

**PUBLIC LAW BOARD NO. 7529**

<b>Brotherhood of Maintenance of Way</b>	)	
<b>Employees Division - IBT Rail</b>	)	
<b>Conference</b>	)	
	)	
<b>and</b>	)	<b>Case No. 75</b>
	)	<b>Award No. 75</b>
	)	
<b>CSX Transportation, Inc.</b>	)	

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

1. The Carrier's dismissal of Claimant C. Delano for the alleged violation of CSXT Operating Rules 100.1, 104.2, 104.4 and the Code of Ethics was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File D21001714/2014-178732 CSX).
2. As a consequence of the violation referred to in Part 1 above, Claimant C. Delano shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement."

Background

On July 2, 2014, SPT Rail Director Little issued a notice of investigation to Claimant stating as follows:

The purpose of this formal investigation [on July 15, 2014] is to determine the facts and place your responsibility, if any, in connection with information received on June 16, 2014 from CSX Special Agent Ashlynn Davis, that you used your Manager's CSX Credit Card to make unauthorized purchases and a Warrant was executed for your arrest on June 20, 2014.

In connection with the above, you are charged with failure to properly perform the responsibilities of your position, unauthorized use of company credit cards, and possible violations of, but not limited to, CSXT Operating Rules 100.1, 104.2, and 104.4; as well as the CSX Code of Ethics.

You may be represented in accordance with the provisions of your working agreement, and you may arrange to have present witnesses who have knowledge of the matter under investigation; however, it will be your responsibility to arrange for their participation.

Following mutually agreed to postponements by the Carrier and Organization, the investigative hearing convened on October 14, 2014, wherein Claimant and his representative presented witnesses and documents pertinent to the matter under investigation as well as cross-examined Carrier witnesses and examined Carrier documents.

On October 30, 2014, Chief Engineer Moore notified Claimant that “sufficient proof exists to demonstrate you used your Manager’s CSX Credit Card to make an unauthorized purchase in the amount of \$950.00” in violation of Rule 100.1 (know and comply with rules and instructions), Rule 104.2 (forbades dishonesty or disloyalty), Rule 104.4 (prohibits concealing facts under investigation or criminal conduct endangering CSX’ reputation), and the CSX Code of Ethics (no misuse of Carrier assets). Based on the evidence at hearing, Chief Engineer Moore decided “that the discipline to be assessed for these proven rules violations is dismissal.”

On November 3, 2014, Claimant elected, after discussing this matter with the Organization, to proceed with review of the imposed discipline by submitting a claim for “expedited handling” to this Special Board of Adjustment No. 7529.

### 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.

Claimant agreed to an “expedited handling” for this claim. In doing so, Claimant acknowledged that the decision of the Neutral Member would be based on the notice of investigative hearing, transcript of hearing, notice of discipline, his service record and Rule 25 of the Agreement.

With respect to Rule 25 - Discipline, Hearings, and Appeals, Section 1(a) states that an employee “shall not be suspended nor dismissed from service without a fair and impartial hearing[.]” The Organization asserts that the Carrier violated Section 1(a) as it failed to provide Claimant a fair and impartial hearing.

Specifics for BMW’s asserted violation of Section 1(a) are: (i) CSX failed to timely investigate Claimant, (ii) CSX inappropriately used its Police to obtain evidence when it did not notify Claimant of his right to representation prior to interviewing him, (iii) CSX required Claimant to submit a written statement and did not provide a copy of it to Claimant and the Organization, (iv) CSX prevented Claimant from securing witnesses when gang members were directed not to talk with Claimant about the criminal charges as that would be obstruction of justice and (v) CSX’ hearing officer inquired into a broad range of topics with witnesses while precluding the Organization from questioning them on the same topics.

Section 1(d) in Rule 25 addresses the matter of a timely investigation. The Organization cites pages from the hearing transcript as evidence that the Carrier did not conduct a timely investigation. [Tr. 7, 27, 35, 38, 80] The cited pages are insufficient evidence for establishing the assertion. Furthermore, Claimant’s witness testified, when questioned about a timely investigation and Section 1(d), “that did take place.” [Tr. 71] In other words, Claimant’s witness acknowledged that Claimant received “reasonabl[y] prompt advance notice, in writing, of the exact offenses of which [Claimant] ... [was] accused” with a hearing “scheduled to begin within twenty (20) days from the date management had knowledge of the [Claimant’s] involvement.” Based on testimony from Claimant’s witness as well as the inconclusive evidence from the cited transcript pages, the Board finds that the Carrier conducted a timely investigation in accordance with Section 1(d).

Beyond a timely investigation, Special Agent (SA) Davis testified that she notified Claimant of his right to representation prior to interviewing him and, after Claimant received such notice, he agreed to proceed with the interview. Claimant was present for SA Davis' testimony; Claimant's testimony does not address or contest her testimony that she provided him with notice, he did not request representation and he agreed to proceed with the interview.

Although Claimant asserts that he produced a written statement which SA Davis withheld from the investigative report and failed to provide a copy of it to Claimant and BMW, circumstances during the hearing disfavor this assertion. For example, during Manager Adams' testimony, Claimant requested that the hearing officer obtain copies of the Manager's CSX credit card statement for inclusion in the record whereas Claimant did not request the hearing officer to obtain his written statement during testimony by SA Davis. Also, Claimant made his assertion during his direct testimony which occurred after SA Davis' direct testimony and her recall for rebuttal testimony. After Claimant's direct testimony, SA Davis testified a third time but Claimant did not examine her about withholding his statement and not providing a copy to him and BMW. The responsibility to establish the assertion resides with Claimant and, given these circumstances where he did not request (as he did for other evidence) his written statement or examine a percipient witness about the absence of his statement from the report, there is insufficient evidence to establish the assertion as fact.

The Organization states that Manager Adams, acting on SA Davis' instruction, directed gang members not to speak with Claimant during the criminal investigation as that would be obstructing justice although CSX maintains that gang members could speak with Claimant about rules violations. BMW asserts this directive prevented Claimant from securing witnesses to testify at the hearing. The distinction for gang members between not speaking with Claimant about matters under criminal investigation but allowed to speak with Claimant about rules violations was not communicated to them by Manager Adams. Since the evidence relied upon by CSX for rules violations is derived solely from the criminal investigation, the Carrier's asserted distinction between not talking on criminal charges but talking on rules violations is elusive. Standing alone, the Manager's directive is tantamount to a "gag order" and problematic for the Carrier under Rule 25. The directive is less problematic when assessed in the context of this exchange at the hearing.

Smith (Hearing Officer): So I'm giving you an opportunity here. If there's somebody you feel is relevant to the case we'll put this case in abeyance and provide for them to be here at a future date.

Delano (Claimant): As long as they take their evidence they provided in.

Knight (BMW): It will stand as it's been introduced.

[Tr. 137]

Claimant did not act on the offer to hold the hearing "in abeyance and provide for" his witnesses "to be here at a future date." Rather, Claimant elected to proceed with the "evidence they provided in" and that evidence is his testimony as well as testimony from his father, his girlfriend, three (3) text messages, a co-worker's written statement and the affidavit from the owner of Rockin' the Smoke BBQ, the vendor for the dinner on December 11 and lunch on December 12. Additionally, the Carrier informed the Organization during SA Davis' testimony that persons not present but named in the

investigative report were available to testify by telephone. Claimant and the Organization did not seek to examine any of those named persons during the hearing.

The hearing officer's offer to hold the hearing in abeyance until such time as Claimant secured witnesses minimizes his inquiry into extraneous matters which were not charged against Claimant such as the rumored New Year's Eve party expensed to CSX and two (2) unauthorized credit-card charges after December 12, 2014. The extraneous matters unduly extended the hearing and caused argumentative exchanges; however, the extraneous questioning was irrelevant to the charged rules violations so the unbalanced witness examination does not implicate the disposition of relevant issues before this Board.

In view of the findings on Rule 25 set forth above, the Board concludes that Claimant received a fair and impartial hearing. Having determined there is no violation of Rule 25, the discipline assessed to Claimant is reviewed in the context of on-property Third Division Award 37357 which captures the Board's function in this matter.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of its discretion. See Second Division Award 7325 and Third Division Award 16166.

Substantial evidence in this proceeding is a lesser, lighter or lower standard of proof than the standard in a criminal proceeding. This record contains substantial evidence that Claimant violated the rules as charged. Manager Adams testified that he did not instruct Claimant to order lunch for December 12, 2014, that resulted in a \$950.00 unauthorized charge to the CSX credit card. Manager Adams reiterated his testimony when re-called to testify in rebuttal to Claimant's testimony that the December 12 credit-card charge was authorized by the Manager.

Supportive of Manager Adams' testimony is his action or conduct when he received the monthly statement for the credit card on January 27, 2014, showing the unauthorized \$950.00 charge. He immediately contacted Director Little -- his superior -- to alert him to questionable charges and notified Scotia Bank of possible fraudulent charges identifying the December 12 charge as well as others not at issue in this proceeding. The lunch is also considered in relation to the dinner. There is no dispute that the December 11 dinner was in recognition of the team's work marking the end of the season which is followed by the team dispersing during the winter months. The record displays no significance for the lunch on December 12 when only a skeleton crew remained from the team of twenty-seven (27) gang members. Manager Adams testified that Claimant never informed him that the vendor required serving two (2) meals to justify travel from Plymouth, South Carolina, to Big Stone Gap, Virginia.

Claimant's response that Manager Adams and SA Davis fabricated their testimonies is not persuasive and Claimant's submission into evidence of an affidavit from the vendor is of insubstantial value as the affidavit is signed by the affiant on one date and notarized on a different date. The affidavit, moreover, does not address the December 12 lunch.

Comprising substantial evidence in this proceeding is testimony from Manager Adams, the investigative report and the unpersuasive testimony from Claimant that he offers as proof that Manager Adams and SA Davis fabricated their testimonies. Substantial evidence supports the Carrier's position that Manager Adams authorized Claimant to order only dinner for December 11 but, in addition to dinner, Claimant charged an unauthorized \$950.00 expense for a lunch on December 12 without approval or knowledge of Manager Adams. In this regard, Claimant provided the zip code associated with the credit card to the vendor thereby enabling payment for the unauthorized meal on December 12. Thereafter, Claimant concealed this zip code disclosure from the Carrier during the investigation. Claimant's unauthorized act violated Rule 100.1 (did not comply with instructions), Rule 104.2 (dishonesty), Rule 104.4 (prohibits concealing facts under investigation) and the CSX Code of Ethics (misuse of Carrier assets). In this regard, the Code of Ethics identifies misuse of CSX credit card as fraud. Claimant testified he was knowledgeable about the Code as well as the rules.

Claimant's disciplinary record reflects three (3) serious offenses within the past two (2) years for which he accepted a time out for the first offense and a twenty (20) day suspension and a twenty-five (25) day suspension for the other serious offenses. The IDPAP states that a single serious offense may lead to dismissal. The proven charge in this proceeding is a major offense, a category beyond serious offense. Lesser penalties accepted by Claimant (time out) and imposed on Claimant (suspensions) have not led to the salutary results for maintaining the employment relationship. Since the charged offense is proven and lesser disciplinary measures have not contributed to maintaining the employment relationship, Claimant's dismissal is not arbitrary or excessive but in accordance with the Agreement. Therefore, the claim is denied.

Award

Claim denied.



Patrick J. Walter  
Neutral Member

Dated on this 14<sup>th</sup> day of  
March, 2016