

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
AWARD NO. 8, (Case No. 8)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE
(Organization File: D70149912)**

vs

**CSX TRANSPORTATION, INC.
(Carrier File: 2012-126137)**

William R. Miller, Referee and Neutral Member
P. E. Kennedy, Employee Member
R. Paszta, Carrier Member

QUESTION AT ISSUE:

Did the Carrier comply with Rule 25 of the Agreement when it charged K. D. Gannett with violation of Operating Rules - General Rule A, General Regulations GR-2, GR-3 and GR-16 and CSX Safeway Rule GS-1 and was substantial evidence adduced at the Investigation on May 15, 2012, to prove the charges; and was the discipline assessed in the form of a 45 day suspension warranted?

FINDINGS:

Public Law Board No. 7529 finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the discipline.

The Board has thoroughly reviewed the record and will first address the Organization's procedural arguments. It argued the Claimant was denied a "fair and impartial" Investigation because Claimant was suspended prior to the Hearing. As previously stated in Award Nos. 1 and 7 of this Board countless arbitral tribunals have found that the Carrier has a right to withhold an employee from service prior to a Hearing in serious matters. The charges brought against the Claimant were of a serious nature and the Carrier did not violate the Agreement when it held the Claimant out of service prior to the Investigation. The Organization further objected to the Claimant's disciplinary record being attached to the transcript of the Hearing as it might prejudice the disciplinary decision maker. Many Boards (See as an example: Third Division Award No. 28932) have decided that the introduction of an employee's record at the end of the Hearing, for the sole purpose of determining the appropriate degree of discipline, if any, is not prejudicial. In this instance there is no showing that the Claimant was prejudiced by Carrier's actions. It is determined that the Carrier complied with Rule 25 of the Agreement and Claimant was afforded all of his "due process" Agreement rights.

On May 3, 2012, Claimant was directed to attend a formal Investigation on May 14, 2012, which was mutually postponed until May 15, 2012, concerning in pertinent part the following charge:

"...to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 1725 hours, on April 24, 2012 at or near milepost 00N85.7, on the Bruceton Sub Division, when it alleged that you fell short of complying with corporate rules and instructions when you engaged in horseplay with another employee, while on company property.

In connection with the above incident, you are charged with failure to properly and safely perform the responsibilities of your position, carelessness and possible violations of, but not limited to, CSXT Operating Rules - General Rule A; General Regulations GR-2, GR-3, and GR-16; as well as, CSX Safeway Rule GS-1."

On June 4, 2012, Claimant was notified that he had been found guilty as charged and was assessed discipline in the form of 45 actual calendar day suspension. On June 19, 2012, the Claimant requested expedited handling of his case as provided for in Appendix (N) Expedited Discipline Agreement of June 1, 1999 BMW/CSXT Agreement.

The facts indicate that the incident in dispute occurred on April 24, 2012, near the end of the workday when Claimant and other crew members were tying up and putting away their equipment and tools. Claimant's Foreman, Mr. Williams attempted to get Claimant's attention as he approached him. The Carrier asserted the Foreman was walking toward the Claimant while calling out his name. According to it, the Claimant heard the Foreman calling his name and he looked at the Foreman, smiled, and quickly ran/skipped away from the Foreman. It further argued the Foreman ran after the Claimant in a playful manner, and pulled his groin muscle while running after the Claimant. Both employees were charged with engaging in horseplay.

The Organization's version of the same incident was different. It argued that the Claimant never heard Foreman Williams calling him and instead asserted that the Claimant suddenly noticed Williams approaching him quickly, and he stepped out of the way because Foreman Williams was too close and because the Claimant was unsure of Foreman Williams intentions at that moment. It suggested that Foreman Williams hurt himself when he made a few quick steps towards the Claimant and there was no horseplay involved.

On pages 4 and 5 of the transcript, Manager System Production on T1 tie team, C. McCauley was questioned about the incident as follows:

"Palleschi: Could you please tell us what you know concerning the charge letter?"

McCauley: On the above date, on 4/24-or 4/25/12, I was notified of an incident that took place on the Bruceton Sub at the 00N85.7 and when I went to investigate the incident I talked with Mr. K. D. Gantt about an incident reported to me of horseplay.

And after talking with Mr. Gant, he stated that Mr. K. T. Williams had came at him and when Mr. K. T. Williams came at him he turned and run away from Mr. K. T. Williams.

Palleschi: Now Mr. McCauley, when you say when he came at him could you please explain that?

McCauley: Yes sir. He came running at him and they were in a jokingly manner, is what Mr. K. T. Williams said. They were horse playing.

Palleschi: Okay and is this information you got from Mr. Williams or Mr. Gantt?

McCauley: This is information I got from Mr. Gantt. *(Underlining Board's emphasis)*

Later on McCauley testified on pages 15 and 16 of the transcript that Mr. Williams told him the reason he was running around with the Claimant was because they were playing. Manager McCauley's statements were not effectively refuted.

On pages 18 and 19 of the transcript Foreman Wilkerson was questioned about what he knew about the incident. He stated he did not see the event, but shortly after its occurrence he picked up Forman Williams. He testified on page 18 in pertinent part as follows:

"Wilkerson: ...And so when I pulled up he, you know, opened the door and got in and I-I just asked him because he was like he was, you know glad to sit down, you know, I just said, you know, what's wrong with you and he said I'm tired, you know, just tired, out of breath, what have you been doing? And he just said, in a laughing manner, you know, like me and Gantt, you know, we was running, you know, that was the statement he told." *(Underlining Board's emphasis)*

On page 19 Foreman Wilkerson was cross-examined as follows:

"Trawick: Okay and then you said that when you got back around there then Mr. Williams got in your truck and he told you in a joking manner that he was out of breath?

Wilkerson: Right.

Trawick: Is that correct?

Wilkerson: Right.

Trawick: Alright, and at that time you said that he stated to you that he and Mr. Gantt was running, is that correct?

Wilkerson: Right." *(Underlining Board's emphasis)*

Wilkerson had no self-interest to tell anything other than what happened and his rendition of what Foreman Williams told him about the incident was never rebutted.

In his defense, the Claimant argued that he did not hear Foreman Williams call out to him and he did not run away from him, but rather just stepped out of the way because the Foreman was getting too close to him. On page 42 of the transcript the Claimant was questioned as follows:

"Palleschi: And, so, are you saying that Mr.-your Foreman, Mr. Williams, walking toward you, did you hear him call you?

Gantt: No, not really.

Palleschi: Not really? Did you or did you not hear him call you?

Gantt: I might have heard him call my name.

Palleschi: Okay so you heard him call your name, correct?

Gantt: Right."

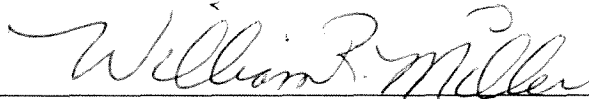
In the few questions above the Claimant went from not hearing his Foreman calling out his name, to maybe hearing him to confirming that he heard him call out his name. On page 44 of the transcript the Claimant testified that it was possible that Foreman Williams might have been attempting to horseplay with him, but that he did not participate. However, his version of

the event is not particularly helped by the statement from co-worker A. Melton that lends credence to the argument that Foreman Williams and Claimant were playing around as he stated in part: **"...Mr. KT [the Foreman] was approaching my truck also an he called Gantt name (smiling). Then made a quick break or (lunged) at Gantt, just a few steps, Gantt stepped back quickly, KT grabbed his thigh. There was about 10 or 15 ft. between the two."** Melton was standing close to the Claimant and he confirmed that the Claimant heard Foreman Williams and Williams approached Claimant in a friendly manner and Claimant was not suddenly surprised by the Foreman's approach. Claimant's colorization of the incident is not persuasive. It is determined that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had 30 plus years of service. Under the Carrier's Disciplinary Policy "horseplay" has been considered a major rule violation and has been prohibited because of the potential accidental harm to the participants or others. Prior to this event the Claimant had three counseling sessions and four serious level violations in the previous five plus years with one of the counseling sessions approximately two months before the incident under investigation. The level of discipline assessed was not arbitrary, excessive or capricious and was in accordance with the Carrier's Progressive Discipline Policy. The discipline will not be set aside and the appeal/claim is denied.

AWARD

Appeal denied.

A handwritten signature in cursive script, reading "William R. Miller", is written over a horizontal line.

William R. Miller, Referee

Dated: October 11, 2012