

**PUBLIC LAW BOARD NO. 6076**

**AWARD NO. 41**

**CASE NO. 41**

**Carrier File: 156894**

**PARTIES TO  
THE DISPUTE:**

**United Transportation Union  
Yardmaster Department**

**vs.**

**CSX Transportation, Inc.  
(Former Louisville & Nashville  
Railroad Company)**

**ARBITRATOR:** Gerald E. Wallin

**DECISION:** Claim sustained in accordance with the Findings.

**STATEMENT OF CLAIM:**

“Organization requests that Mr. K. D. Clay be reinstated and that he be credited for all lost Railroad Retirement credits, vacation credits and that he be made whole, to include any and all lost overtime starting July 22, 2008 (the day he was removed from service until he’s returned to service. Also any and all reference to this incident be stricken from Mr. Clay’s personal file”

**FINDINGS OF THE BOARD:**

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant’s employment was terminated after the Carrier found him guilty of engaging in four specific kinds of misconduct during a confrontation with the Terminal Superintendent and two other Carrier officials at Filford Yard in Atlanta on the afternoon of July 22, 2008. At the time of the incident, claimant had more than 13 years of service. His work record contained entries for five instances verbal discussions for minor matters and one 15-day actual suspension for the use of profane language and conduct unbecoming an employee. The suspension was approximately 19 months previous to the incident in question.

After listing the date, location, and approximate time of the incident, the notice of investigation described the four specific kinds of misconduct as follows:

“... you failed to behave in a civil and courteous manner when dealing

with fellow employees, you endangered three company officers, and damaged company property when you became violent and threw a company phone on the floor, and you used profane and vulgar language when addressing ..." the three Carrier officials.

According to the record, in brief summary, the Terminal Superintendent questioned claimant's telephone usage and its adverse impact on productivity while claimant was serving as second shift Yardmaster at Tilford Yard. It is undisputed that claimant became loud and angry while he rose from his chair at his desk in the corner of the Yardmaster's office. He also grabbed the telephone unit on the desk and threw it to the floor while saying words to the effect that if the Terminal Superintendent did not want him to use the phone, then he should "... take the fucking phone ..." out of the wall. After claimant quickly calmed down, he was removed from service.

The Organization raised a number of procedural objections to the handling of the investigation. Our review of the record shows all of them to lack merit. For example, the notice of charges was sufficiently detailed that claimant and his representatives had proper notice of the purpose of the investigation. Because the parties' Agreement does not require that the notice also cite the rules that might be involved, the lack of rule citations in the notice did not make it lacking in specifics.

Turning to the merits, we find the record to contain substantial evidence in support of the Carrier's determination that claimant did use profane language and was not civil and courteous during the interaction with the Carrier officials. However, we have not found any evidence whatsoever that supports the Carrier's conclusion that claimant was also guilty of the two most serious aspects of the charges: Endangering the three Carrier officials and damaging company property.

Regarding damage to the phone, according to the Terminal Superintendent's own testimony, the telephone unit was still operable after being thrown to the floor. Indeed, the transcript contains recordings of telephone conversations during the relevant time frame that show claimant was able to conduct a business-related conversation with the phone minutes after the incident. Moreover, the record does not establish that the unit was chipped, cracked, or even scratched as a result of claimant's behavior. Accordingly, we are compelled to find that the Carrier has not sustained its burden of proof to establish the equipment damage aspect of the charges. In this regard, it is important to be cognizant of the significant distinction between damaging equipment versus abusing it: they are not the same.

Regarding endangerment, the record is similarly lacking in proof. According to the transcript, the Carrier official closest to claimant was approximately five feet away from him. Moreover, when claimant arose from his chair, he arose from it in a direction away from the officials. A floor plan diagram of the office shows that claimant's chair was between him and the officials after he stood up. None of the officials testified that claimant threw the phone in their direction. Indeed, the record shows that the phone ended up near claimant's feet. Finally, evidence in the record suggests that the Carrier's policy on violence in the workplace was not applicable to the facts at hand. Accordingly, we are once again compelled to find that the Carrier failed to

satisfy its burden of proof to establish the endangerment aspect of the charges.

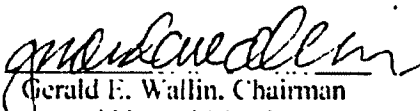
Given the failure of proof regarding the two most serious aspects of the charges against claimant, we conclude that the remaining charges that have been proven do not warrant termination of employment. However, in light of his prior record of similar misconduct, the present incident calls for a significant disciplinary penalty albeit less than discharge.

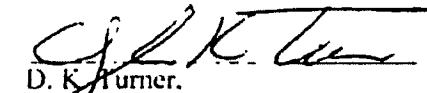
After due consideration of the relevant circumstances, we find that claimant must be offered prompt reinstatement to his former employment status with seniority and the other attributes of that status unimpaired but without back pay or other economic benefits for the time he has been out of service. Claimant's reinstatement shall be subject to the Carrier's usual requirements for returning to service after extended absence.


The Carrier is directed to implement these Findings and Award within thirty days of the date shown below.

AWARD:

The Claim is sustained in accordance with the Findings.

  
Gerald E. Wallin, Chairman  
and Neutral Member

  
D. K. Turner,  
Organization Member

  
R. E. Meadows,  
Carrier Member

Date: November 13, 2009