSX violated Rule 25(c) because the Carrier did not "affirmatively inform" Claimant of his opportunity to contact his union representative prior to writing the statement. The phrase in Rule 25(c) that an employee *shall be informed* indicates some type of action by the Carrier is required to inform the employee of the right to a union representative but the exact shape or details of that action is not spelled out in the rule. In other words, it is left to the Carrier's discretion to act in a manner that shows it "affirmatively inform[ed]" the employee. In this claim the Carrier informed Claimant by setting forth the right to contact a union representative in writing on the form provided to Claimant for his written statement. The written notice of Rule 25(c) is readily viewable and emphasized in *italics*. Claimant testified he did not see the written notice on his written statement until the day of the investigative hearing due, in part, to his being in a "panic" during the interview.

Claimant's testimony is assessed in the context of his less than "fully honest" responses to the interview questions and his repeating the less than "fully honest" answers in his written statement. Claimant was dishonest during the interview. His asserted "panic" is attributed to his untruthful responses and does not insulate him from the consequences of his dishonesty. Assessed in that context, Claimant's testimony asserting he did not see the written notice is not credited. In the circumstances presented in this claim, the Board finds the Carrier's written notice informing Claimant of his opportunity to contact his union representative, emphasized in *italics* on the form he used to write his statement, complies with Rule 25(c).

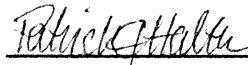
Besides informing Claimant of the opportunity to contact a union representative, Rule 25(c) states that a copy *shall be furnished* Claimant and his union representative *if reduced in writing and signed by him*. The phrase *shall be furnished* is dependent on the statement being *reduced in writing and signed by him*; the copy is not dependent on the employee or union representative requesting it. Once the statement

is (i) written and (ii) signed, it *shall be furnished* "immediately" to the employee and union representative. Claimant wrote a statement but never signed it. In that situation, the Carrier's failure to "immediately" provide a copy of the statement to Claimant and the union representative did not violate Rule 25(c).

Having determined in the circumstances presented that there is no violation of Rule 25(c), the Board further determines there is substantial evidence of the charged rules violations. Claimant's less than "fully honest" responses violates Rule 104.2 (prohibits dishonesty) and Rule 104.4 (concealing facts under investigation). In violating Rules 104.2 and 104.4, Claimant also violated Rule 100.1 which requires an employee to know and comply with rules, instructions and procedures governing their duties. Claimant's rules violations constitute a major offense which follows three (3) months after his time out for a serious offense. In this situation, dismissal is not harsh or excessive. This claim is denied.

Award

Claimed denied.



Patrick J. Halter
Neutral Member

Dated on this 25 day of
January, 2016