

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
AWARD NO. 18, (Case No. 18)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE
(Organization File: D70823312)**

vs

**CSX TRANSPORTATION, INC.
(Carrier File: 2012-133453)**

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 L. Cherneski with violation of Operating Rules - General Rule A; General Regulations GR-2, CSX Policy of Work Place Violence; CSX Policy on Harassment, as well as the CSX Code of Ethics and was substantial evidence adduced at the Investigation on September 26, 2012, to prove the charges; and was the discipline assessed in the form of permanent dismissal 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 dispute.

The Board has thoroughly reviewed the record and found that the Carrier complied with Rule 25 of the Agreement and Claimant was afforded all of his "due process" Agreement rights.

On September 10, 2012, Claimant was directed to attend a formal Investigation on September 20, 2012, that was postponed until September 26, 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 1230 hours on Sunday, August 26, 2012 at or near mile post BAA 2.2, while you were working on the Baltimore Terminal Subdivision, in the vicinity of Hollins Ferry Rd., Baltimore, MD. It is alleged that you entered into a verbal altercation with another employee that involved threats of violence, profanity, sexual innuendo, vulgar language and racial slurs.

In connection with the above incident, you are charged with conduct unbecoming an employee of CSX Transportation, failure to properly perform the responsibilities of your position, inappropriate behavior in the work place, being immoral, quarrelsome and possible violations of, but not limited to CSXT Operating Rules - General Rule A; General Regulations GR-2, CSX Policy on Work Place Violence; CSX Policy on Harassment, as well as the CSX Code of Ethics."

On October 12, 2012, Claimant was notified that he had been found guilty as charged and was assessed discipline in the form of permanent dismissal. On October 19, 2012, the Claimant requested expedited handling of his case as provided for in Appendix (N) Expedited Discipline Agreement of the June 1, 1999 BMW/CSXT Agreement.

The Board first notes that this is a companion case to Award No. 20 of this tribunal, both of which involved the same incident, but different Claimants. The various Rules and Policies set forth in the charges requires employees to be civil and courteous, and prohibits employees from entering into altercations, being quarrelsome, and from using profanity. It further prohibits employees from harassing other employees or threatening them with violence and requires employees to treat their co-workers with respect.

On August 26, 2012, the Claimant was a Foreman in charge of four other employees. The crew was installing timbers at a road crossing and each had specific tasks. The incident arose when the Claimant was drilling holes in the timbers while the other employees were working on the opposite side of the timbers. One of the team members Mr. Gale, asked the Claimant to return and continue drilling on the side of the crossing where all the other employees were working. The Claimant chose not return and continued to work on the other side of the crossing, and Mr. Gale became agitated yelling at the Claimant using profanity. Claimant responded in kind after which Mr. Gale made fun of the Claimant's teeth and made a sexual innuendo to the Claimant. The other crew members testified at the Hearing that Mr. Gale instigated the altercation and in response the Claimant approached Mr. Gale and the two had a face-to-face verbal exchange wherein the Claimant threatened Mr. Gale and made a racial slur towards him. On pages 31 and 32 of the Transcript the Claimant was questioned as follows:

"Helene: Did you and Mr. Gale engage in a verbal altercation at the Hollins Ferry Road crossing on August 26, 2012?

Cherneski: Yes.

Helene: Did you use vulgar language towards Mr. Gale?

Cherneski: Yes.

Helene: Did you threaten Mr. Gale with violence?

Cherneski: Not directly; I responded to a statement with grounds; I responded to, I, I remember hearing let's get it on here and there, that's when I -- so I did respond to that, yes.

I agree.

Helene: You say you agree you threatened Mr. Gale?

Cherneski: Yes." (*Underlining Board's emphasis*)

The Claimant admitted to the violation of all charges, but defended his actions by stating that he acted in the heat of the moment responding to Mr. Gale's offensive behavior. The Board's review of the transcript confirms that Mr. Gale instigated the altercation, but at a certain point the Claimant became the aggressor when he physically threatened Mr. Gale. Claimant as a Foreman was in a position of authority and failed to show proper leadership. The record is clear that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

As previously stated the Claimant admitted his culpability, thus the only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had a little less than ten years of service. During the altercation the Claimant became the aggressor wherein Mr. Gale had reason for fear of his safety. Under the Carrier's IDPAP, altercations are considered to be "major offenses" for which an employee may be dismissed for a single occurrence whether verbal and/or physical. The Carrier has an obligation to provide a safe work environment free of threatening or verbally abusive behavior and does not have to condone such behavior. Due to the seriousness of the matter the Board finds and holds that the Carrier's discipline was appropriate because it was not arbitrary, excessive or capricious and was in accordance with the Carrier's Progressive Discipline Policy.

AWARD

Appeal denied.



William R. Miller, Referee

Dated: April 24, 2013



PLB7529-20

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
AWARD NO. 20, (Case No. 20)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE
(Organization File: D70823212)**

vs

**CSX TRANSPORTATION, INC.
(Carrier File: 2012-133657)**

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 N. R. Gale with violation of Operating Rules - General Rule A; General Regulations GR-2, CSX Policy of Work Place Violence; CSX Policy on Harassment, as well as the CSX Code of Ethics and was substantial evidence adduced at the Investigation on September 26, 2012, to prove the charges; and was the discipline assessed in the form of permanent dismissal 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 dispute.

The Board has thoroughly reviewed the record and found that the Carrier complied with Rule 25 of the Agreement and Claimant was afforded all of his "due process" Agreement rights.

On September 10, 2012, Claimant was directed to attend a formal Investigation on September 20, 2012, that was postponed until September 26, 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 1230 hours on Sunday, August 26, 2012 at or near mile post BAA 2.2, while you were working on the Baltimore Terminal Subdivision, in the vicinity of Hollins Ferry Rd., Baltimore, MD. It is alleged that you entered into a verbal altercation with another employee that involved threats of violence, profanity, sexual innuendo, and vulgar language.

In connection with the above incident, you are charged with conduct unbecoming an employee of CSX Transportation, failure to properly perform the responsibilities of your position, inappropriate behavior in the work place, being immoral, quarrelsome and possible violations of, but not limited to, CSXT Operating Rules - General Rule A; General Regulations of GR-2, CSX Policy on Work Place Violence, CSX Policy on Harassment, as well as the DSX Code of Ethics."

On October 12, 2012, Claimant was notified that he had been found guilty as charged and was assessed discipline in the form of permanent dismissal. On October 26, 2012, the Claimant requested expedited handling of his case as provided for in Appendix (N) Expedited Discipline Agreement of the June 1, 1999 BMW/CSXT Agreement.

The Board first notes that this is a companion case to Award No. 18 of this tribunal, both of which involved the same incident, but different Claimants. The various Rules and Policies set forth in the charges requires employees to be civil and courteous, and prohibits employees from entering into altercations, being quarrelsome, and from using profanity. It further prohibits employees from harassing other employees or threatening them with violence and requires employees to treat their co-workers with respect.

On August 26, 2012, the Claimant was a Track Welder in a crew working under the authority of Foreman L. Cherneski. The crew was installing timbers at a road crossing and each had specific tasks. The incident arose when Cherneski was drilling holes in the timbers while the other employees were working on the opposite side of the timbers. Claimant asked Foreman Cherneski to return and continue drilling on the side of the crossing where all the other employees were working. Cherneski chose not to return and continued to work on the other side of the crossing, and Claimant became agitated yelling at Mr. Cherneski using profanity. Cherneski responded in kind after which Claimant made fun of Cherneski's teeth and made a sexual innuendo to Cherneski. The other crew members testified at the Hearing that Claimant instigated the altercation and in response Mr. Cherneski approached the Claimant and the two had a face-to-face verbal cursing at one another. On pages 30 and 31 of the Transcript the Claimant was questioned as follows:

"Helene: Did you and Mr. Cherneski engage in a verbal altercation at the Hollins Ferry Road crossing on August 26, 2012?

Gale: Yeah.

Helene: Did you use vulgar language towards Mr. Cherneski?

Gale: Yeah.

Helene: Did you use profanity and sexual innuendo towards Mr. Cherneski?

Gale: Yeah. (*Underlining Board's emphasis*)

The Claimant admitted to the violation of all charges, but defended his actions by stating that he acted in the heat of the moment reacting to Mr. Cherneski's initial failure to respond to his request to drill holes on the side of the timbers the other crew members were working on. The problem with the Claimant's theory is it overlooks the fact that Mr. Cherneski was the Foreman in charge of the Claimant and the other crew members and that the Claimant instigated the altercation, therefore, he was the spark that started the incident. The record is clear that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

As previously stated the Claimant admitted his culpability, thus the only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had a little less than five years of service. Claimant instigated the altercation using profanities, making fun of Cherneski's appearance and making sexual innuendo while the two were in front of Mr. Cherneski's crew showing disrespect for authority. Under the Carrier's IDPAP, altercations are considered to be "major offenses" for which an employee may be dismissed for a single occurrence whether verbal and/or physical. The Carrier has an obligation to provide a safe work environment free of threatening or verbally abusive behavior and does not have to condone such behavior. Due to the seriousness of the matter the Board finds and holds that the Carrier's discipline was appropriate because it was not arbitrary, excessive or capricious and was in accordance with the Carrier's Progressive Discipline Policy.

AWARD

Appeal denied.



William R. Miller, Referee

Dated: April 24, 2013