

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated August 6, 2010, Sheldon Carman, Manager System Production Teams, C 8, instructed S. W. Pelham ("the Claimant") to attend a formal Investigation to be held on August 16, 2010, in South Charleston, West Virginia "to determine the facts and place your responsibility, if any, in connection with information I received on Wednesday, July 21, 2010, in regard to statements you made about reporting an injury just to ruin the C8 Curve Patch Teams current safety record and other statement about tearing the team apart." In connection with the alleged incident the Claimant was "charged with conduct unbecoming an employee of CSX Transportation, Insubordination, making threatening remarks and possible violations of but not necessarily limited to, CSX Transportation Operating Rules - General Rule A, General Regulations GR-2 and GR-3; CSX Safe Way General Safety Rule GS-1, as well as, the CSX Code of Ethics." The letter "confirm[ed] that [the Claimant was] being withheld from service pending the results of this hearing."

A letter dated October 12, 2010, to the Claimant from Manager Carman noted that a letter dated August 6, 2010, was sent to him advising him of a formal Investigation on the above-mentioned charges and added, "At the request of the Organization, this Investigation has been postponed until you are medically qualified to attend an Investigation." Subsequent letters dated November 1, 2010, November 11, 2010, and November 23, 2010, informed the Claimant of further postponements, with the last letter

rescheduling the hearing to December 13, 2010, at the CSX headquarters building in Jacksonville, Florida. The hearing was held on that date.

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.

Sheldon W. Carman, Manager System Production Team C 8 the past eight months and the charging officer in this proceeding, was called as a witness by the hearing officer. The hearing officer asked him, "Mr. Carman please state briefly the facts as you know them in regards to the incident that led to this charge letter." Rather than testify from his memory, Mr. Carman read a statement that he had written out. So far as pertinent to this proceeding, his statement included the following information.

Claimant Pelham was Acting Foreman of Team C 8 on July 21, 2010. Around 8:00 o'clock that morning he (Mr. Carman) took Mr. Doug Monday, the Assistant Foreman, aside and asked him what was going on with Mr. Pelham that morning, had he seen or heard anything. Mr. Monday acted as if he wanted to tell him something and then said that it was nothing. He (Carman) asked him again and told him that he needed to know if something was going on.

On the way to the job site [Mr. Carman's written statement said] the team was

talking about reaching 1000 safe days and how well they had been doing lately. Mr. Pelham said sarcastically that he thought that he had hurt his shoulder. Mr. Monday asked him if he was serious. Mr. Pelham said that he did not know if he injured it at work or not, but that it would be a shame to ruin the record. Mr. Pelham asked him, "Are you serious about this?" He said, "No, I'm only joking." They talked about other things including the foreman bid, and Mr. Roberts asked Mr. Pelham if he was going to roll him. Mr. Pelham replied, "Yes, I plan to roll you tomorrow morning and take the rest of the week off. When I get back next week, I'm going to rip this team apart." Mr. Monday again asked him if he was serious, and Mr. Pelham apparently made a comment that their safety record was over.

He (Mr. Carman) [he continued to read from his statement] then went to confirm what Mr. Monday had told him with the two other employees. All three employees heard the conversation and remembered it the same way.

Mr. Carman testified that he took Mr. Pelham's statements that he was going to turn in an injury to ruin a safety record and that he was going to tear the team apart as a threat and as intimidation. Mr. Pelham, Mr. Carman stated, did not have any discussion with him about an injury prior to his (Mr. Carman's) conversation with Mr. Monday and never reported an injury to him. To his knowledge, Mr. Carman testified, Mr. Pelham has not had any injury while working for CSX.

Mr. Carman was asked on cross-examination what Mr. Pelham's job was for the day of the incident, July 21, 2010. He stated that Mr. Pelham's job was to assist the foreman of C 8. As it turned out, Mr. Pelham was only at work for about ten minutes that day, Mr. Carman testified, and he therefore did not assist the foreman. Mr. Pelham did not threaten anybody with harm, Mr. Carman testified, but "he did to my knowledge

threaten to ruin a safety record and rip the team apart.” He was told, Mr. Carman stated, that Mr. Pelham said that he was going to falsify an injury to ruin the safety record that he had helped build.

John Roberts is foreman of team C 8 and also held that position on July 21, 2010. On that date, he stated, he, Mr. Monday, Mr. T. Martin, and Mr. Scott Pelham were riding in the foreman’s truck to the job site. “As I wrote on my statement,” he testified, “Scott made a comment that he had hurt his arm or shoulder and needed to claim an injury.” Doug Monday, Mr. Roberts stated, said to “quit messing around.” Mr. Roberts testified that this was the second day that he had met Scott Pelham, that “I was told that he was a big bulls__r so I didn’t know to take him serious or not.”

Mr. Roberts provided the following written statement at the request of Mr. Carman:

Scott said that his shoulder was hurt, didn’t know if it had happened on the Rail Road or not. Stated he need[ed] to claim an injury to take away what he had worked to build. Did not think he was serious because of what I was told about him. He is a Bull Shi__r. Said he was going to roll me effective today as Foreman of C 8.

On cross-examination Mr. Roberts testified that if someone tells him as a foreman that he may be injured, it is his duty to report it. He did not report an injury for Mr. Pelham, Mr. Roberts stated. That testimony was followed by the following questions and answers between the Organization representative and Mr. Roberts as recorded in the transcript of the hearing:

- Q. So you didn’t think Mr. Pelham was serious about being injured?
- A. No, like I said I was told that he was a big bullsh__r, that, I really didn’t

think nothing else about it.

Q. Okay and do you think his concern for the safety record it was one that he did not want to be a detriment and report the injury?

A. There again, I didn't know him, don't know him, I couldn't honestly answer that if I, not knowing him.

Q. Okay. And you did not take him serious on that he was actually injured?

A. No.

The Organization co-representative then asked Mr. Roberts, "Mr. Roberts, if you had felt that Mr. Pelham had hurt his shoulder you would have requested him to fill out an injury report is that correct?" Mr. Roberts answered, "Yes," and added, "I talked to Carman about it or I would have to complete an injury report."

Ralph Douglas Monday, Assistant Foreman C 8, identified a written statement that he gave to Manager Carman and read it into the record. His statement was as follows:

On July 21, 2010 at approximately 6:45 a.m., myself, Ralph D. Monday, Kenny Martin, and John Roberts and Scott Pelham departed from the motel. Scott stated that his stomach was hurting and he didn't know if he was going to be able to make it thru the day. Foreman John Roberts asked Scott if he was going to roll him. Scott said he was going to roll John Roberts and probably take the rest of the week off cause he didn't feel well. I asked Scott if he needed to go back to the motel and take the day off [and] then I asked if he needed to go to the doctor. Scott said he would be okay and try to make it.

Some idle "chitter-chatter" was made in which I can't repeat verbatim because I was driving, fighting Atlanta traffic. Something was said to the effect that Scott

said it was bull that he was not being given an award for the team 1000 days injury free because he was not here when we hit the milestone. I told him I thought they should give him the award as well. Some other comments were made about the safety award; again I was driving so I can't really repeat the conversation verbatim.

As we pull up to the job site a comment was made about the moral[e] of the team. I told Scott he needed to change his attitude, do his job like he did before all the stuff started, get out of his probation period and just keep his nose clean. Scott laughed and asked why I was looking at him like that, which led me to believe he was joking.

Once arriving at the job briefing site Scott stated he needed to use the bathroom. He asked me for some paper towels. I didn't understand him at first but he asked again and I gave him some napkins. Scott said he had defecated on himself and asked if I smelled it. I didn't smell anything.

I forgot to mention earlier but Scott also made a comment about his shoulder being hurt from earlier and needed to report an injury. I gave him a funny look and he laughed and said he was only kidding, for me to lighten up.

Anyhow, during the job briefing I asked Supervisor Carman where Scott was, and he said he would talk to me after job briefing. After the job briefing Supervisor Carman and I stepped to the side and had a conversation. Supervisor Carman told me basically verbatim what was said in the truck. He asked if I was concerned in

any way of Scott returning to the team. I told Supervisor Sheldon I would tap Scott or anyone on the team on the shoulder and take them to him if I saw Scott or anyone doing anything unsafe. I also asked Supervisor Carman if I could have permission to call Scott and tell him he needs to tell Carman he was officially placing his roll so he would not be upset for getting paid Trackman pay all week – per instructions of his supervisor. Sheldon said yes, but made me give my word I would tell him if Scott in any way threatened the safety of the team or retaliation on anyone. I gave my word I would.

I then tried two or three times to call Scott but to no avail. I sent him a message and told him to call me ASAP. I also wanted to give him a heads up that I had concerns that he was going to get into serious trouble if he didn't come back to work. He never called or texted back. I then sent him another text message to call Sheldon to officially place his roll.

I told Supervisor Carman I could not get a hold of him. Supervisor Carman asked me if I would write a statement about what all was said in the truck and at job briefing this morning. I told him no. I told him I had to work out here 26 more years and I was no snitch. Sheldon pleaded his case as to why it was important to give a statement. I asked him to let me think about it. [Describes various persons consulted who told him that he must give a statement if asked to do so] I then talked to Supervisor Carman and he told me I had to write a statement.

I only know what happened, I can only quote verbatim what I said. I think this

whole situation could have been avoided! Anyone that knows Scott knows he is a little off center. But none the less; Scott is a good foreman. He knows concrete work and has taught me more than I could have ever thought possible. I like Scott both personally and professionally and I have only known him 4 short months. I think its bull I have to write this. I told Carman to let him get back in and all this would blow over. I am extremely upset with CSX for forcing me into this situation and I do ask for permission to ride all by myself in my personal vehicle on my dime to come to job site so I am never put in this situation again. I don't know how I can be forced to write down private conversations with fellow employees. But this is what I heard and none of it I wanted repeated especially on paper.

Claimant Scott W. Pelham testified that he is foreman of C 8 and has held that position for three years. The hearing officer asked him whether the statements by Mr. Roberts and Mr. Monday that he made comments about falsifying an injury were correct. He answered, "I never was going to falsify any injury." The hearing officer then asked him if he made comments in the van or the bus about falsifying or reporting an injury. He stated, "I never said I was going to report an injury."

The hearing officer read Mr. Roberts's statement to Mr. Pelham and asked him "whether humorous or joking" he made comments about reporting an injury. He answered that he did not say it in the context that he was going to claim an injury on the railroad. The hearing officer then asked him, "Well what did you say?" He testified, "I never intended to claim an injury on the railroad."

The hearing officer then read part of Mr. Monday's statement to Mr. Pelham, concluding with the words, "Scott also made a comment about his shoulder being hurt

from earlier that day.” Mr. Pelham testified, “My shoulder being hurt earlier that day?” The hearing officer then said to Mr. Pelham, “Mr. Monday said that you had told him or you had made a comment rather you needed to report an injury and he gave you a funny look, he laughed and said he was only kidding and for me to lighten up?” Mr. Pelham stated, “Poor choice of words.” The following exchange then took place between the hearing officer and Claimant Pelham:

- Q. Did you make comments or jokes about falsifying or about reporting an injury?
- A. I never meant to claim an injury on the railroad.
- Q. No sir I’m not asking if you claimed an injury.
- A. I never meant that I was going to claim an injury on the railroad.
- Q. Did you make those comments as Mr. Monday and Mr. Roberts state in their statements?
- A. Not in the text [sic context?] that I was going to claim injury on the railroad, no.
- Q. Okay so please tell me in your own words, what you did say?
- A. On this paper it says that I was hurt earlier, that I was saying I was hurt earlier that day, I had just gotten into the vehicle, so I mean there was no way I could have been hurt earlier that day.
- Q. Okay, but did you make comments about reporting an injury, laughing about it and ruining a team’s safety record?
- A. I’d never admitted that I was going to claim injury on the railroad, never one time did I admit to, to say that I was going to blame the railroad for an injury I had.

Q. Okay but you did make comments about a potential injury?

A. I never admit to claiming injury on the railroad, because there was, I mean there was no injury there to claim.

In response to questions by his Organization representative, Claimant Pelham denied that he violated any of the rules or regulations listed in the charge letter or that he violated the CSX Code of Ethics. He was not injured and did not fill out a report of injury, Mr. Pelham testified.

Permitted to make a statement in his own behalf, Mr. Pelham noted that he bid for and was awarded the job of foreman of the C 8 concrete tie team. At that time, he stated, his supervisor, Jerrell Pickle, told him that they had the opportunity “to make a legitimate concrete tie team” after a dismal safety record the year before where there were 16 or 17 injuries. “It was my goal at that time,” Mr. Pelham declared, “to do nothing but to bring that safety record to be the best on CSX and I feel that I’ve accomplished that with the help of my other teammates.” He observed that there were “times we worked on the job with eight or nine people no supervisor and we never got anybody hurt.” “The one thing I’m most proud of,” he remarked, “I’ve never cleared a track late one time. I’ve been on time,” he stated, “always done what was required of me and I always got people in safe and that was my biggest goal and the thing that I took most pride in was to making sure nobody got hurt.”

He concluded with the following comment: “I’ve been on the railroad for eleven and a half years and never been injured and I want to keep it that way because I feel that injuries cost the railroad too much, and . . . I never want to cause the railroad any injury problems and I felt like I have done my job to the best of my ability.”

In a closing statement on behalf of the Claimant, the Organization notes that the

charge letter alleged that Mr. Pelham made a statement about reporting an injury just to ruin the C 8 Curve Patch team's safety record but, the Organization contends, there was no testimony to support that charge. Nor, the Organization argues, was there any testimony to support the charge that the Claimant engaged in conduct unbecoming an employee of CSX Transportation, that he was insubordinate, or that he made threatening remarks. The Claimant, the Union asserts, denied that he violated any of the rules or regulations listed in the charge letter, or the CSX Code of Ethics. For these reasons, the Organization contends, the Claimant should be exonerated of the charges placed against him, and he should be compensated for all loss of wages and benefits since he was withheld from service beginning July 21, 2010.

Following the close of hearing, by letter dated December 30, 2010, the Assistant Chief Engineer notified the Claimant of the Carrier's ruling in the case as follows:

Based on evidence and testimony from the witnesses during the course of the hearing, sufficient proof exists to demonstrate that you are guilty of conduct unbecoming as charged. Through this review, and because the charge assessed was properly proven, it is my decision that the discipline to be assessed is thirty (30) day actual suspension.

The Board must begin by stating that it is not clear from the Assistant Chief Engineer's decision letter of December 30, 2010, of what exactly the Carrier has found the Claimant guilty. The final paragraph of the letter, which was written in bold type and is reproduced immediately before this paragraph, is clear enough. It states that the Claimant is "guilty of conduct unbecoming as charged." This Board understands that to be a finding of guilt of the charge of conduct unbecoming an employee of CSX Transportation.

What is confusing, however, is that the immediately preceding paragraph of the December 30 letter states as follows in the first sentence: "During the hearing on these charges, Carrier representatives presented sufficient evidence and testimony to substantiate the above-referenced charges." The "above referenced charges" are all of the charges listed in the charge letter and repeated in the December 30 decision letter, namely, "conduct unbecoming an employee of CSX Transportation, insubordination, making threatening remarks and possible violations of but not necessarily limited to, CSX Transportation Operating Rules - General Rule A, General Regulations GR-2 and GR-3; CSX Safe Way General Safety Rule GS-1, as well as, the CSX Code of Ethics."

The two paragraphs appear to be in conflict. However, the only paragraph in the letter written in bold print is the one that finds the Claimant guilty of "conduct unbecoming as charged." The Board will assume that bold print was used to indicate that it is the operative paragraph regarding the finding of guilt. That inference is reinforced by the fact that there is absolutely no evidence of insubordination on the part of the Claimant in this case, which allegation is included in the charge letter and is also listed in the December 30 letter as one of the "above-referenced charges." This Board will proceed on the basis that the only allegation of which the Claimant was found guilty is conduct unbecoming an employee of CSX Transportation. It is the Carrier that created the ambiguity by including in its decision letter two inconsistent findings regarding which charge(s) were substantiated by the evidence, and it is proper that the ambiguity should be construed against the party responsible for the ambiguity.

The Board believes that there is substantial evidence in the record that Mr. Pelham said in front of the other employees while riding in the foreman's truck on the way to the job site that he hurt his shoulder and needed to report or claim an injury. The written

statements of both Mr. Monday and Mr. Roberts, introduced into evidence at the hearing, assert that Claimant Pelham made such a statement and Mr. Roberts personally testified at the hearing that “Scott made a comment that he had hurt his arm or shoulder and needed to claim an injury.” (Tr. 24).

In his own testimony Mr. Pelham refused to give a straight answer when asked repeatedly to relate what he did say in the truck. When asked directly whether he made comments about a potential injury, he stated, “I’d never admitted that I was going to claim injury on the railroad, never one time did I admit to, to say that I was going to blame the railroad for an injury I had.” He also stated, “I never meant to claim an injury on the railroad.” The question, however, was not what the Claimant admitted or what he intended to claim, but what he said. On that question, the Claimant’s testimony was evasive and not forthcoming. The Board is satisfied that the evidence persuasively establishes that the Claimant made the statement that his shoulder was hurt and that he needed to report an injury.

The evidence also establishes that the Claimant was not serious about reporting an injury to his shoulder but was only joking or attempting to tease the other employees about reporting an injury and thereby mar their safety record without intending to actually report an injury and blemish the team’s safety record. According to the evidence, however, the Claimant’s audience was not sure at first whether he was serious or not. This is evident from the statements of both Mr. Monday and Mr. Roberts.

Thus according to Mr. Monday’s statement, after the Claimant spoke about needing to report an injury, “I (Mr. Monday) gave him a funny look and he laughed and said he was only kidding for me to lighten up.” Mr. Monday needed reassurance that Mr. Pelham was only kidding. Mr. Roberts testified, “I didn’t know if he was bullshi__g or

not. I was told that he was a big bullshi__r so I didn't know to take him serious or not.” (Tr. 24). When asked on cross-examination, “Mr. Roberts if you had felt that Mr. Pelham had hurt his shoulder you would have requested him to fill out an injury report is that correct?” Mr. Roberts answered, “I talked to Carman about it or I would have to complete an injury report.” (Tr. 26). The evidence shows that Mr. Pelham's coworkers were not sure, at least at first, whether he was serious or not about making an injury report.

Mr. Pelham is an experienced railroad worker. He knows how sensitive carriers are on the subject of injuries, how serious they take them. The CSX Individual Development & Personal Accountability Policy provides that the late reporting of an injury is a major offense for which an employee can be removed from service and disciplined up to dismissal for a first offense. Lying about an injury is treated with great severity. It is not an exaggeration to say that joking about an injury on the railroad is like making a bomb joke at an airport. There simply is no tolerance for such conduct.

The Board believes that Mr. Pelham has learned a lesson from this incident. It was impressed by, and believes to be sincere, his statement that he would never want to cause the railroad any injury problems. The proof of his sincerity lies in the fact that he took over a concrete team prone to injuries and succeeded in developing a safety-conscious group with an enviable record of safety over a period of approximately three years. In the present case, however, he let his penchant for joking or flippancy get the better of his good judgment.

Because the Claimant was not serious about reporting an injury; did not make such a report or receive any injury; and because his work record shows that he is very conscious of working safely and in instilling safe work habits in the team of which he is foreman, the Board has determined that his discipline should be reduced from a 30-day

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Case No. 88

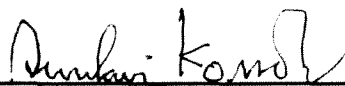
actual suspension to a 15-day actual suspension. The Board assumes that the 30-day suspension period assessed by the Carrier was assigned or designated by it to the time period that the Claimant was off work because of illness or because he was withheld from service. In other words there is no indication in the record that the 30-day suspension period was to be served by the Claimant sometime after December 30, 2010, the date of the decision letter. There would therefore be no back pay due the Claimant as the result of the reduction of his suspension period. With regard to the removal of the Claimant from service, the Board cannot say that the Carrier acted wrongfully since the offense involved an improper claim of injury which, at least at the beginning, was believed by the Claimant's coworkers possibly to be true.

A W A R D

Claim sustained in accordance with the findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the date the signed Award is transmitted to the parties.



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
March 31, 2011