Award No. 41
Case No. 41

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated September 30, 2008, M. R. McGowan, Engineer Program Construction, instructed S. M. Hardy ("the Claimant") to attend a formal Investigation on October 21, 2008, in the conference room at the CSX office building in Cumberland, Maryland, "to determine the facts and place your responsibility, if any, in connection with your failure to follow my specific instructions to you on Thursday, September 25, 2008, in that you were to take the vehicles assigned to 5DYD to the Red Roof Inn located at Route 1, Jessup, Maryland, and park them for the week end. On Friday, September 26, 2008," the letter continued, "I physically removed CSX Vehicle #116037 from your residence with the assistance of Henry Doll, Assistant Roadmaster." The letter stated that the Claimant was "charged with conduct unbecoming an employee of CSX Transportation, failure to follow instructions, insubordination, and unauthorized use of a company vehicle, and possible violations of, but not limited to, CSX Transportation Operating Rules - General Rules A; General Regulations GR-2 and GR-3, as well as the CSX Corporation Code of Ethics." The letter further confirmed that the Claimant was "being withheld from service pending the results of this investigation." The hearing was

postponed one day to October 22, 2008.

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 began his employment with the Carrier on January 9, 2006, in the Engineering Department. At the times here relevant he held the position of foreman on gang 5DYD. His supervisor was Engineer Program Construction Michael R. McGowan. Gang 5DYD is a Program Construction team responsible for surfacing interlockings and yard leads. It is a floating gang the members of which receive a weekly per diem travel payment added to their paychecks.

Because of an incident with another employee, Mr. McGowan requested Claimant Hardy to sign a typed, written statement in which he certified his understanding that he was not allowed to use company trucks or equipment for personal use. The written statement further declared:

. . . Only my supervisor can allow the use of Program Construction trucks or

equipment on scheduled time/days off. . . . Company trucks while off duty are to be parked at the hotel designated by my supervisor where we are staying or at a local CSX head courters [sic headquarters ?] building around the current job site.

Hardy signed the statement and dated it 08/07/08. According to Mr. McGowan's testimony, he had a lot of new employees working for him, and he had all of them sign a similar statement to make sure that they were aware of the company policy regarding personal use of company vehicles.

In the early afternoon of Thursday, September 25, 2008, Mr. McGowan instructed the Claimant to move the gang's three company vehicles from Wilsmere yard in Wilmington, Delaware, to the Red Roof Inn in Jessup, Maryland, and park them there. These included a fuel truck, a gang truck, and the foreman's truck No. 116037. Asked by the hearing officer where the employees' personal vehicles were parked on September 25th, Mr. McGowan testified, "Theoretically they should have been parked at the hotel that they drove to prior to starting." At all times here relevant, that was a hotel in Philadelphia, Pennsylvania.

Because of information provided to him on Friday, September 26, 2008, regarding truck 116037, Mr. McGowan and Assistant Roadmaster Henry Doll drove to the Claimant's house in Cumberland, Maryland, around noon on that date and found the truck parked in front of the house. Mr. McGowan, who had a spare key, removed the truck from there and drove it to the company's office building in Cumberland, Maryland. He

informed the Claimant by phone that he had taken the truck and that the Claimant was being removed from service. At no time, Mr. McGowan testified, did he give the Claimant permission to take truck 116037 to Cumberland, Maryland on September 25 or 26, 2008.

Mr. McGowan checked fuel purchase records for truck 116037 and found that gas had been purchased for the truck on the Claimant's company credit card on the following weekends after the Claimant had signed the document acknowledging his understanding that he was not allowed to use company trucks or equipment for personal use or without his supervisor's permission on scheduled days off: Sunday, August 26, 2008; Sunday, September 14, 2008; Sunday, September 21, 2008. Since the Claimant has been a member of force 5DYD, Mr. McGowan testified, the Claimant has never been authorized to drive the company vehicle to his residence.

On cross-examination Mr. McGowan stated that according to his original instructions the three trucks were to be driven to the Red Roof Inn in Jessup, Maryland, by three people, with the Claimant being their foreman. As it turned out, the driver of the fuel truck was unable to drive the truck to Jessup on Thursday, September 25, 2008. Only someone with a hazmat endorsement on his license is permitted to drive a fuel truck. Mr. McGowan and Claimant Hardy discussed the matter by phone, and Mr. McGowan made arrangements with someone from another team to drive the fuel truck on Saturday, September 27, 2008, from Wilmington to Jessup.

Mr. McGowan was asked how, September 25, 2008, being the end of the workweek, the Claimant and the other two drivers were to be transported back to Cumberland, Maryland. The question was raised in their phone conversation, Mr. McGowan stated, and the solution was to pay an employee mileage on his personal vehicle to follow the three drivers from Wilmington to Jessup "and then proceed from there if they could handle it. If not," Mr. McGowan continued, "they'd have to return back to Philadelphia which would have been more mileage, dropping the other people off at their personal vehicles."

On September 25th, the regular operator of the gang truck stated that he did not feel well and wanted to go home. The Claimant therefore had to look for someone else to drive the vehicle from Philadelphia to Jessup. He was able to get a machinist named Louis Martin, who volunteered to drive the gang truck to Jessup. Mr. Martin drove the gang truck to the Red Roof Inn in Jessup, Maryland, and the Claimant drove truck 116037 to the same location. They arrived at the Red Roof Inn at approximately 5:30 p.m.

In response to questions from the hearing officer, the Claimant testified that he operated vehicle 116037 on September 25, 2008; drove it to Cumberland, Maryland, on that date; and was not given permission to drive it to Cumberland, Maryland.

In response to questions from his Organization representative, the Claimant testified as follows. He attempted to follow Mr. McGowan's instructions to him on September 25th to take the vehicles assigned to 5DYD to the Red Roof Inn in Jessup,

Maryland, and park them for the weekend. The vehicles were coming from Wilsmere yard in Wilmington, Delaware. He could not find anyone to drive the fuel truck. He was able to get an employee named Louis Martin to drive the stake body truck (also called the gang truck). He held a job briefing and instructed his employees that he would be willing to pay one of them mileage if he would follow them (the Claimant and Mr. Martin) to Jessup and then take them back to their vehicles in Cumberland.

No one [the Claimant's testimony continued] wanted to help. The Claimant was then left with the decision to take his own truck (#116037) and the stake body truck to Jessup and then take himself and Mr. Martin home in the Claimant's truck. The Claimant informed Mr. McGowan that he could not find anyone to follow them. Mr. McGowan instructed the Claimant to make it work. When he could not make it work, that is when the Claimant decided to drive vehicle 116037 from Jessup to Cumberland in order for Mr. Martin to retrieve his personal vehicle.

The Claimant testified that he did not have his personal vehicle parked at the CSX yard in Cumberland, Maryland, that his wife had the vehicle. The reason that he took truck 116037 to his residence on September 25, 2008, he stated, was because he couldn't find transportation to his house. He arrived at his residence approximately 8:00 p.m., the Claimant testified. According to the Claimant neither he nor anybody else from his household drove the vehicle after he parked it at his residence that evening.

The Claimant was asked by his Organization representative the main reason that he

would take the company vehicle from CSX property to his residence on weekends. He stated that he did so to stock supplies and do housekeeping on the vehicle. He testified, "I was told that housekeeping needed to be done. I was allowed to take it to the residence and wash it and clean the inside and stock up supplies from the previous week." Mr. McGowan was aware that he was doing this, the Claimant stated. He testified that the last week that he worked in Brunswick, Maryland, the Carrier's managers came to check his work in the yard and commended him on the housekeeping of the truck and how orderly his books and notes were.

With reference to General Rule A, the Claimant was asked how he complied with that rule, which requires employees, when in doubt concerning the meaning or application of a rule or instruction, to ask one's supervising officer for clarification. He stated that he did this by contacting Mr. McGowan on the cell phone and informing him that he could not find anyone to transport them back to Cumberland, Maryland, by paying them mileage. "[T]hat's when he told me to make it work and hung up," the Claimant testified. The Claimant explained that Mr. McGowan said that he had an incoming call and that he would have to get back to the Claimant. The Claimant stated that "he just hung up and I never heard from him."

After the Claimant completed his testimony in answer to questions by the Organization representative, the hearing officer resumed questioning of the Claimant. In answer to the hearing officer's questions, the Claimant testified that Mr. Martin's

personal vehicle was parked in Cumberland, Maryland, and his (the Claimant's) personal vehicle was also parked in Cumberland, Maryland. His workday, the Claimant stated, starts at the hotel from where he leaves in the morning. He is responsible for being at his work location (i.e., the hotel) at the beginning of a workweek, the Claimant acknowledged. His transportation from his home to the work location, the Claimant stated, is in his personal vehicle.

The Claimant was asked by the hearing officer why his vehicle was parked in Cumberland rather than at the hotel near his Wilmington, Delaware, work site. He stated, "Because I brought the vehicle back for housekeeping and to stock up supplies." There is no car wash that he can use near his work location, the Claimant testified, because the car washes don't take credit cards. Mr. McGowan told him, the Claimant testified, that in his opinion the Claimant was allowed to take his vehicle home and use his own time without charging overtime to clean the vehicle and maintain it.

The hearing officer asked the Claimant if the permission he had was a blanket permission or per usage permission. He answered that it was "a gentleman's agreement." The Claimant testified that the statement that Mr. McGowan typed up and that he (the Claimant) signed "says to leave it at the hotel or designated CSX headquarters, so he said that's a loophole. I can take it from the hotel and bring it back and leave it in the yard over the weekend so I can do housekeeping and maintenance to it." The yard, the Claimant stated, is the CSX yard in Cumberland, Maryland.

The hearing officer asked the Claimant if he attempted to call Mr. McGowan back when he received no call back from him. He stated that he did not. The hearing officer asked him why he did not attempt to call Mr. McGowan back. He answered as follows:

> To be perfectly honest, because I was fed up with the situation at hand. He always wants me to try to take care of things to the best of my ability and he is a busy man and I understand that. He's a supervisor and he doesn't call back a lot, so I was fed up and I took it upon myself to get me and Mr. Martin home because it was already late and I wasn't charging overtime, even to get the vehicles there. I just wanted to get home and see my family.

The first time on September 25th that he contacted Mr. McGowan about getting a ride from Jessup to Cumberland was, he would say, around mid-afternoon, the Claimant testified, but he really did not have a clear time. When he and Martin dropped the vehicles off at 5:30 p.m., the Claimant stated, he contacted Mr. McGowan. "I let him know that we were in Jessup, Maryland and that the vehicles were at the hotel," the Claimant testified. The hearing officer asked the Claimant, "At that time at 5:30, did you again tell him you didn't have anyone that could take you and Mr. Martin to Cumberland?" The Claimant answered, "No, because I already advised of that previously."

The hearing officer asked the Claimant, "At that time did you, at 5:30 when you were talking to him, did you tell him that you were going to take the truck to Cumberland or go ahead and ask for permission to take the truck to Cumberland?" He answered, "No, I didn't."

The Claimant testified that he would have left truck 116037 at the yard in Cumberland when he arrived there from Jessup but could not get a hold of his wife. He stated that he therefore "took it to my house for the night and then Friday my plan was to clean it and take it back to the Cumberland Yard for the weekend."

After the Claimant completed his testimony, Mr. McGowan was recalled by the hearing officer to testify. He denied that the Claimant contacted him on September 25th and informed him that he could not find anyone to get him and the other truck driver back to Cumberland to their personal vehicles. He did speak with the Claimant the afternoon of September 25th, Mr. McGowan stated. During that conversation, Mr. McGowan testified, the Claimant did not at any time state that he could not find someone to transport him and the other truck driver to Cumberland.

Mr. McGowan denied that he gave the Claimant permission to take the vehicle home for supplies and cleaning. He has never in the past given anyone permission to take the vehicle home for cleaning or for supplies, he stated. Mr. McGowan denied that the Claimant told him that he was unable to get a driver to transport him and the other driver to Cumberland and that, in reply, he told the Claimant to just handle it. "It was very specific instructions on trucks to be moved to Jessup," Mr. McGowan testified. "His statement to me," Mr. McGowan stated, "whenever I asked about the trucks, it was confirmed that the trucks that could be moved were moved."

On cross-examination Mr. McGowan denied that on September 25, 2008, he ever

informed the Claimant in regard to transporting the truck from Delaware to Jessup to just simply make it happen or make it work.

After the conclusion of the hearing, by letter dated November 10, 2008, Lynn Houser, Asst. Chief Engineer System Production Teams, notified the Claimant of the Carrier's determination, based on a review of the transcript and exhibits, that the charges against him "were valid and proved." There was sufficient proof, the letter stated, that he was guilty as charged and in violation of the cited rules and regulations. "Therefore, based upon my finding of guilt and the seriousness of the offenses, it is my determination," the letter continued, "that your discipline to be assessed is 90 calendar day suspension, starting September 29, 2008 and up to an including December 28, 2008."

It is the position of the Carrier that the Claimant was provided a fair and impartial Investigation, that it produced substantial evidence of his guilt, and that the discipline assessed was fully justified. The Claimant, the Carrier asserts, ignored an instruction to take the vehicles on his gang to the Red Roof Inn. Instead of taking his vehicle there, the Carrier argues, he took the vehicle to his residence without permission. He was well aware, the Carrier asserts, that he was not to take the vehicle home. The discipline assessed was fully justified, the Carrier contends, and was not harsh or capricious. The Carrier notes that approximately a year earlier the Claimant accepted a waiver for a 15-day actual suspension and 15-day overhead suspension for failure to protect his assignment.

In a closing statement the Claimant noted the mental and financial stress the present situation has caused him and his family. "I do not take this lightly; CSX is not a job, it is my career and I would never do anything to jeopardize that," the Claimant declared.

In its closing argument on behalf of the Claimant, the Organization asserted that the Carrier acted in an unreasonable manner in removing the Claimant from service before the hearing, thereby causing undue hardship to the Claimant and his family. The Carrier, the Organization argues, did not produce convincing evidence but only suspicion that the Claimant acted in an unreasonable manner. In his supervisory position of foreman, the Organization contends, the Claimant was required to direct other employees and make decisions. In the present case, according to the Organization, the Claimant made a decision. Further, the Organization argues, the Carrier did not make clear that the Claimant would be removed from service for taking the Carrier's vehicle to his residence, something that he has done prior to the present incident on numerous occasions. In fact, even after the present incident, the Organization argues, the Carrier permitted other employees to take a Carrier vehicle to their residences. This, the Organization asserts, suggests that the Carrier does not enforce its instructions with reasonable uniformity for all employees. The penalty imposed in this case was excessive, the Organization contends, and the Claimant should be placed back into service and compensated for all lost wages and fringe benefits.

The Claimant, in questioning by the hearing officer, admitted that on September 25, 2008, he drove vehicle 116037 to Cumberland, Maryland, without permission. Through questioning by the Organization representative he then attempted to mitigate or excuse the seriousness of his admission. The essence of his defense was that his supervisor, Mr. McGowan, had told him to "make it happen" with regard to getting the trucks to the Red Roof Inn in Jessup, Maryland; and that his way of accomplishing that was by getting Louis Martin to drive the stake body truck to Jessup and then personally driving Mr. Martin and himself to Cumberland, where both of them had their private vehicles parked.

According to Mr. McGowan's testimony, the Claimant never told him in their cell phone conversations on September 25th that he could not get anybody to drive him (the Claimant) and Mr. Martin, the driver of the stake body truck, back to Cumberland, Maryland. Mr. McGowan's testimony is credible and consistent with his testimony that his instruction to the Claimant was that the driver who followed the truck to Jessup, if necessary, would "return back to Philadelphia . . . dropping the other people off at their personal vehicles." Mr. McGowan also testified that he told the Claimant that he (Mr. Hardy) could drive his personal vehicle down and he would be the one paid the mileage down (Tr. 17).

Philadelphia is where the gang's hotel was located and where they would normally park their private vehicles. Mr. McGowan testified that at no time after the Claimant

signed the statement regarding personal use of the company truck did he give the Claimant permission to drive the company truck to his residence. That would mean that as of September 25th he did not know that the Claimant had used company truck 116037 to drive back and forth from the hotel the previous weekend and that the Claimant did not even have his private vehicle with him at the hotel on September 25th.

The Claimant did not deny that Mr. McGowan suggested that the Claimant could drive his personal vehicle down to Jessup, following the trucks. Such an instruction by Mr. McGowan would be consistent with his testimony that he did not give the Claimant permission to travel to his residence with the company truck. It would not be consistent with the Claimant's testimony that he traveled back and forth, between Philadelphia and his home, the weekend of September 18-21, 2008, with Mr. McGowan's permission. Had Mr. McGowan given such permission he would have known that the Claimant did not have his private vehicle with him that week and would not have suggested that the Claimant be the one to follow the trucks to Jessup in his personal vehicle and, if necessary, back to Philadelphia.

Nor has the Claimant provided a credible explanation for not asking permission to drive the company truck to transport him and Mr. Martin to Cumberland, Maryland, from Jessup, Maryland. The Claimant testified that sometime in the afternoon of September 25th he called Mr. McGowan by cell phone and advised him that he could not find anyone who, for payment of mileage, would be willing to accommodate their needs and transport

them (the Claimant and Mr. Martin) back to Cumberland, Maryland. In reply, according to the Claimant, Mr. McGowan told him to "make it work" and then hung up because he had an incoming call.

At approximately 5:30 p.m. on September 25th, the Claimant and Mr. McGowan had another conversation. Regarding that conversation both the Claimant and Mr. McGowan are in agreement that the Claimant told Mr. McGowan that the vehicles were at Jessup. He did not mention Cumberland in the conversation and did not request permission to drive truck 116037 to Cumberland. Nevertheless he drove himself and Mr. Martin to Cumberland, Maryland, for their personal convenience without permission and in disregard of his supervisor's instructions memorialized in the written statement that the Claimant signed dated August 7, 2008.

Even if Mr. McGowan had told the Claimant to "make it happen," which Mr. McGowan denies saying, the Claimant had to know that such an instruction did not include taking the truck to Cumberland without permission. This should have been clear to the Claimant because Mr. McGowan told him to park the truck at the Red Roof Inn in Jessup. Such an instruction was inconsistent with the Claimant being allowed to drive the truck to Cumberland. Cumberland is not Jessup. In view of Mr. McGowan's instruction regarding parking the vehicle in Jessup, the only circumstance under which the Claimant would be permitted to drive the truck to Cumberland on September 25th would be if Mr. McGowan rescinded his previous instruction and told the Claimant that he could take the

truck to Cumberland.

The Claimant's statement to Mr. McGowan in their 5:30 p.m. cell phone conversation was also misleading. The Claimant told Mr. McGowan that both trucks were at the hotel in Jessup. At the time he told that to Mr. McGowan, however, the Claimant knew that he was not going to leave truck 116037 at Jessup but, instead, was going to leave immediately for Cumberland in the same truck. The Claimant therefore intentionally misled his supervisor into believing that truck 116037 was going to remain in Jessup when, in fact, he intended to leave in that same truck for Cumberland as soon as their conversation ended.

The Claimant's explanation for not parking the company truck at the CSX yard in Cumberland, and taking it home instead, is not credible. He said that he could not reach his wife to come and pick him up at the Cumberland yard. He also testified, however, that Mr. Martin's personal vehicle was parked in Cumberland. No explanation was given why the Claimant did not ask Mr. Martin to drive him home after depositing the company truck in the CSX yard at Cumberland.

The Claimant attempted to blunt the force of the August 7, 2008, statement that he signed by stating that it contained a loophole which permitted Mr. McGowan to give him permission to drive the truck for personal use consistent with the content of the statement. Thus the Claimant testified that "this statement he [Mr. McGowan] typed up . . . says to leave it [the vehicle] at the hotel or designated CSX headquarters, so he said that's a

loophole. I can take it from the hotel and bring it back and leave it in the yard over the weekend so I can do housekeeping and maintenance to it." (Tr. 34).

Perusal of the August 7, 2008, statement, however, shows that it says, in pertinent part, "Company trucks while off duty are to be parked at the hotel designated by my supervisor where we are staying or at a local CSX headquarters building around the current job site." (emphasis added). The Board is unable to discern a loophole in the statement. The August 7 statement plainly does not permit the Claimant to park the company vehicle in the Cumberland headquarters building if his assignment is in Jessup, Maryland, more than a hundred miles distant. The headquarters building would have to be "around the current job site."

The Board finds no evidence in the record of disparate treatment of the Claimant. There was evidence that on one occasion a Carrier employee under Mr. McGowan's supervision was permitted to take a company vehicle to his residence. However, Mr. McGowan testified without challenge that this was done with permission of the supervisor (Tr. 55). In the present case the Claimant acted without permission.

With regard to removal of the Claimant from service and the degree of discipline assessed, the Board finds no contract violation. The Claimant intentionally disobeyed both the general instructions given to him by his supervisor regarding taking a company vehicle home without permission, and the specific instructions given to him on September 25, 2008, regarding parking the vehicle at the hotel in Jessup, Maryland. Such conduct

constituted insubordination, which is a major offense for which an employee may be withheld from service. This was the Claimant's second significant rules violation within a period of slightly over a year. Taking all of the circumstances of this case into consideration, and in light of the Claimant's disciplinary record, the Board is unable to say that the discipline imposed was excessive or unreasonable. The claim will be denied.

In his closing statement the Claimant declared that CSX is not a job; it is his career, and he would never do anything to jeopardize that. The Claimant should learn a lesson from this case that he should not try to beat the system. He should also take to heart the admonition that when he puts his signature to a statement, he is expected to fully comply with his undertaking. He should not look for loopholes. Although a young man with few years of service, he apparently is a talented individual because the Carrier has placed him in the responsible position of foreman. The Claimant should look at the present incident as a learning experience that will enable him to become a better employee. It is not too late for the Claimant to prove to his superiors that he can be a valuable asset to CSX. But that will require a determination on his part to follow the rules in letter and spirit under all circumstances. When in doubt as to the correct course of action, he should always consult with a responsible supervisor or manager. The Board wishes him well.

AWARD

Claim denied.

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
August 13, 2009