

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYEES' DIVISION
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(CSX TRANSPORTATION, INC

STATEMENT OF CHARGE:

By letter dated October 29, 2007, the Carrier instructed Bryan J. Borland ("the Claimant") to attend a formal hearing on November 9, 2007, "to determine the facts and place your responsibility, if any, in connection with an incident that occurred on October 10, 2007, at the Red Roof Inn in Utica, NY, when you allegedly entered the hotel lobby and confronted the hotel clerk in an angry demeanor about an issue with your room." The writer of the letter noted that it was told to him that the Claimant "threw chips on the lobby floor and returned to your room, flipping the mattress off the bed and took paper and tissues, throwing them all over the room." The letter informed the Claimant that he was "charged with conduct unbecoming an employee of CSX Transportation, failure to properly and safely perform the responsibilities of your position and possible violations of, but not necessarily limited to, CSX Transportation Operating Rules - General Rule A, General Regulation GR-2 and GR-3; CSX Safe Way - General Safety Rule GS-1." The letter stated that the Claimant "will be withheld from service until this matter is resolved." According to the evidence presented at the hearing the Claimant was informed on October 14, 2007, that he was being withheld from service as of that date.

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are

respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was hired by the Carrier in January, 2007, and as of the date of the incident in question had held positions as Trackman, Machine Operator, and Assistant Foreman. At the time of the incident his gang was working near Utica, New York, and the employees had been staying in a motel called Red Roof Inn in that city. The gang finished its work in that area on October 10, 2007, and the Claimant checked out of his room at 14:23 hours on that date. At approximately 6:00 p.m. on October 10, SPT Timekeeper Tom Fox received a telephoned complaint from the motel manager, Beth, about the Claimant's behavior in the motel at the time of checkout. The Timekeeper notified his supervisor, SPT Manager Mike Powell, of the complaint. The Manager called Beth and asked her to provide a written statement of the incident. She faxed the following statement addressed to the Timekeeper:

To: Mr. Fox

From: Red Roof Inn, Utica NY

Guest Name: BJ Borland

C/I: 10/06/07 (00:32)

C/O: 10/10/07 (14:23)

Mr. Borland came to the front desk and asked if his cell phone charger was brought to the front desk. He appeared upset. Stephanie Jones retrieved his Carhart [sic] jacket which had the cell phone charger in the pocket along with unopened Doritos Bags (individual serving size). Mr. Borland began taking the Dorito Bags out of the sleeve and throwing them on the floor. He asked why did they take my stuff out. I didn't check out. It was apparent that your group was checking out today. The housekeeper cleaned the room so that CSX would not get charged for tonights [sic] stay. When Bianca went to his room after he had been told that the room had been cleaned he: had ripped tissue on the floor

and the bed had been torn apart. I remade the bed and cleaned the tissue off of the floor and bed.

Please also be advised, that Mr. Borland had been assigned a non-smoking room per the rooming list. He smoked in our room.

Thank you for your promptness!

/s/ Bethany

The Manager also asked the Timekeeper to provide him a written statement of what had been reported to the Timekeeper by telephone, and on Saturday evening, October 13, 2007, the Timekeeper provided the following statement, which he sent to the Manager by email:

On Wednesday afternoon 10/10/07 at about 6PM I got a message off of my Company cell phone from a woman named Beth from the Utica, NY Red Roof Inn the hotel our gang the 6XC6 had just been staying in. She said she had a problem with one of our CSX employee's [sic] named BJ Borland as he was checking out and she wanted me to call her back at 315-724-7128 when I got this message. I called her back at 615 PM and she told me Mr. Borland came into the lobby very angry about his room and something about some bags of chips being put into his coat pocket. She told me she had never experienced anything like this from anyone from CSX, that when the C6 comes there every year all the guys are so polite and kind but Mr. Borland was way out of line and she did not think she deserved to be treated like she did. She told me he threw chips and a pop bottle on the floor in the lobby then went into his room and flipped the mattress off of the bed and took papers and tissues and threw them all over the room. I told her this action from Mr. Borland was not acceptable with any CSX employee on C6 or any other gang and I assured her the Company would back me up and at least talk to Mr. Borland so this would never happen again with him while he was employed with CSX. Again I told her I was very sorry about this incident and was going to report this to Mike Powell the team manager as soon as I got off the phone with her. I call Mike Powell as soon as I hung up with Beth and explained to him what was told to me, and he asked me the phone number of the Red Roof as he was going to call them to apologize.

The Timekeeper testified at the hearing and said basically the same thing that he wrote in his email to the Manager. He stated that the hotel representative told him that the Claimant "was agitated very vocal, not swearing no curse words nothing like that. In her words he was out of control." According to the Timekeeper, the hotel representative said that the Claimant had thrown chips and an empty pop bottle on the lobby floor and then went back into his room where he flipped the mattress off his bed and took tissues and threw them all around the room. The Timekeeper testified that during the week of the hearing he called the hotel representative to attend the hearing as a witness but that she declined to do so. He had also told her previously

that the matter could be going to a hearing and that she could be asked to come to a hearing. She told the Timekeeper then that she did not want to be part of putting somebody out on the street for 30 days or more.

The Claimant testified as follows about the events of October 10, 2007. The hotel representative's written statement of the incident is not entirely true. He does not agree with the statement that he was upset when he came up to the desk. A Carhartt jacket was given to him at the front desk when he came there. There was a cell phone charger in the pocket of the jacket. He did not intentionally take bags of Doritos out of the jacket sleeve and throw them on the floor. He did not throw ripped tissues on the floor of his hotel room after he went back to it from the front desk of the hotel. He did not smoke in his hotel room and has never smoked in a hotel room provided by the Carrier, whether it was a smoking room or not. He was not angry when he went to the front desk. He was not angry or upset until he found that there was garbage in his jacket.

The night before [the Claimant's testimony continued] he had packed up all of his bags and put them in his car for go-home day. He had not noticed that he left his Carhartt in the room along with his cell phone charger plugged into the wall. The lady at the desk had taken both of those items out of his room before he had checked out. He went to the front desk and asked if anybody had a Blackberry white cell phone charger, and the lady went around the corner to grab his charger and returned it with his Carhartt jacket. She told him that the cell phone charger was in the pocket.

He did not throw chips around the hotel lobby [the Claimant's testimony proceeded]. He did not go into his room and flip the mattress off the bed. He did not throw papers and tissues all over the room. His cell phone charger was in the pocket of the jacket that was returned to him at the front desk. In addition someone from the hotel staff had emptied the entire contents from his garbage can the night before into a sleeve of his jacket. The lady handed him his jacket, and it felt extremely heavy.

When he put the jacket over his arm [his testimony continued], he heard crinkling noises, and an unopened bag of potato chips fell out of the sleeve onto the floor. He then lifted the coat from his arm, and a spoon fell out of his jacket, also napkins with pizza sauce. He shook the sleeve, and the rest of the garbage fell out of his jacket. He looked at the lady at the desk, and she had a blank stare on her face. He asked her why she would put garbage in his coat. She said that there was another couple whose uneaten food the hotel had thrown away by mistake and to whom the hotel had to pay a lot of money. "So they had emptied the entire contents of the garbage can into my coat thinking that it was garbage because of the unopened bag of chips."

When he saw the garbage fall on the floor out of the sleeve of his jacket [to continue with the Claimant's testimony], he was very upset. He began picking up the trash from the pile where it fell out of his coat. The lady offered to clean it up. He said, "It's okay, ma'am, I'll take care of it. It's my garbage." She brought over a garbage can in which to place the garbage. He thanked her and put the garbage in the can. She placed the can back under the front desk. He told her that he apologized for any inconvenience. She apologized for the trash in his coat. He said that he didn't mean to be rude in any way. She said that he was not rude in any way and that she would proceed to check him out of the hotel. From there he left and got into his car and drove home.

In response to questioning by the hearing officer the Claimant gave the following testimony. When the lady at the desk handed him his coat a single unopened bag of Doritos fell out of his coat. When he pulled his coat off of his arm, more bags of Doritos fell out, anywhere from three to six unopened bags of Doritos. He threw them all away the night before in the trash can of his hotel room. He did not go back to his room after he left the hotel lobby. He went straight to his car. To his knowledge in the morning he had left nothing in his room. But he had not checked out of the hotel. He planned on coming back after work, taking a shower, and then checking out of the hotel. He was not angry when he found trash in his jacket, he was upset. He talked to the lady at the desk before he was upset and when he was upset. He did not raise his

voice or curse. He talked to her in a respectful manner. He does not see what happened in the hotel as an incident. He was upset about garbage in his coat, and he left the hotel.

When he went to the desk [the Claimant's testimony continued], he did not ask for a jacket; he asked for a Blackberry phone charger. He did not know that he left the jacket in the room until he went to retrieve his cell phone charger that he knew he had left in the room. The trash fell through the opening of the sleeve where your wrist would be. The wrist did not have elastic.

During the workweek on October 8th [the Claimant's testimony proceeded], someone from the hotel left an extremely rude note in his room with swear words accusing him of smoking in the room and stating that he could be fined a maximum of \$10,000 for smoking in a New York State hotel room. He took the note to the front desk, and the clerk told him that they have had problems before with the person who wrote the note, that it was not her job to complain to customers. He (the Claimant) smoked a cigarette on the balcony, spoke on the phone, and then smoked another cigarette there. He took the cigarette butts into the room and threw them away in the garbage can so that he would not litter the lawn. He told the lady at the desk that he did this and that he was sorry for any inconvenience he caused. The lady said that she would take further action with the employee the next time she saw her.

The Claimant gave the following additional testimony in response to questioning by the hearing officer. When he returned to the motel after working that day he got off the bus with his bags in hand. He took his bags straight to his car, opened the trunk, put his bags in the trunk, and closed the trunk. He went to the driver's side door of his car, got into the car, and his cell phone beeped. He immediately looked for his charger because he has an ac plug in his car. His intention on entering the car was to drive around to the front lobby to check out.

When he saw that he did not have his phone charger, he literally ran up the stairs, put his key card in the door, opened the door, and immediately went to the electrical outlet next to the bed where he had plugged in his cell phone charger the night before to charge the phone. His cell

phone charger was not there. He pulled the bed cover back to see if he had left it lying on the bed where he had packed his bag. He put the cover back down on the bed. He left the room, shut the door, and went straight to the lobby. He asked the lady at the front desk if they had his cell phone charger.

The hearing officer questioned the Claimant why he put his bags in his car in the morning if, according to his testimony, he stated that he planned to return to his room after work and take a shower. He stated that in the morning he had intended on taking a shower if he had gotten dirty, but that day he did not have to go back to the rail/anchor cart and had not gotten dirty. The hearing officer asked the Claimant why nevertheless if he thought that he was going to get dirty he had not left clothes in his room. He answered, "How hard is it to unzip a book bag and pull out a shirt and pants that are already folded and packed into a bag?"

Manager Powell, who signed the charge letter for the Carrier, briefly described the content of each of the rules that he charged the Claimant with violating. General Rule A states that employees must know and obey rules and special instructions that relate to their duties. GR-2 states that all employees must behave in a civil and courteous manner when dealing with customers, fellow employees, and the public. GR-3, among other things, requires employees to "Report any violation of the rules or special instructions promptly to a supervising officer." The Manager stated that at the time of the incident the Claimant never called him to let him know that he had an altercation with the motel. The part of General Safety Rule GS-1 that especially applied in this case, the Manager stated, was "All employees governed by these rules, must ensure that: Behavior in the workplace is civil and courteous." According to the Manager, the Carrier considers the place of lodging to be part of the workplace since the Carrier pays for the lodging.

In an answer to a question from the Claimant of whether he had not told the Claimant when taking him out of service that he (the Claimant) was going to have 30 days off, the Manager testified that what he recollected saying was, "You could possibly be looking at 30

days.”

The Organization contends that the testimony of the Claimant must be accepted since he is the only one who testified that had firsthand knowledge of the facts. The motel manager’s statement may not be used as a basis of imposing discipline on the Claimant, the Organization argues, because it is hearsay and was not subject to cross-examination. The Claimant was not given a fair and impartial hearing, the Organization maintains, “because he has not been given the right to face his accuser, and cross- examine any testimony” that would have been given by the motel manager had she appeared at the hearing.

Many National Railroad Adjustment Board awards have noted that strict rules of evidence do not apply in NRAB arbitration proceedings. This Board therefore does not believe itself bound by strict rules of evidence. The Board notes, however, that there are recognized exceptions to the hearsay rule that have been codified in Rule 803 of the Federal Rules of Evidence. Those pertinent to this proceeding are the following:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The Board believes that the motel representative’s statement which she voluntarily made in a telephone call to the Timekeeper while still under the stress of excitement caused by the incident with the Claimant falls within the general intent of the excited utterance hearsay exception quoted above. The motel representative called the Timekeeper spontaneously while

she was still agitated by the incident. The circumstances attendant to her call to complain to the Carrier of the Claimant's conduct lend verity and credibility to her statement.

The Claimant's account of the incident, by contrast, describes alleged conduct by the motel staff which is so uncommon and even bizarre for a reputable place of lodging as to be unbelievable. The Board cannot believe that a national motel chain which has been doing business with the Carrier for years would put garbage in the jacket sleeve of one of its guests. Nor did the Claimant's explanation of the motel staff's thinking make any sense.

He stated that because he had unopened bags of Doritos in his jacket, the staff person assumed that it was garbage and added additional garbage. Why would an unopened bag of snack food be perceived as garbage? The Claimant's explanation is also inconsistent with his testimony that he had thrown all of his unopened bags of Doritos in the trash can in his room. If so, how did even one unopened bag of Doritos come into his jacket in the first place?

It is extremely unlikely that the housekeeper who cleaned the Claimant's room would have taken something discarded in the wastebasket and put it in the Claimant's jacket pocket or sleeve. And why would he throw out unopened bags of chips? The Claimant's whole story does not hold up and is not credited by this Board. Moreover, the Claimant's testimony that he came to the front desk to ask if they had his cell phone charger corroborates the motel representative's written statement that he came to the front desk and asked if his cell phone charger was brought to the front desk.

For the foregoing reasons this Board has determined to credit the motel manager's version of the incident as described in her oral reports and written statement to the Carrier over the incredible testimony of the Claimant. The Board is of the opinion that the Claimant's conduct violated Carrier rules cited in the charge letter and was deserving of serious discipline. The Board, however, finds no justification for discipline in excess of 30 calendar days, beginning with the date of the Claimant's removal from service, for the violations committed.

In the present case the length of the discipline seems to have been determined by the

length of the proceedings rather than by the nature of the offense. The discipline letter is dated November 29, 2007, and the discipline was assessed to start on the date of removal from service and to end on December 1, 2007. The comment made to the Claimant by the Manager when taking the Claimant out of service was that he could possibly be looking at 30 days. The Board believes that what the Manager said was a reasonable assessment of the appropriate discipline for the nature of the offense involved and that the Carrier has not justified the imposition of greater discipline in this case.

The Board notes that Rule 25 of the parties' Agreement, Section 1(d) states, "... The hearing shall be scheduled to begin within twenty (20) days from the date management had knowledge of the employee's involvement. ...". In this case management had knowledge of the Claimant's conduct that formed the basis of the charges on October 10, 2007, but it scheduled the hearing to begin on November 9, 2007, some 30 days after its knowledge of the Claimant's involvement. No explanation appears on the record for the delay. The Carrier also did not issue its decision in the case until November 29, 2007, the last possible day permitted by Rule 25. The Board finds that the suspension should be reduced from 49 days to 30 days and that the Claimant should be made whole for any loss of wages or other benefits for the difference involved.

It is important to comment that the Claimant should not interpret the reduction of his penalty as a vindication of his position or approval of his conduct. He committed a serious offense and deserved significant discipline for his misconduct. In his very short term of employment with the Carrier he has already managed to run afoul of its attendance policy and rules of conduct. However, with the proper attitude it is not too late for him to correct his ways and become an excellent employee. It is hoped that the Organization will cooperate with management in impressing upon the Claimant that his record is not a good one and that there must be significant and sustained improvement on his part.

A W A R D

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

A handwritten signature in dark ink, appearing to read "Sinclair Kossoff", is written over a horizontal line.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
March 19, 2008