

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated August 29, 2008, T. E. Mohler, Engineer Program Construction, notified J. L. Lewis ("the Claimant") to attend a formal Investigation on September 11, 2008, in the Atlanta Division Office in Atlanta, Georgia, "to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 0930 on Thursday, August 14, 2008, on the Abbeville Subdivision, near, Winder, Georgia." On that day, according to the letter, the Claimant failed to follow Mr. Mohler's "specific instruction concerning communicating with the Roadmaster and myself regarding the day's work assignment." The letter further stated that the Claimant "became very angry" and started "using profanity" directed against Mr. Mohler when he questioned the Claimant about his location. "After several failed attempts to get you to control your behavior," Mr. Mohler continued, "I instructed you to get into a CSX vehicle for transportation back to the company provided lodging facility where you would . . . be removed from service, at which time you refused to follow my instruction once again, shouting profanity and walked off the property."

An additional purpose of the Investigation, the letter asserted, was

to determine the facts and place your responsibility, if any, in connection with damage found to your company vehicle. This included damage to the tailgate, as well as the left and right rear quarter panels. As of the writing of this letter of charge, this damage has not been documented or reported in the proper manner, to the proper authority.

The letter concluded:

In connection with the above matters, you are charged with conduct unbecoming an employee of CSX Transportation, insubordination, failure to follow instruction and failing to report incidents involving the company vehicle assigned to your care and control. Your actions in connection with the above, appear to be in possible violation of, but not necessarily limited to, CSX Transportation Operating Rules – General Rule A, General Regulation GR-2, GR-2A, GR-3A, CSX Safe Way – General Safety Rule GS-1, as well as CSXT's Policy on Workplace Violence, and CSXT's Policy on Harassment.

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.

Claimant Lewis, Track Foreman in position 5AAT-066 on the Atlanta Service Lane, began his employment with the Carrier on July 28, 1997. A. E. Mohler, Engineer Program Construction, had been in his position for approximately four years as of August

14, 2008. One of the employees that he supervised was the Claimant. The week beginning Monday, August 11, 2008, the Claimant's team, of which he was foreman, was working near Winder, Georgia, and was responsible for closing designated road crossings so that track work could be done through the crossings.

Mr. Mohler's supervisor was D. L. McCarty, Jr., Manager of Program Construction. Mr. McCarty had just assumed that position, and the Claimant had raised the question with Mr. McCarty of from whom he was to take directions. On August 12, 2008, Mr. McCarty met with Mr. Mohler and Claimant Lewis. Although Mr. McCarty was then Manager of Program Construction, he had not completely relinquished his duties of another position. At the meeting on August 12th, Mr. McCarty told Claimant Lewis that until he (McCarty) came on board 100 percent, Mr. Lewis should take his instructions from Mr. Mohler.

In the same meeting, in front of Mr. McCarty, Mr. Mohler instructed Claimant Lewis to call the Roadmaster, whose name was Mark Williams, every morning at around 7:00 a.m. and get his daily lineup of crossings that had to be worked on and then to call Mr. Mohler and let him know what the lineup was. In addition, Mr. Mohler instructed Claimant Lewis to call him in the afternoon each day with an update of what happened during the day.

On Thursday morning, August 14, 2008, as of 9:20 a.m. the Claimant had not yet called Mr. Mohler to inform him which road crossings were going to be worked. Around

9:20 a.m. Mr. Mohler called the Claimant and asked him where he was. He said that he was on the way to the road crossing where Mr. Mohler had called him from. He arrived around 9:30 a.m., and Mr. Mohler asked him where he had been. He said that he went to Palmer Yard, some ten miles in the opposite direction, to get ice and water. In their telephone conversation, the Claimant had hung up his cell phone on Mr. Mohler, and Mr. Mohler asked him why he did this. The Claimant said that it was his personal phone and that he did not have to talk to Mr. Mohler if he did not want to.

Mr. Mohler asked the Claimant if he called Roadmaster Williams. The Claimant said that he had tried to call him but that the Roadmaster did not answer. Mr. Mohler asked him what time he called. He said at 7:00 o'clock. When Mr. Mohler asked the Roadmaster about the call, the Roadmaster said that his cell phone showed that he had missed a call around 8:14 a.m. Mr. Mohler testified that Roadmaster Williams is the local contact for road closures. The schedule of closures can change overnight, Mr. Mohler explained, and that is why they have to plan the work the first thing in the morning.

In his conversation with the Claimant on the morning of August 14th, Mr. Mohler testified, they "talked about following instructions and why he (the Claimant) hadn't notified me and why he had made the choices to go where he did as opposed to coming to the job site – and he was visibly upset, swearing; in other words, refusing to do as he was told." Mr. Mohler called over one of the employees to take the Claimant back to the motel. According to Mr. Mohler, he "told Mr. Lewis several times to get in the truck and

settle down and he wouldn't do either." Mr. Mohler testified, "As the conversation progressed we talked about the consequences of failing to do as he was told and he essentially didn't care; he wasn't getting in that truck." The Claimant, according to Mr. Mohler, refused to ride back to the motel in the truck, as ordered to by him, and started to walk on the road away from the job site. At that time, Mr. Mohler stated, "I told him to be sure that he didn't return to the property."

Mr. Mohler testified that when he and Mr. McCarty visited Mr. Lewis's gang on Tuesday, August 12, he noticed that there was damage to the truck on the back left quarter panel. When he asked the Claimant what happened, Mr. Mohler stated, the Claimant said, "Tools and equipment." According to Mr. Mohler, he (Mohler) said, "What do you mean tools and equipment?" and the Claimant said, "That's all I'm going to say, tools and equipment." He (Mohler) was in a bit of a hurry that morning, Mr. Mohler testified, and let it go at the time, but when he looked at the truck later, he noticed that there was more damage on the right rear quarter panel and that the tail gate was crushed in. None of the damage to the Company vehicle had been reported to Mr. Mohler. His instructions to employees, Mr. Mohler testified, are that he is to be notified immediately of any damage to a vehicle. Mr. Mohler obtained an estimate from a body shop for parts and labor to repair the truck which came to \$3,748.33.

The Claimant, Mr. Mohler testified, is Operating Rules qualified and is tested every year on his ability to know and understand the rules. In addition to various

Operating Rules and General Safety Rules, Mr. Mohler stated, the Claimant violated the CSX policy on Workplace Violence and its Non-Harassment policy.

On cross-examination Mr. Mohler testified that the Claimant was specifically told on Monday to call the Roadmaster at 7:00 a.m. and then to call Mohler when he finds out what road crossings were scheduled to be closed. He did not do so on Monday, Mr. Mohler stated. When he did not do so again on Tuesday, Mr. Mohler stated, he (Mohler) asked him why, and he (the Claimant) said that he already knew which roads were scheduled. This could change overnight, Mr. Mohler testified, and that is why the Claimant was instructed to call every morning. Mr. McCarty, Mr. Mohler's supervisor, Mohler stated, gave the Claimant specific instructions on Tuesday when he visited the gang that the Claimant was to call the Roadmaster at 7:00 o'clock in the morning and to call Mr. Mohler when he finds out. That Thursday, as of 9:30, Mr. Mohler stated, he still hadn't heard anything from the Claimant.

Mr. Mohler was questioned on cross-examination if he did not tell the Claimant to get off of company property. He acknowledged that he told that to the Claimant but said that it was after the Claimant refused to get into the truck to be driven back to the motel. The Claimant, according to Mr. Mohler, "kept walking around, walking up and down the road, and he wouldn't stop and listen." The Claimant, Mr. Mohler testified, said that if he was out of service he did not have to listen to anything that Mr. Mohler said. He reassured the Claimant, Mr. Mohler stated, that he was not being withheld from service

until he was back at the motel and told him that in the meantime he needed to follow specific instructions. “I warned him,” Mr. Mohler testified, “told him about the consequences of his failure. I said it is a severe consequence and he said, ‘I don’t have to listen to you.’”

D. L. McCarty, Jr., Manager of Program Construction, testified that the Claimant had expressed some concerns that he was getting directions from several different people: the Roadmaster, the Engineer of Track, the Employee-in-Charge, and Mr. Mohler. “I pretty much heard his side of some issues that he was having,” Mr. McCarty stated, “and that’s when I instructed him from now on he would answer directly to Mr. Mohler.” It was at that point in their conversation, Mr. McCarty testified, that Mr. Mohler instructed the Claimant how he wanted the calls to happen each day.

Mark Williams, Roadmaster since 1991, testified that when the Claimant first came to the Winder, Georgia, area he did not call him (Roadmaster Williams) at all. Roadmaster Williams, according to his testimony, therefore told the Claimant that he needed to call the Roadmaster in the mornings. The Roadmaster also talked to Mr. Mohler and told him that he needed to have his foreman call him (Mr. Williams) in the mornings around 7:00 so that he (Williams) could brief him (the Claimant) on what crossings would be scheduled to be torn out (i.e., closed) that day so that the Claimant could arrange to be there and work on them. On August 14, 2008, Roadmaster Williams stated, he does not recall getting a call at 7:00 a.m. from the Claimant.

Roadmaster Williams testified that a couple of mornings the Claimant called him between 7:30 and 8:00 o'clock. At that time Mr. Williams's phone would be in the office, and he would be in a job briefing. The Claimant would leave a message, and Mr. Williams would have to come back out of the meeting around 8:00 'clock and try to call the Claimant and track him down. This meant that an hour or more of the day would already be gone before Mr. Williams could even talk to the Claimant to line him up on what he needed to do. At that point, Roadmaster Williams testified, he requested Mr. Mohler to have the Claimant call him shortly after 7:00 o'clock before his (Williams's) 7:30 job briefing with other employees. On August 14, 2008, Roadmaster Williams testified, his phone had a message around 8:10 or 8:12 a.m. where the Claimant had tried to call. At that time, Roadmaster Williams stated, he was tied up with another call and was unable to take the Claimant's call.

On cross-examination Roadmaster Williams testified that he told the Claimant that if he could not get a hold of him at 7:00 o'clock for any reason, to call Employee-in-Charge R. M. Brooks, who would have been briefed with the rail gang or the surfacing unit, whichever needed a crossing removed.

The Claimant testified that on August 13, 2008, he and Employee-in-Charge Randy Brooks talked about which road crossings they were going to tear out and put in and that they would meet at the Bankhead crossing. On August 14th, the Claimant stated, he and Randy Brooks met around 7:50 a.m. From there, according to the Claimant, they

moved down to the Mt. Moriah Road crossing where Mr. Mohler was. At the Moriah Road crossing, the Claimant testified, Mr. Mohler told him that he was out of service and to get off the railroad property.

The Claimant acknowledged that he did not call the Roadmaster at 7:00 a.m. on August 14 as he had been instructed to. Asked whether he had called Mr. Mohler on that date as instructed to, he answered, "No, I didn't, because of safety reasons." He denied that while he and Mr. Mohler were talking on August 14th, he lost his temper, got angry, and walked away. The Claimant admitted that Mr. Mohler instructed him to get into the company truck and that he did not follow that instruction.

He explained to Mr. Mohler, the Claimant stated, that he would ride with any one of the other members of the team but not the one that Mr. Mohler designated to take him back to the motel. He did not refuse to get in the truck, the Claimant explained; he only refused to have that particular employee take him anywhere because he did not trust that employee due to the latter's friendship with Mr. Mohler. He felt threatened by that particular employee, the Claimant testified.

The damage to the truck, the Claimant testified, occurred over a year's period of time from the heavy equipment that the switch tie gang carries on the truck and loads and unloads. He brought the damage to the truck to the attention of the prior program manager, Mr. Vecillio, the Claimant stated. According to the Claimant, Mr. Vecillio and Mr. Mohler both said that there would be a certain amount of wear and tear on the

vehicles. They were told, the Claimant testified, that if they had an accident, such as running into a pole where there was major damage, they were to fill out a report, but not for wear and tear on the truck. The Claimant stated that the truck they were using was not suited for the work that they were doing and that they were supposed to be given a new truck. Mr. Mohler, the Claimant testified, had seen the damage repeatedly.

The Claimant acknowledged that when the vehicle was given to him it was new. It was his responsibility, the Claimant acknowledged, to ensure that the people on his team did not damage the vehicle when loading and unloading equipment on the truck. Asked to account for the damage to the vehicle, the Claimant testified, "Exhaustion, the equipment is heavy, men tired, they make mistakes." When tired, he stated, they may drop equipment and accidentally scratch the truck, or do so in loading or unloading. The truck, the Claimant testified, is a light pickup truck and is not designed for heavy equipment use.

In response to questions from the Organization representative, the Claimant testified that in his conversations with Mr. Mohler on August 14, 2008, he did not at any time use profanity; he was not angry; and he did not make any threat against Mr. Mohler. In their conversation on August 14, the Claimant stated, Mr. Mohler told him that he was going to take him (the Claimant) out of service, fire him, and that he should get off of railroad property. Viewing the pictures of the vehicle, the Claimant testified that the damage to the vehicle was minimal.

“The reason I didn’t call the roadmaster,” the Claimant testified, “I was doing what they told me to do. That my first, first and only thing I’m required to do is be safe. I got my gang out safely. I got to a place I was safe and by the time I got to a place that I was safe I got a call from Mr. Tony Mohler”

When he talked to Roadmaster Williams on Monday morning, August 11, the Claimant testified, his instructions were simple, namely, to get with Randy Brooks, the Employee-in-Charge. Roadmaster Williams, the Claimant stated, told him that Randy Brooks would get Rule 707 authority for them and instruct him regarding each crossing that had to be closed.

Recalled for rebuttal testimony, Mr. Mohler testified that at no time did the Claimant tell him that he would get in the truck and ride back to the motel if Mr. Mohler gave him a different driver.

After the conclusion of the hearing D. L. Moss, Jr., Director Program Construction, by letter dated September 30, 2008, notified the Claimant of his finding that the facts supported the charges placed against him (the Claimant) and that the Claimant was guilty of violation of the cited CSX Transportation Operating Rules and Regulations and Safe Way Rules. The Director assessed discipline of a 60 calendar day suspension starting August 14, 2008, and ending on October 12, 2008.

It is the position of the Carrier that the Claimant was provided a fair and impartial investigation and that it produced substantial evidence that he was guilty as charged. The

Carrier argues that the hearing officer found the Carrier's testimony and other evidence more credible than the Claimant's and that a hearing officer's credibility determinations are normally accepted at the appellate level. A 60-day actual suspension was appropriate discipline, the Carrier contends, in view of the severity of the offense.

There was an aspect of the Investigation that was not fair to the Claimant. At the hearing the Organization representative objected when the hearing officer began to question the Claimant about the absence of an insurance card and registration documentation in the Claimant's vehicle (Tr. 75). The representative pointed out that there was no mention about registration or proof of insurance in the charge letter.

The hearing officer, although noting the objection, in effect denied it on the ground that the Claimant "personally brought up his vehicle inspection . . . as part of his testimony" The first person to raise the issue of the registration and proof of insurance was Mr. Mohler (Tr. 6) and not the Claimant. It was improper for the hearing officer to pursue that issue as he did, devoting many questions to it, when it was not mentioned or referenced in the charge letter. The objection of the Organization representative should have been sustained and questioning about the registration and proof of insurance stopped. This Board has given no weight whatsoever to the testimony on that issue in deciding this case.

The Claimant violated a very clear instruction that he was to call Roadmaster Williams shortly after 7:00 o'clock each morning to obtain information about which

road crossings to close. At the meeting among the Claimant, Mr. McCarty, and Mr. Mohler on August 12, 2008, Manager McCarty told the Claimant that he was to take instructions from Mr. Mohler, and Mr. Mohler instructed the Claimant to call the Roadmaster every day around 7:00 o'clock. The Roadmaster's telephone records show a call to him apparently by the Claimant at 7:25 a.m. on August 13, 2008.

On August 14, 2008, however, the Claimant did not call Mr. Mohler around 7:00 o'clock. His explanation for failing to do so was not credible. He stated that he did not call for safety reasons (Tr. 70). The Claimant testified that he was responsible for the safety of the men on his team, but he did not explain how making a telephone call to the Roadmaster would have jeopardized his or his men's safety. By his own testimony, the Claimant was on the premises of a motel until after 7:00 a.m. on August 14 (Tr. 57-58). The Roadmaster's phone records show that the Claimant's call to him on the morning of August 13 took four minutes. There is no plausible evidence in the record to explain why the Claimant could not have taken four or five minutes off before leaving the motel on August 14 to call the Roadmaster to obtain the road closing information as instructed by his supervisor. There has been no credible showing that any safety consideration prevented the Claimant from calling the Roadmaster as he was required to do.

There is no claim by the Claimant that he forgot to call the Roadmaster. Nor did he deny that Manager McCarty told him on August 12th that he was to take instructions from Mr. Mohler; or that Mr. Mohler told him during that same meeting on that date, in

front of Mr. McCarty, that he was to call the Roadmaster each day around 7:00 a.m. for road closing information and then convey that information to Mr. Mohler. The Claimant testified about a conversation that he allegedly had with Roadmaster Williams on August 11th in which he was instructed to communicate with Employee-in-Charge R. Brooks for road closing information. Roadmaster Williams testified that he told the Claimant to get in touch with Mr. Brooks in the event the Claimant could not reach Williams, but not as a substitute for calling the Roadmaster. Whatever was told the Claimant on August 11th, however, is beside the point because Manager McCarty made it clear to him on August 12th that he was to take instructions from Mr. Mohler. The evidence establishes that the Claimant was disobedient to a clear direction of his supervisor – namely, Mr. Mohler’s instruction to call the Roadmaster around 7:00 a.m. each morning for information about road closings and then report the information to Mr. Mohler – and thereby committed the offense of insubordination, as alleged in the charge letter.

The Claimant was also insubordinate when he disobeyed a direct order to get into a company vehicle for transportation back to the motel because he was being put out of service. His explanation that he disobeyed because he felt threatened to go with the employee designated by Mr. Mohler to drive him is not believable. The Claimant testified that he was afraid to go with that person because the latter was a friend of Mr. Mohler’s. This was an employee with whom the Claimant worked every day and gave direction to as the employee’s foreman.

There is no evidence or claim that the employee in question ever harmed, threatened, or mistreated the Claimant. The fact that the employee was allegedly a friend of Mr. Mohler's would not be a reasonable basis for the Claimant to be afraid to ride with him in broad daylight from the work site to the motel. The Board finds that the Claimant's explanation for disobeying his supervisor's order to get into the company truck to be driven back to the motel is something concocted by him after the fact in an attempt to excuse a clear act of insubordination and bears no resemblance to reality.

The two acts of insubordination committed by the Claimant on a single day constituted a very serious offense. No employer is required to put up with open disobedience to legitimate instruction from a supervisor. The 60-day suspension of the Claimant was appropriate discipline for such serious misconduct. It is basic to any employer/employee relationship that employees will obey instructions given to them by their supervisor. No business can operate successfully without good faith acceptance of that principle by its employees. The Claimant would do well to take that principle to heart and not attempt to find ways to defy, evade, or circumvent it. The stakes are too high not to comply.

A W A R D

Claim denied.

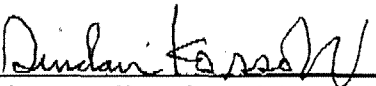
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ORDER

This Board, after consideration of the dispute identified above, hereby orders that
an award favorable to the Claimant not be made.



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
July 23, 2009