

PUBLIC LAW BOARD NO. 7529

Case No. 14
Award No. 14

Brotherhood of Maintenance of Way Employee Division
IBT Rail Conference

vs.

CSX Transportation, Inc.

Statement of Claim:

1. "The Carrier's decision to impose discipline upon Claimant G. Hollmon in the form of a fifteen (15) day actual suspension beginning June 27 through July 11, 2012, with a thirty (30) day overhead suspension for a period of one (1) year from the date he returned to work, for the alleged violation of General Operating Rules – General Rule A, General Regulations GR-2, GR-3 and CSX Code of Ethics in connection with his alleged falling short of complying with corporate rules, instructions and policies when he willfully neglected his duties by sitting in the truck while other team members were working and allegedly being insubordinate and quarrelsome with his teammates and supervisors and failure to properly perform the responsibilities of his position on June 26, 2012 is on the basis of unproven charges and is entirely improper, unwarranted and in violation of the Agreement (System File D0994412/2012-132694).
2. "As a consequence of the Carrier's violation described in Part 1 above, Claimant G. Hollmon shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement."

Procedural Issues:

Before addressing the merits of this matter, this Board must first resolve procedural issues raised by the Organization. By letter dated July 24, 2012, the Organization requested all exhibits, documents, and any other items the Carrier planned to introduce at the investigation, including any documents signed by Claimant or other witnesses. Carrier did not provide the requested information and, according to the Organization, thereby violated its obligation to provide Claimant with a fair and impartial hearing.

This obligation does not extend to require that Carrier provide the Organization copies of all statements and exhibits it intends to introduce at the investigation. Rule 25 only requires that Carrier provide Claimant copies of any written statements he made, which was done herein. Rule 25(c) also requires that a copy of Claimant's statement also be provided to his union representative, which Carrier failed to do. However, since Claimant had a copy of his own statement and he was encouraged to contact his union representative before signing

it, this failure did not, under these circumstances, impede the fundamental fairness of the hearing.

Rule 25(c) also states that an employee required to make a statement prior to hearing in connection with any matter which may eventually result in the application of discipline "shall be offered the opportunity to contact his accredited union representative before a statement is reduced in writing." The Organization urges that Carrier violated this rule by failing to offer Claimant this opportunity.

After the incident, Roadmaster Skinner asked Claimant to write a statement. Claimant initially refused. Skinner then said that maybe he needed to contact his union representative. When Engineer Track Atlanta Ramsey arrived, Claimant had begun writing his statement and was also making phone calls. Ramsey explained that a statement would speak for itself and be in Claimant's interest. Ramsey recommended that Claimant contact his union representative. The uncontradicted testimony of Skinner and Ramsey, as summarized above, establishes that Carrier complied with Rule 25(c) by recommending that Claimant contact his union representative.

While the charge letter referred to GR-3A, the appropriate Rule was GR-3, which was introduced at the hearing. Since the charge gave Claimant notice of the allegations against him with sufficient specificity to permit him to prepare his defense, the typographical error did not affect the fairness of the hearing.

Finally, the Organization urges that Carrier's failure to call James Burns violated Claimant's right to a fair and impartial hearing. Burns witnessed at least one (1) of two (2) relevant conversations Claimant had with two (2) supervisors. Both supervisors, Claimant, and another employee testified about these conversations. Carrier's failure to call multiple witnesses to the event does not impair Claimant's right to a fair hearing. Finally, it is noted that the Organization did not seek to call Burns as a witness.

Findings and Opinion:

The Carrier and Employee involved herein are Carrier and Employee as defined in the Railway Labor Act, as amended. This Board has jurisdiction over this matter.

On June 26, 2012, Claimant G. P. Hollmon (ID No. 171798), an employee with thirty-five (35) years of service, was assigned as a Trackman to the 5A47 team, working on the Atlanta Terminal subdivision in the vicinity of Union City Siding. Team 5A47 consisted of five (5) employees – foreman, backhoe operator, a truck driver, and two (2) trackmen. On the day in question, Team 6A01 was assigned to work with Team 5A47 installing cross ties. The latter team consisted of four (4) employees – a foreman, backhoe operator, vehicle operator, and trackman. During the morning, the teams pulled up spikes, knocked off anchors, putting in new ties, and setting spikes.

It was over 90 degrees that day. On such hot days employees are permitted to take breaks as needed, cool off for a few minutes, and take water. The teams took an extended lunch of about forty-five (45) minutes. After the lunch break, Claimant was assigned to driving down spikes. A truck carrying equipment necessary to operate hydraulic tools followed the work. After returning from lunch, Claimant was taking a break in the truck. The other trackman, James Burns, and the truck driver, William Steed, who were assigned to Team 5A47, were also in the truck taking a break. The truck driver, William Steed, was also in the truck at this time. The foreman of both teams then spoke with Claimant. Their testimony, as well as Claimant's and truck driver Steed's, is summarized below.

Testimony of J. D. Mitchell

J. D. Mitchell, Track Foreman, Team 6A01, testified that Claimant was taking breaks in excess of the other employees. He went to the truck where Claimant was taking a lunch break, opened its door, and asked him whether he had "any shame." Claimant told Mitchell to get away from him, that "he had thirty-five (35) years on the book and he didn't have to do nothing." Mitchell said, "OK" and closed the truck door. He did not instruct Claimant to return to work. Right after Mitchell closed the truck door, Claimant's foreman, D. D. Callier, opened it. He instructed Claimant to go back to work. According to Mitchell, it was five (5) to ten (10) minutes from the time Callier so directed Claimant until he actually returned to work. (Transcript at p. 42, line 37).

Testimony of D. D. Callier

D. D. Callier, Foreman for Team 5A47, testified that employees from his team and the other team had complained to him about Claimant not working and that he did not believe that Claimant was "carrying his weight." After the lunch break, Callier instructed Claimant and Burns to go to the north end and start driving spikes. Within an hour after returning from lunch, Claimant and Burns had not driven in many spikes. Mitchell's team was sent to the north end to assist them. When they arrived, Burns was taking a break in the truck. Claimant gave the employees from Mitchell's team the hammer and joined Burns in the truck.

After Mitchell had spoken to Claimant, Callier opened the truck door. The driver was in the truck, Burns was in the front passenger seat, and Claimant was in the back seat. Callier told Claimant and Burns that the employees from Team 6A01 were driving spikes on the north end, and they were there to assist them. Callier said he did not need three (3) men from his team in the truck while the other team was on the ground working, and he needed them to return to work. Burns did so, but Claimant did not at that point.

Claimant said if those guys, referring to Team 6A01, "want to be All Stars, I'm going to let them be All Stars." (Transcript 69, lines 1-2). An argument then ensued. Claimant stepped out of the truck and said he was going to call someone and began searching for a phone number. Callier kept repeating that he needed Claimant to do his job and Claimant continued bickering. Claimant was rude and told Callier that he was acting like he thought he was God. According to Callier, he did not raise his voice above a normal speaking tone. About ten (10) to twenty (20) minutes after being instructed to return to work, Claimant did so.

Testimony of Claimant

After lunch, Claimant and the truck driver, Watt Steed, backed the truck up to where the spikes were to be driven. Claimant and Burns took the hose from the truck and hooked it into the hydraulic hammer. They then took turns driving in spikes. Burns then went to the truck for a break and Claimant continued driving spikes with Rick Hollingshead, the back hoe operator. When the employees from Team 6A01 got there, Claimant went to the truck for a quick break. No more than three (3) minutes after Claimant entered the truck, Mitchell snatched opened the door and said, "have you no shame". Claimant responded, asking "do you have thirty (30) years?" He then stated that he was on break. Mitchell then jumped out of the truck.

Two (2) minutes later, Callier opened the door. According to Claimant, Callier was addressing only him, not Burns. Callier said that he could not have the employees from team 6A01 do all the work and told Claimant to return to work. Claimant responded that he had just stopped to take a break.

Claimant got out of the truck and told Callier that he had to call somebody because Callier was harassing him. Callier said he had folks he could call as well. According to Claimant, it was at this point that "all the talk came in." (Transcript at p. 76, line 76). Claimant then attempted to call the Ethics Hotline but was unable to reach anyone. Claimant told Callier, "don't bother me, because if I call my union representative, they got something to say." (Transcript at p. 79, lines 43-44). Claimant returned to work about five (5) minutes after first being directed to do so by Callier. (Transcript at p. 90, lines 14-17). According to Claimant, Callier was argumentative.

Testimony of W. L. Steed

W. L. Steed was the truck driver and was also responsible to operate the backhoe on the day in question. After lunch, one of the employees from Mitchell's team relieved Burns, and he came into the truck with Steed for a break. Claimant continued driving spikes for five (5) to seven (7) minutes after Burns, got into the truck for a break. Then Claimant also got into the truck.

Between five (5) and ten (10) minutes after Claimant entered the truck, Mitchell opened the passenger rear door, cursed at Claimant, and said Claimant was not doing anything. Claimant responded that he had some thirty (30) years and when a younger guy wants to relieve him, he would let him.

Mitchell then shut the truck door, and within seconds Callier opened it. Before he did so, Burns left the truck and returned to work. Callier told Claimant that he was going to get out of the truck and help drive spikes; that he was not going to sit in the truck like he did the previous day. According to Steed, both Mitchell and Callier were confrontational to Claimant.

Analysis

While the testimony summarized above differs in some respects, it supports the following conclusions. After lunch, Claimant and Burns began driving in spikes. Members of Mitchell's team were instructed to assist them. Shortly after their arrival, Burns went to the truck for a break, and a few minutes later, Claimant did likewise.

When Mitchell and Callier approached the truck, Claimant, Burns and driver Steed were in the truck while members of Mitchell's team were working. Burns got out of the truck and returned to work either before or immediately after Callier directed Claimant to return to work. According to Claimant, he did not do so for five (5) minutes. According to Mitchell, Claimant did not return to work for about five (5) to ten (10) minutes after Collier directed him to do so, and according to Callier, it was ten (10) to twenty (20) minutes before he returned to work. Before he returned to work, Callier repeatedly told Claimant to do so. Claimant maintained that he was being harassed and that he was calling the Ethics Hotline and his union.

Even assuming that it took Claimant five (5) minutes to return to work after first being instructed to do so, as he maintains, this period is still longer than it reasonably should have taken. Claimant was responsible to promptly follow the reasonable instructions of his foreman. His efforts to contact the Ethics Hotline or his union do not excuse his failure to do so. By refusing to follow instructions with reasonable promptness, Claimant was insubordinate and willfully neglected his duty in violation of GR-2.

The Organization relies on several awards holding that where there is a direct conflict of testimony between Claimant and Carrier's primary witnesses, and the result can truly be said to be a "net wash", the Carrier, as the party with the burden of persuasion, must lose. However, as noted in detail above, there is not a direct conflict regarding the facts critical to a determination in the instant matter.

Claimant was assessed a fifteen (15) day actual suspension and a thirty (30) day overhead suspension for a period of one year after Claimant returned to work. Given the finding that Claimant was insubordinate, this penalty is neither harsh, arbitrary, nor excessive.

Award:

Claim denied.

February 28, 2013

Date



Mitchell M. Kraus
Referee