Award No. 30
Case No. 30

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
(
(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated July 15, 2008, L. D. Biddy, Asst. Division Engineer - Structures Florence Division, instructed J. M. Cockrell ("the Claimant") to attend, as principal, a formal Investigation on July 28, 2008, at the Carrier's Transportation Office in Rocky Mount, North Carolina, "to determine the facts and place your responsibility, if any, in connection with an incident involving the removal of scrap iron from a construction site at Clarkton, NC. An investigation was initiated," the letter continued, "after a call from you on June 30, 2008 to a CSX Police Officer informing him of this alleged incident."

The letter stated that "Ethics Violations may have occurred because the scrap iron allegedly was given to you by a contractor for which you were providing flagging protection." The letter further asserted that it was alleged that the Claimant sold the scrap to a scrap dealer and that he used a company vehicle on June 6, 2008, to transport the scrap and paid himself five hours' overtime while allegedly engaged in the unauthorized use of the Carrier's vehicle.

In conjunction with the alleged incidents, the letter proceeded, the Claimant was charged with "conduct unbecoming of a CSX employee, dishonesty, unauthorized use of

a company vehicle and possible violation of" Operating Rules A, L, GR-1, GR-2 (parts 4, 7, and 8), GR-3 (part 1), GR-5, GR-15, and CSX Ethics Policy.

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 Carrier contracted out the rebuilding of two bridges at Clarkton, North Carolina to a company called RJ Corman Railroad Construction, LLC. The work involved replacing the caps, the deck, and the stringers with steel H beams. The Claimant was assigned as an assistant foreman flagman to provide on-track protection for the contractor for the period from April to June, 2008, so that the contractor could do the repair work on the bridge.

Charles A. Wiggins, Manager of Bridges at Rocky Mount, North Carolina, and the Claimant's immediate supervisor, testified that the Claimant was instructed "to tell the contractor to dispose of the steel, that it was in the contract for them to clean up all scrap

material and dispose of it." The Claimant conveyed this information to the contractor. The contractor provided a letter on its stationery signed by an Assistant Operations Manager that stated, "RJ Corman Railroad Construction give all materials to Johnny Cockrell to dispose of that all steel was under 16ft long and all pieces was 2 to 3 ft long. Everything over 16 ft long went back to CSX yard."

Manager Wiggins testified that had the Claimant taken company material and sold it, that would be considered theft from the company. He realized, however, Manager Wiggins stated, that the scrap steel belonged to R. J. Corman, the contractor that was performing the work. "It was part of their contract to dispose of it," Manager Wiggins testified. He had no trouble viewing the steel that the Claimant took as scrap, Manager Wiggins stated. The Claimant removed the steel scrap from the premises on various days between April and June and sold it for a sum in excess of $4,000 to a scrap dealer.

"The problem comes in," the Manager testified, "when a contractor gives something of value to an employee of CSX. It could be construed," the Manager continued, "as possibly illegal, definitely unethical behavior, something of that value could possibly lead to unscrupulous or unethical favoritism shown by the flagman towards the contractor and is not in CSX's interest."

The Claimant testified that a fellow employee called him and reported that Wallace O'Neal, a special agent for the CSX Railroad Police, had called him asking questions about whether he thought that the Claimant was selling steel to a scrap yard. The

Claimant called Officer O'Neal on the evening of June 30, 2008, and said that he understood that Officer O'Neal was investigating him about selling some steel. Officer O'Neal told the Claimant, and testified at the hearing, that he did not know what the Claimant was talking about.

The Claimant explained to Officer O'Neal that he was working the flagging job at Clarkton, North Carolina, while the two bridges at Clarkton were being repaired by R. J. Corman; that the scrap steel or iron had been given to him; and that he brought it to Rocky Mount Recyclers in Rocky Mount, North Carolina, to sell. Officer O'Neal told the Claimant that he was not investigating him for anything but from what the Claimant had told him, he needed to call his supervisor. Officer O'Neal testified that he thought that there were ethical problems with what the Claimant was doing.

Charles A. Wiggins, Manager of Bridges at Rocky Mount and the Claimant's immediate supervisor, testified that the Claimant called him on June 30, 2008, at approximately 8:30 p.m. and said that he had some information he had to let Manager Wiggins know about. The Claimant told Manager Wiggins about the scrap steel obtained from the contractor and that he had sold for a few thousand dollars. After the conversation, Manager Wiggins called L. D. Biddy, Assistant Division Engineer, and told him of his conversation with the Claimant. Manager Wiggins testified that he explained to Mr. Biddy "that I felt like this was a ethics violation because he received something of such value from the contractor that he was protecting."

Officer O'Neal investigated the matter for the Carrier and confirmed that the Claimant had received in excess of $4,000 for the scrap steel. The steel was sold to the scrap dealer in six transactions, the first one being on April 4th and the last, on June 6, 2008. North Carolina law requires scrap dealers to record the license tag on the vehicle of anyone who sells merchandise to them. The scrap dealer's records showed that on June 6, the Claimant was there twice to sell scrap. The first time he arrived at the scrap dealer at 7:04 a.m. and departed at 8:29 a.m. He returned later the same day at 3:07 p.m. and left at 3:23 p.m. On both occasions on June 6, the Claimant brought the scrap in a Carrier vehicle. On July 2, 2008, Manager Wiggins testified, he asked the Claimant if he had used a company vehicle to haul any of the scrap to the scrap dealer. The Claimant told him that he had not.

Manager Wiggins testified that on June 6, 2008, the Claimant paid himself five hours of overtime. Friday, June 6, was a scheduled day off for the Claimant, and he had put five hours of time on his time sheet for that date. Manager Wiggins testified that looking at the times that the Claimant was in and out of the scrap yard on two occasions on June 6th, the Claimant could not have been working at his job on that date that he claimed the time for. Mr. Wiggins pulled the dispatcher bulletins for June 6th, and the Claimant did not have a work authority that day at the contractor's location.

"Mr. Cockrell approached me prior to the 6th," Manager Wiggins testified, "and stated that the contractors had to work a little cleaning up the scrap. He needed to be

there to make sure that they didn't interfere with train traffic," Mr. Wiggins continued. "I agreed," Mr. Wiggins stated, "told him he needed to be there, as they cleaned up." Manager Wiggins, in his testimony at the Investigation, noted the times stamped on the scrap receipts for June 6 and the travel time of 2 hours 29 minutes between Rocky Mount Recycling and Clarkton, North Carolina, and testified, "All points to Mr. Cockrell being on the job where he told me he was going to be." (Tr. 25).[1]

Manager Wiggins was asked by the Claimant's representative, "Does CSX have any policy in effect that prevents the contractor from allowing employees of CSX to be given scrap iron?" He answered, "I'm familiar with the CSX Ethics Policy as it governs employee, but not as to their contractors." (Tr. 28). He had no reason to doubt, Manager Wiggins testified, that the Claimant's statement to him that the steel scrap he was given belonged to the contractor, R. J. Corman, was correct. Manager Wiggins acknowledged that the Claimant was allowed to use a company vehicle between the end of his normal

---

[1]The record is not clear as to precisely what the Carrier's position is concerning June 6, 2008. At page 21 of the transcript Manager Wiggins stated that looking at the times that the Claimant was at the scrap yard on June 6th, "he could not have been working at his job on that date that he claimed the time for." On page 25 of the transcript, lines 40-41, Mr. Wiggins states in reference to June 6th, "All points to Mr. Cockrell being on the job where he told me he was going to be." The Claimant testified that the five hours' pay he claimed for June 6th was for work he performed at the Rocky Mount yard and that he did not proceed to Clarkton that day (Tr. 34). Taking the testimony of both witnesses into consideration, the Board believes that what the Carrier is probably claiming is that the Claimant did not go to the Rocky Mount yard on June 6th but went instead to Clarkton as he originally said he would. However, instead of doing flagging work for the contractor, he spent the time collecting the scrap and taking it to the scrap dealer for his own purposes.

workweek on Thursday, June 5, 2008, and the beginning of his next workweek, June 9, 2008.

The Claimant testified that he received permission from the contractor, R. J. Corman, to remove the steel scrap that he removed. He used a Company vehicle twice to transport the scrap from Clarkton, North Carolina, to Rocky Mount, North Carolina. He never hauled the scrap on Company time or pay, he testified. He did not receive permission from Mr. Wiggins or Mr. Biddy to use a Company vehicle to transport the scrap steel, he stated. He used a Company vehicle on June 6th, the Claimant testified, because "it was on the way home. I figured I was disposing of scrap material for the railroad." The hearing officer asked the Claimant whether, even if the contractor had given him the scrap steel to dispose of, he was "aware that this is a violation of our ethics policy." He answered, "No sir, I did not know."

On June 6th, the Claimant testified, he left home about 6:30 in the morning on the way to Rock Mount yard and stopped at the scrap dealer to drop off a load of scrap. From the dealer, he stated, he went to the yard to gather materials for the Clarkton job, such as "J" bolts, washers, nuts, pins, etc. Then he put work orders in for the whole week and put his payroll in. "I did not pay myself for going to the scrap yard," he testified. He did not go to Clarkton on June 6th, the Claimant stated.

After he finished his work at Rocky Mount yard, the Claimant testified, he went back home, loaded his trailer up with another load of steel, and went to the scrap yard that

afternoon. The scrap yard, he stated, is six or seven miles from his residence. He had authorization to use a company vehicle from the end of his regular workweek on Thursday, June 5, 2008, until the beginning of his workweek on Monday, June 8, 2008.

The Claimant testified that he had authorization to possess the scrap iron in order to dispose of it and that if he had not disposed of it, the contractor would be responsible for doing so. The loading, transporting, and selling of the scrap iron, the Claimant stated, never interfered with his rest, was not in competition with CSX, and never became detrimental to CSX.

Manager Wiggins testified that there would have been no reason for the Claimant to load bolts and washers for the job on June 6, 2008, because at that point they were cleaning up the scrap and the material that was left over from the project. When he was a foreman, Manager Wiggins stated, he could input both work orders and payroll within 15 minutes. The Claimant, Manager Wiggins testified, prepares a payroll for only one person, himself.

Mr. Wiggins reiterated, "I gave him [the Claimant] instructions to have the contractor dispose of the material. Per contract it was their duties to dispose of it. . . . At one point I asked Mr. Cockrell, follow-up, if the contractor for disposing of the material [sic]. He said they were giving some of the material to local people, but he never once volunteered that he was receiving any of it himself."

Manager Wiggins testified that he authorized the Claimant to drive a company

vehicle during the period here in question so that he [Mr. Wiggins] would have a hi-rail vehicle available in case of emergency for the weekend. It was for the mutual benefit of the Carrier and Mr. Cockrell, according to Manager Wiggins, in that the Carrier had the vehicle available for a possible emergency and Mr. Cockrell saved money on the gas.

The Carrier contends that it produced substantial evidence of the Claimant's guilt and that the discipline assessed was fully justified. The Claimant, the Carrier argues, violated the portion of the Carrier's Code of Ethics which states, "You may accept gifts (with a market value of up to $150 per year, per entity providing the gifts) . . . All gifts received from third parties (including suppliers, customers, and consultants) should be reported to your supervisor. If you are offered a gift that exceeds the limits set forth in this Code, you should politely return the gift with an explanation that Company policy does not permit you to accept such gifts. . . ."

Further, the Carrier contends, the Claimant used the company vehicle to transport some of the material, which is an unauthorized use of a company vehicle. In addition, the Carrier maintains, the Claimant admitted his guilt when he admitted that he removed the steel scrap on five Fridays without receiving permission from Mr. Wiggins or Mr. Biddy to do so and that he used a company vehicle on two occasions to transport the steel scrap. Admission of guilt, the Carrier notes, satisfies the Carrier's burden of producing substantial evidence of guilt.

The Carrier points out that the Claimant had ethics training in 2006 and argues that

he was fully aware that selling the scrap would be an ethics violation. The discipline, the Carrier contends, is in line with the offense and is supported by the decision in Third Division Award No. 31840, which the Carrier asserts is a similar case. The Carrier also cites Award No. 11 of Public Law Board No. 6965 in support of the disciplinary action.

The two awards cited by the Carrier involved respectively theft and intended theft. This case involves neither. For there to be a theft, there must be a victim. Here the Carrier was not a victim because it gave full-title to the steel scrap to the contractor. Its only demand of the contractor regarding the pieces of steel was to clear them off the property. The contractor was not a victim because it willingly "gave" the steel pieces to the Claimant on the condition that he would remove them from the property.

The Board has placed the word "gave" in the previous sentence in quotation marks because the steel was hardly a gift for the Claimant. The word gift is defined in The New Oxford American Dictionary (2001) as "a thing given willingly to someone without payment; a present." In Third Division Award No. 39021, an employee was dismissed from employment for accepting expensive gifts from suppliers in return for purchasing supplies from them at inflated prices to the detriment of his employer who paid for the merchandise.

In the present case the steel scrap was not received without payment. In addition, it was paid for by the Claimant and not the Carrier. In order to receive the steel, the Claimant had to agree to remove the steel from the job site at his own effort and expense.

He also had to remove it within a given time span. It could not remain on the Carrier's property that the contractor was renovating after the date that the job was due to be finished.

No doubt, had the Claimant not agreed to remove the steel from the job site, the contractor would have had to incur considerable additional expense on its own to properly dispose of the steel. Business people, such as RJ Corman Railroad Construction, are not in the habit of giving away valuable goods or merchandise for nothing. It is a fair bet that the contractor figured that taking money, time, and paperwork into account, it would be more cost-effective and efficient to its business to use the Claimant to dispose of the steel than to use its own employees or contract out the work to another company. Unlike the situation in Third Division Award No. 39021, however, the Claimant was not required or expected to cheat the Carrier in any way in connection with the receipt of the steel. Nor did the transaction involve theft or intended theft as in the two cases cited in the Carrier's brief.

Although there was no theft or intended theft in this case; and the Claimant was given the steel in exchange for valuable services to be performed for the contractor; nevertheless the situation which the Claimant put himself in was problematic. The reason for this is that he was not closely supervised, and the work involved in disposing of the steel was performed on the same site as his regular duties. He therefore both faced the temptation, and had the opportunity, to use Carrier time for his private undertaking

involving the disposal of the steel. The Carrier is not required to put itself in a position where it has no control over whether its employee is working for himself or for the Carrier and where the employee is in a position easily to take advantage of the Carrier. Nor is it in the best interests of the employee to put himself in a position where he is tempted to serve his own interests at the expense of his employer on company-time.

The evidence indicates, moreover, that the Claimant did take advantage of the situation to serve his own interests at the expense of the Carrier. The Claimant could not adequately account for the five hours that he charged to his payroll for Friday, June 6, 2008, a day on which he was scheduled off and therefore received pay at the overtime rate. He claimed that he went to the Rocky Mount yard where he loaded bolts, washers, and other supplies in his pickup truck to be taken to the Clarkton job site on the following Monday. He also testified that he put work orders and his payroll into the computer system.

The Claimant had no answer, however, for Manager Wiggins's testimony that the bolts and washers were no longer needed because the job was just about complete. Nor did he dispute his supervisor's testimony that entering work orders and payroll in the computer takes about 15 minutes. Most telling, the Claimant did not challenge Manager Wiggins's testimony that he (the Claimant) told Mr. Wiggins prior to June 6th that he would be working for the contractor at Clarkton on June 6th, protecting the contractor while the latter was loading material. It is not likely that the Claimant would have told

his supervisor that he was going to work at Clarkton and, instead, work at the Rocky Mount yard without telling the supervisor of his change in plans and the reason therefor.

The evidence of the scrap receipts and gas purchases indicates, moreover, and the Board finds, that the Claimant in fact worked at the Clarkton site on June 6th to dispose of the scrap material and take it to the scrap dealer. The Board believes that the Claimant rationalized claiming pay for this work the same as he rationalized using the Carrier's pickup truck on two occasions to transport scrap to the dealer: "I figured I was disposing of scrap material for the railroad." (Tr. 36). The Claimant was not attempting to steal from the Carrier, but his own personal pecuniary interest in clearing the site of the scrap and accomplishing what the contractor had commissioned him to do clouded his thinking and caused him to subordinate the Carrier's interests to his own.

The Board believes that dismissal was an excessive penalty in this case because there was no theft and no intent to steal. In addition, the situation was not one that was shady on its face, like in Third Division Award No. 39021, where the claimant was receiving expensive gifts from companies for which he was performing no services. In the present case the Claimant was performing a genuine service for the contractor who was paying the Claimant in merchandise (the steel scrap) that belonged to the contractor and not to the Carrier. The fact, however, that the Claimant was working unsupervised and that the scrap he was being paid for in kind to remove was located at the same site where he was working for the Carrier created a conflict of interest to which the Claimant

succumbed. The Board is persuaded, however, that there was no intent on the part of Claimant to receive wages to which he was not entitled and that he rationalized to himself that he was disposing of material for the railroad on June 6th and therefore could properly include those hours on his payroll. This was wrong conduct on the part of the Claimant, but it was not theft and did not warrant the punishment of dismissal.

The Carrier was correct in finding that the Claimant's conduct violated its Code of Ethics because of the conflict of interest presented. The Claimant was properly subject to significant discipline for the violation committed. However, for the reasons explained, the Board finds that dismissal was excessive discipline in this case. The Claimant shall be promptly offered reinstatement to employment with seniority unimpaired.

AWARD

Claim sustained in accordance with findings..

ORDER

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.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
March 3, 2009