

**PUBLIC LAW BOARD NO. 7529**

**Brotherhood of Maintenance of Way** )  
**Employees Division - IBT Rail** )  
**Conference** )  
 )  
**and** )  
 )  
 )  
**CSX Transportation, Inc.** )

**Case No. 74**  
**Award No. 74**

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

1. The Carrier's dismissal of Claimant J. Keener for the alleged violation of CSXT Operating Rules 100.1, 103.7, 104.3 and Safeway Rule GS-3 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (Carrier's File 2014-175228).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Keener shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement."

Background

On April 1, 2014, Claimant was assigned as a Bridge Mechanic to operate a backhoe at Mile Post QC 319.30, a location near Seneca River and bordering wetlands. The job briefing instruction for Claimant was to move the backhoe from the vicinity of the bridge's west end to the east end; however, the road leading to the worksite and across the bridge was flooded. Claimant drove the backhoe onto the flooded road and across a submerged bridge but one of the tires on the backhoe slipped off the edge of the bridge which resulted in the backhoe landing on its side in approximately six (6) to eight (8) feet of water. Claimant maneuvered himself out of the cab of the submerged backhoe and escaped to safety. A contractor retrieved and repaired the backhoe.

On April 16, 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 0930 hours, on April 1, 2014, in the vicinity of QC 319.98, when, you were to move CSX backhoe TBHRC05815 to the days job site at QC 319.30. You decided without permission to drive the backhoe approximately 170 feet through the flooded right-of-way that was submerged to an un-known depth. Furthermore, you attempted to cross a submerged bridge causing you to slide off the north side of the bridge resulting with the backhoe rolling nearly upside down in approximately 6 to 8 feet of water. Additionally, the equipment had to be retrieved by an outside contractor and divers and delivered to Buffalo to be rebuilt from sustained water damage.

In connection with the above incident, you are charged with failure to properly and safely perform the responsibilities of your position, careless operation of your assigned equipment, and possible violations of, but not limited to, CSXT Operating Rules - 100.1, 103.7 and 104.3; as well as CSX Safeway Rules GS-3.

Rule 100.1 requires an employee to know and comply with rules, instructions and procedures governing their duties and to contact a supervisor should there be uncertainty about the safest course. Rule 103.7 prohibits employees from defacing or damaging CSX property and Rule 104.3 prohibits careless behavior and behavior that endangers life or property. CSX Safeway Rule GS-3, Job Briefing, requires an employee to conduct a job briefing at the beginning of the shift as well as throughout the workday to maintain awareness of the surroundings and recognition of potential hazards.

On July 9, 2014, an investigative hearing convened wherein Claimant and his representative cross-examined Carrier witnesses and presented testimony and evidence.

On July 29, 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, 103.7 and 104.3; as well as CSX Safeway Rule GS-3.

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 10, 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

There is substantial evidence that Claimant committed the charged rules violations. In this regard, Claimant attempted to drive a CSX vehicle through a swamp and across a submerged bridge in violation of Rule 100.1 and he violated Rule 103.7 when he overturned the backhoe into the water thereby damaging the Carrier's property. Driving into a flooded area exhibits careless behavior and behavior which endangers life or property (Rule 104.3). Claimant violated Safeway Rule GS-3 by not briefing himself about the flooded area and changed work environment after his supervisor's morning briefing. Claimant's testimony reflects his culpability: "I definitely wouldn't do it again[.]"

Dismissal is warranted for this major offense where a first-time infraction of such magnitude can lead to discharge. With fifteen (15) years of service and knowledge of the rules, Claimant elected to disregard the rules and proceeded across the submerged bridge thereby causing thousands of dollars damage to Carrier property plus Claimant risked personal injury or death. Prior discipline for Claimant shows three (3) serious offenses within the past two (2) years: vehicle collision (October 2012); no track authority and no protective gear (April 2013) and failure to complete paperwork for (i) self-job briefing and (ii) track occupation (July 2013).

As noted in Award 15 of this Board:

The Carrier has been lenient with the Claimant in the past as his record shows that prior to this incident Claimant had a history of three other major accidents involving Carrier equipment indicating he had a recurring problem with working safely on the railroad. The Board finds and holds that the discipline assessed was not arbitrary, excessive or capricious and was in accordance with the Carrier's Progressive Discipline policy[.]

Claimant has not corrected his behavior notwithstanding progressive discipline measures. In view of Award 15, dismissal is the appropriate measure for this major offense.

#### Organization's Position

Claimant did not receive a fair and impartial investigative hearing as the Carrier violated Rule 25(c) when it did not inform or afford union representation for Claimant and failed to provide Claimant or BMW a copy of Claimant's written statement or a copy of the co-worker's written statement. A violation of Rule 25, standing alone, warrants sustaining the claim.

The record establishes, at most, that Claimant exercised poor judgement on the date of the incident. Given his fifteen (15) years of service and testimony that he did not intend to cause damage to CSX property and "definitely" would not engage in the same course of conduct in the future, the penalty of dismissal is harsh and unwarranted in the circumstances of this claim.

#### 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.

The on-property record does not disclose any mention of a Rule 25 violation as alleged by the Organization. This due process allegation surfaces for the first time in the Organization's statement of position; this Board will not consider this new argument since it was not discussed on-property.

Aside from Rule 25, the Carrier presented substantial evidence that Claimant committed the charged rules violations. Claimant's rules infractions reflect a continuation of his disciplinary record, that is, 3 serious offenses in the past 2 years, and demonstrates continuing failure to correct his work behavior that endangered his life and caused approximately \$10,000.00 damage to CSX property. Award 15 is pertinent: "The Board finds and holds that the discipline assessed was not arbitrary, excessive or capricious and was in accordance with the Carrier's Progressive Discipline policy[.]"

Based on the evidentiary record and arbitral precedent, this claim is denied is denied.

Award  
Claim denied.

  
\_\_\_\_\_  
Patrick J. Halter  
Neutral Member

Dated on this 25 day of  
January, 2016