

Case No. 18 Award No. 18
Case No. 19 Award No. 19

STATEMENT OF CLAIM:

BACKGROUND: Train Dispatchers George R. Ballinger ("Ballinger") and Claude H. Foushee ("Foushee") were involved in an altercation with each other on February 21, 2002 while on duty at the Carrier's Centralized Train Dispatching Center ("Operation Center"), Jacksonville, Florida. Both employees were charged (as explained infra) with conduct unbecoming an employee of CSXT and a single investigation was held, with both Claimants present throughout. Because the charges are so closely intertwined and came about because of the February 21 incident, the Board has determined that it is administratively appropriate to deal with both claims together.

FINDINGS: On March 29, 2002, Claimants Ballinger and Foushee were directed to attend a formal investigation in connection with the charges of conduct unbecoming a CSXT employee; that they failed to act in a civil and courteous manner toward each other; that they had used boisterous, profane, vulgar language toward each other on February 21. Additionally, both were charged with willful neglect of duty and endangering personal life because they were absent from their train dispatcher positions. Ballinger was also charged with harassment and Foushee was charged with possession and displaying a weapon (knife).

Subsequent to an investigation held on March 18, 2002, the Carrier determined that both Claimants were guilty. On March 29, 2002, they both were dismissed from the service, resulting in these claims.

In these cases, the Board concludes it is best to focus on and discuss its key findings, rather than dwelling upon the respective contentions of the Parties. It goes without saying that the Board has carefully reviewed the transcript of the investigation, the stated positions of each of the parties as shown by the on-the-property record as well as the supporting documents relied upon by the parties. Following our review, the Board concluded that neither Claimant was without fault. However, the Board also concluded that the discipline of dismissal was unduly harsh under all the circumstances.

The significant events that led to this dispute arose on February 21, 2002, shortly after 1900 hours at the Operations Center. Foushee and Train Dispatcher Donnie Nichols ("Nichols") were standing and talking together on a stairway. Ballinger (a Caucasian employee) approached and gave a Nazi-type "Sig Heil" salute toward Nichols and said something which Nichols thought was "jeep." Nichols did not return the salute and Ballinger said something along the line that "your supposed to return the salute." Foushee (an African-American employee) then said something along the line that Nichols "wasn't an asshole" and "wouldn't respond like that." At that point Ballinger asked something like: "Who are you calling an asshole?" Foushee's response was that he was not referring to Nichols or Ballinger and he went on to state to Ballinger, "but if the shoe fits."

Ballinger then left to go to the restroom. However, he returned on his way to the Director's Office and this time directed another Nazi-like salute directly to Foushee and said "Sig." Ballinger then remarked to Foushee: "You don't like this? Does this offend you?" Foushee then said "Yes, it offends me." Ballinger then proceeded to the Director's Office on other business. Shortly thereafter, Ballinger returned from the Director's Office and gave another Nazi salute, walked to the water fountain and back toward Nichols and Foushee.

Foushee was leaning on the steps and, because of his size, blocked the steps. Ballinger asked to go down the steps. At that point, the conversation became very heated between Foushee and Ballinger. Ballinger walked away, followed by Foushee and a heated exchange, which can properly be characterized as boisterous, profane and vulgar occurred. They were finally separated by other employees and both returned to their work areas.

The first question relates to the charge directed at both employees that their conduct and behavior was improper in the workplace. From our review of the record, we find that the Carrier had a proper basis to conclude that both employees had an altercation that included the use of loud and inappropriate language. Indeed, there is no dispute from the testimony adduced at the investigation that the two Claimants behavior was well beyond acceptable workplace standards.

The second question, which also applies to both Claimants is whether they willfully neglected their duty and endangered personal life when they absented themselves from their work stations. Clearly, both neglected their duty when they improperly left their train dispatcher positions. However, we find no evidence to support a charge that they endangered personal life.

The next question applies only to Ballinger. It is whether his comments and behavior directed toward Foushee could properly be construed as harassment. We find clear and convincing evidence that it does. While we conclude that the initial Nazi salute was directed at Nichols, Ballinger's subsequent action of using the salute two more times shows a gross lack of sensitivity, immaturity and behavior that was just plain wrong. His attempts to explain his actions at the investigation are not credible. Foushee's comment to Ballinger after Ballinger had made the first Nazi salute (directed at Nichols) clearly showed that Foushee was already distressed. Ballinger had to know this when Foushee made the comment noted above. Employees normally do not make a comment to a co-worker in front of others like Foushee did immediately after the salute, unless one is extremely upset. Then when Ballinger returned and gave two more Nazi salutes, this shows

extremely poor judgment, complete lack of sensitivity and a clear form of provocation and harassment by Ballinger.

With respect to Foushee's reaction, his proper course of action was to have controlled his temper and language and report the matter to supervisors. In any event, while it is understandable for Foushee to aggressively react, he was also wrong in what he did and, thus, must share responsibility for the incident at issue here.

With respect to that portion of the charge that Foushee possessed and displayed a weapon, we find little support to sustain the charge. In sustaining the charge, the Carrier gave controlling weight to the testimony of Train Dispatchers S. W. Elmenforf ("Elmendorf"), and G. S. Osteen ("Osteen"). On this point, Elmendorf testified, in relevant part, as follows: "As they went by [referring to Ballinger and Foushee] I stated that I heard change rattling - - and then I seen Claude pull a pocket knife from his right hand pocket and thumb it open." He added: "I said it was a cheap plastic handled knife. Its the--I've seen--at the flea markets." He also stated: "It was a black handled chrome bladed or silver bladed knife." Finally, he testified: "--he held it to his side there real close to his side like he didn't want anybody to see it, and I presumed he was trying to conceal it."

In response to questions by the Organization's Representative, Elmendorf, in relative part, testified as follows: "I was behind him. They had already walked in front of me and were getting close to the stairs going down towards AL desk." In response to a question of how long he had the knife in this vision, he said "Just for a few seconds."

Osteen, in relative part, testified as follows:

"As I recall it, as Claude came down the steps, like I said I was getting out of the way, they came by in a swift manner, but I think, I thought I remembered seeing something in Claude's hand that resembled a knife. I couldn't tell you anything about it, what size, you know. What little bit I saw appeared to have been some type of pocket knife."

In response to a question which hand held the knife, Osteen replied "I don't recall."

The Carrier's reliance upon the testimony of Elmendorf and Osteen is not well-founded for many reasons. Elmendorf testified that he saw Foushee pull a knife from his pocket. However, Foushee had already passed Osteen who testified that Foushee passed him with a knife in his hand. One or both had to be wrong.

Neither Elmendorf or Osteen reported that they saw a knife until well after the incident and then only when questioned. Yet, It was clear that both of these Dispatchers knew that something very unusual was occurring, loud voices, etc., but still did not feel any urgency to report that they saw a knife. Osteen could not recall which hand held the knife.

CSX Special Agent Cochran who was assisted in part by CSX Manager of Security C. A. Daniels conducted an investigation and concluded that there was no knife. Ballinger saw no knife. Nichols, who was present at the outset of the confrontation and at the scene when it ended, did not see a knife. Two supervisors and a Train Dispatcher who intervened to separate the two employees saw no knife. It was also testified to that up to ten (10) people observed various parts of the incident and none reported that they saw a knife.

In summary, on the question whether Foushee had drawn a knife, we find that the sum of the relevant record does not support the Carrier's position on this point.

With respect to the quantum of discipline assessed, it is unduly severe, given the circumstances. While both employees seriously erred, there is nothing in the record before the Board of any past discipline. Both employees have many years of discipline-free service. Ballinger entered service as a Clerk-Operator in August 1974. Foushee had been promoted to a Train Dispatcher in 1976.

The Board concludes that the discipline should be reduced to a 90 day suspension beginning from the date the Claimants were relieved from service. We hold that such a suspension is commensurate with the proven offenses and the notion of a progressive discipline for first time offenders. Accordingly, the Claimants will be returned to service with all benefits and seniority restored, and back pay for the period out of service, less the pay for the 90 day suspension.

As a condition of reinstatement, the Claimants will be required to meet the Carrier's usual requirement for return-to-duty and must enter and successfully participate in anger management and sensitivity training as determine by the Carrier.

AWARD

As specified in the Findings.

SR Friedman - DISSENT
Steve R. Friedman
Carrier Member

Eckehard Muessig
Eckehard Muessig
Neutral Member

David W. Volz
David Volz
Employee Member

Dated: 11-19-02