

**PUBLIC LAW BOARD NO. 7163
CASE NO. 390**

LCAT No. 18-69444

The Board consisted of the regular members and in addition Referee Meeta A. Bass when award was rendered.

PARTIES)	BROTHERHOOD OF MAINTENANCE OF WAY
)	EMPLOYES DIVISION - IBT RAIL CONFERENCE
)	
TO)	VS.
)	
DISPUTE)	CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier’s discipline (dismissal) of Mr. S. Halcomb, by letter dated March 8, 2018, in connection with allegations that he violated CSX Transportation Operating Rules 104.2(c), 2000.1 and the CSX Workplace Violence Policy was arbitrary, unsupported, unwarranted and in violation of the Agreement (Carrier’s File 18-69444 CSX).**
- 2. As a consequence of the violation referred to in Part 1 above, Claimant S. Halcomb shall be exonerated, record cleared, returned to service immediately with all rights and benefits unimpaired and compensated for all loss including straight time, overtime and other compensation.”**

FINDINGS:

The Board upon the whole record and all the evidence, finds that:

The Carrier and the Employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Board has jurisdiction over the dispute involved herein. Parties to said dispute were given due notice of hearing thereon.

The Carrier hired the Claimant on April 26, 2010. On January 9, 2018, the Claimant's coworker entered into the room where the Claimant was sitting. The coworker made a joke about the manner in which the Claimant had parked his vehicle. The Claimant responded with profanity, questioned his coworker if he wanted a piece of him, and a statement that escalated to an offer to go outside to resolve it. While there was no physical act of violence directed toward the coworker, the Claimant recounted the incident to another worker and stated that he would have "beat his ass" if the coworker had come outside. One (1) observer in the room described the Claimant's action as an act of aggression. The other worker described the situation as a serious matter, and he felt like "it had got to a point that was uncommon for the workplace." The same worker further felt that the Claimant's action had crossed the line. The coworker stated that he felt scared, intimidated, and attempted to bid out to "keep his head down and stay quiet as to avoid any confrontation." The coworker reported the incident on January 25, 2018 following another incident.

The Carrier issued a Notice of Investigation letter dated February 2, 2018 which stated as follows "...to develop the facts and place your responsibility, if any, in connection with the information received that on January 25th, 2018, at approximately 15:30 hours in the vicinity of Hawthorne Yard, it was reported that you displayed aggressive and violent behavior towards an employee when you challenged him to a fight, and all circumstances relating thereto ..."

Following a postponement, the investigation hearing was held on February 21, 2018. Following the investigation hearing, the Claimant received a Discipline Notice dated March 8, 2018, finding a violation of CSXT Operating Rules 104.3 (c), 2000.1 and CSX Workplace Violence Policy. The Claimant was dismissed. The Organization appealed the Carrier's decision by letter dated March 13, 2018, and the Carrier denied the same on May 30, 2018. A formal conference was held with no change in the position of the Carrier. This matter is before this Board for a final resolution of the claim.

The Board has reviewed the record developed by the parties during their handling of the claim on the property and considered evidence related to the following to make its determination of this claim:

- 1) Did Claimant receive a full and fair investigation with due notice of charges, opportunity to defend, and representation?
- 2) If so, did the Carrier establish by substantial evidence that Claimant was culpable of the charged misconduct or dereliction of duty?
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory, or unreasonably harsh in the facts and circumstances of the case?

The Carrier contends that the Claimant was afforded a fair and impartial hearing. The Claimant was given proper notice of the charges; he and his union representative were present at the hearing; the Claimant was given the opportunity to produce and examine evidence. The Organization failed to timely raise procedural arguments at the hearing, and, therefore, is barred. Notwithstanding, the Carrier admits that there was a typo in the notice of the hearing—the date that the incident was reported was indicated in the Notice of Investigation rather than the date of the incident. The Carrier further asserts that the conversation with hearing officers' and the Carrier's witnesses were immaterial to the investigation proceedings, and the Organization declined to examine the witnesses on said issue. The Carrier also acknowledged that the Claimant made a request for his written statement. Following his request, the Carrier contends that reasonable efforts were made to deliver his statement to the Claimant without success prior to the investigation. However, the statement was provided to the Claimant at the hearing which he confirmed as accurate. The Carrier maintains that the Claimant's fundamental due process rights were protected. The Carrier contends that the evidence establishes that the Claimant violated the cited rules by substantial evidence. The Carrier asserts that the conduct of the Claimant constituted an act of aggression and the evidence established that the Claimant was quarrelsome, threatening, and had malicious intent when he engaged his coworker. Moreover, the penalty of dismissal is appropriate and commensurate with the proven charges. The Carrier asserts that an employer should not be forced to employ a person who threatens other employees. It is the Carrier's position that the claim should be dismissed.

The Organization contends that the Claimant was denied a fair and impartial hearing. The Organization argues that the Carrier's hearing officer engaged in highly improper conduct which served to materially undermine the Claimant's right to a fair and impartial investigation. The Carrier officer, during a recess, participated on a phone call that the Claimant and Organization were not invited to join. There is an appearance of impropriety which violates the employees' rights to a

fair and impartial investigation. The Carrier did not assert or attempt to defend Rule 104.3(c). The Notice of Discipline makes no references to Rule 104.3(c). The Organization argues that the Carrier cannot amend a notice of discipline more than sixty (60) days after the notice of discipline; the Organization's disciplinary appeal was filed. The Organization maintains that the claim should be sustained as to this alleged rule violation. The Organization also contends that the Carrier failed to meet its burden of proof to establish a violation of the cited rules. Further, the Organization argues that due to the Claimant's denial of the charges, there was insufficient evidence to establish that the Claimant was aggressive or violent. Moreover, the Organization contends the penalty of "dismissal" was arbitrary and unwarranted for these circumstances. The Carrier imposed a 45-day suspension for a verbal altercation for another incident. This altercation happened with this Carrier, in the same yard, but penalties greatly differ. It is the position of the Organization that the claim should be sustained and the Claimant be reinstated to service.

The Carrier does not identify the exact offenses in the notice of investigation but instead states "that you displayed aggressive and violent behavior towards an employee when you challenged him to a fight, and all circumstances relating thereto." There is sufficient notice to the Claimant for the potential rule violations. At the investigation, the Carrier introduced CSXT Operating Rule 104.2, 2000.1 and CSX Workplace Violence Policy as the potential charges that the Claimant was facing. The Carrier dismissal letter states that "substantial evidence was revealed in the hearing demonstrating that you violated the rule(s) as charged, and as such, you are guilty of violating CSX Transportation Rule(s) 104.3(c), CSX Workplace Violence Policy and 2000.1." The Organization correctly points out that the Carrier did not assert or attempt to defend Rule 104.3(c).

Operating Rule 104.2. reads:

Employee behavior must be respectful and courteous. Employees must not be any of the following:

- a. Dishonest, or
- b. Insubordinate, or
- c. Disloyal, or
- d. Quarrelsome.

General Safety Requirements

2000 – Safety Responsibilities

2000.1 All employees are governed by the rules contained in the Safe Way and must have a copy available for use when on duty. Employees must:

- 1. Warn coworkers of unsafe acts and hazards;**
- 2. Behave in a civil and courteous manner in the workplace;**
- 3. Keep work areas and CSX property clean, orderly, and protected from hazards; and**
- 4. Observe all local, state, and federal laws and regulations.**

The CSX Workplace Violence Policy is incorporated herein as if fully rewritten. The policy specifically reads:

CSX Corporation and its subsidiaries (CSX or the Companies) prohibit threats or acts of violence against the Companies' employees or non-employees doing business with CSX or while on CSX property or in CSX-sponsored lodging. Existing rules, agreements, and practices already prohibit such behavior. Violation of these rules, agreements, practices, or this policy by any employee may result in the removal of the employee from the Company's premises and disciplinary action up to and including termination of employment.

The Board finds that there is substantial evidence of record to support a violation of CSXT Operating Rule 104.2, 2000.1 and CSX Workplace Violence Policy without prejudicing the rights of the Claimant. The mis-numbering of the rule of which the Claimant is clearly given notice in this particular case is harmless and nonprejudicial.

The Organization also challenges the fact that during a recess at the formal investigation prior to the testimony of the Claimant but before the conclusion of the hearing, that the Carrier's witnesses, charging officer and hearing officer were talking during a break. The Union representative objected on the record and raised the issue of violation of the sequestration order. The hearing officer stated that the conversation was not related to the hearing and provided the Organization with the opportunity to examine the witnesses. There was no evidence of record of prejudice established in the record. The purpose of sequestration is to ensure the integrity of testimony. Each of the witnesses had been called to testify but were subject to recall. The Organization representative stated that if "I chose to recall any one of those

witnesses now that they have been able to corroborate whatever story or cross-examination is being brought forth by the Organization.” The Board agrees that the incident should not have happened, but not every ex-parte communication is prejudicial. There was no allegation that any information, not gained from the record, was actually received by the Hearing Officer to support the claim of impropriety.

After careful review of the transcript and written statements, the Board finds the actions of the Claimant amounts to threatening, intimidating, and violent behavior toward his coworker. The Board finds that the Carrier has established by substantial evidence that the Claimant has violated the aforementioned rules. The difficulty in this case concerns the termination of an eight-year employee with no prior record of discipline. There is also a lack of progressive discipline. It is becoming increasingly a practice in labor relations to adopt a zero-tolerance policy in place of progressive discipline in cases of workplace violence. In the instant case, the arbitrator cannot substitute his judgment for that of management where management has clearly articulated and promulgated reasonable rules against workplace violence and has presented where violence is proven. There are some actions by employees that constitute such egregious behavior that immediate termination is warranted and appropriate.

The Organization argues disparate treatment and claims that in another verbal altercation case of discipline, the Claimant in that case was suspended for 45 days. The Claimant in this case was dismissed. The Board notes that there are various types of threats and in its determination of whether the penalty was reasonable and commensurate with the offense, the Board has considered aggravating, as well as mitigating, circumstances. Exhibit H was introduced and the witness was examined on his statements contained in Exhibit H. The statement reads:

“On Tuesday, January 9, 2018, Scott Halcomb and I worked together exclusively. He and I work together on the 5R40 inspection team. During our work day on January 9th, Scott told me just about beat Chris Williams’s ass in the morning. He told me Chris had come into the office being a smart ass about how his car was parked. He told me he responded by telling Chris that he was sick of his shit. Scott told me he called Chris outside and they could take care of it. Scott told me if Chris would have come outside, he would have beat his ass. Scott was very worked up just telling the

story. I asked Scott if anyone else was in the room when this went down. He said that Matt Hooker was. So, after work that night, I called Matt to see how it went down. Matt told me Chris was just kidding with Scott, that Scott just blew up with Chris. A few days later, I was in the truck with Scott when he ran Chris off the road. We were leaving the office as Chris was coming in. Scott said, better get over, motherfucker. He was still very angry with Chris, apparently.”

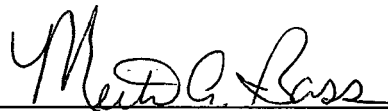
The Board finds that this aforementioned incident constitutes aggravating circumstances, which distinguishes this incident from the other claim cited by the Organization and also supports a higher level of discipline. The Carrier’s decision to dismiss the Claimant was not arbitrary, capricious or excessive. The Board finds that the Claimant violated CSXT Operating Rule 104.2(d), 2000.1 and CSX Workplace Violence Policy. The Board finds that the penalty of dismissal is appropriate and commensurate with the offense.

AWARD

Claim denied.

ORDER

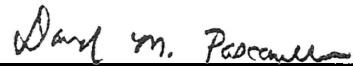
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.



Meeta A. Bass
Neutral



Katrina Donovan
Carrier Member



David Pascarella
Organization Member

Dated at Chicago, Illinois, this 26th day of NOV. 2019.