AWARD NO. 453
Case No. 453

Organization File No. D91508018
Carrier File No. 18-95596

PUBLIC LAW BOARD NO. 7163

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION,
) INTERNATIONAL BROTHERHOOD OF TEAMSTERS
TO)
)
DISPUTE) CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. G. Reeves, by letter dated November 27, 2018, in connection with allegations that he violated CSX Transportation Operating Rules 100.1.2, 104.2.a, 104.6, 104.7.a and 104.10.1 was arbitrary, capricious, unnecessary and excessive (System File D91508018/ 18-95596 CSX).

2. As a consequence of the violation referred to in Part 1 above, Claimant G. Reeves shall be fully exonerated and

'... be made whole for all financial losses as a result of the violation, including compensation for:

1) Straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Mr. Reeves at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by Mr. Reeves while wrongfully removed from the effective rosters);

2) Any general lump sum payment or retroactive general wage increase provided in any applicable agreement that become effective while the Claimant was unjustly removed from the effective rosters;

3) Overtime pay for lost overtime opportunities based on overtime for any position Mr. Reeves could have held during the time he was removed from the effective rosters, or on overtime paid to any junior

employee for work Mr. Reeves could have bid on and performed had the Carrier not unjustly removed him from the effective rosters;

4) Health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from the effective rosters;

Additionally, all notations of this improper suspension should be removed from all Carrier records.' (Employes' Exhibit 'A-4')."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated March 20, 2008, this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

Following a formal investigation at which he was charged with claiming pay for time not worked, Claimant was dismissed from service. The record of the investigation shows that Claimant left work early on October 5, 2018 without permission. He submitted his payroll for 8 hours, but worked only 5 hours and 49 minutes. This caused the Carrier to review his payroll records from August 27 through October 5, finding numerous discrepancies between the hours Claimant worked and the time he claimed for payroll purposes. Based upon this record, we find that the Carrier had substantial evidence to support its charge against Claimant. The Board does not agree that a different standard of proof applies in this case because of the nature of Claimant's offense. While a few arbitrators in other industries have imposed a higher burden of proof in cases involving moral turpitude, the standard in this industry has been "substantial evidence" from time immemorial, regardless of the nature of the offense. Similarly, arbitral panels in this industry have consistently

held that this offense, which reflects upon Claimant's dishonest character, warrants dismissal. We find no basis for modification of the discipline imposed.

In reaching this conclusion, we have considered the various arguments advanced by the Organization and find them to be unpersuasive. In particular, we reject the Organization's contention that the Notice of Investigation was improper because it did not cite the specific rules Claimant was accused of violating. The relevant portion of Rule 25 states, "An employee who is accused of an offense shall be given reasonable prompt advance notice, in writing, of the exact offense of which he is accused with copy to the union representative." The Board, with this Neutral Member, addressed this issue in Award No. 365, wherein we held:

> The Organization also takes issue with the Carrier's finding that Claimant was in violation of Operating Rules 100.1 and 104.7, inasmuch as neither Rule was cited in the Notice of Investigation or mentioned in the investigation itself. First, we find that the Carrier is not required to cite rules that might have been violated in its charge, unless the Agreement specifically imposes such a requirement. The applicable Agreement in this case does not. It is sufficient that enough facts are cited in the charge to enable the employee to understand the scope of the investigation and prepare a defense. We find that the Notice of Investigation in this case satisfies that requirement.

We similarly find that the Notice of Investigation in this case sufficiently informed Claimant of the purpose and scope of the investigation, and there is no evidence he was hindered in the preparation of his defense.

We also do not agree that Claimant was denied due process because the Carrier witnesses discussed the case prior to the investigation. In their collection of evidence, it would be natural that Carrier witnesses would need to converse. There is no suggestion, however, that their conversation resulted in fabricated testimony or evidence. More significantly, there is no evidence they discussed the case with the Hearing Officer, or that he directed how they should testify.

AWARD: Claim denied.

Barry E. Simon
Chairman and Neutral Member

David M. Pascarella
Employee Member

John Nilon
Carrier Member

Dated: 8/9/21
Arlington Heights, Illinois

EMPLOYE MEMBER'S DISSENT

TO

AWARD 453 OF PUBLIC LAW BOARD NO. 7163
(Referee Barry Simon)

I must dissent with the Majority's opinions. First, the Majority erred when it held in Award 453:

> "*** The Board does not agree that a different standard of proof applies in this case because of the nature of Claimant's offense. While a few arbitrators in other industries have imposed a higher burden of proof in cases involving moral turpitude, the standard in this industry has been 'substantial evidence' from time immemorial, regardless of the nature of the offense. Similarly, arbitral panels in this industry have consistently held that this offense, which reflects upon Claimant's dishonest character, warrants dismissal. We find no basis for modification of the discipline imposed."

The majority outright ignored the industry precedent cited by the Organization which involved charges of moral turpitude. In this connection, evidence in cases involving charges of moral turpitude must not be just "substantial" or "preponderant", but at least "clear and convincing". Herein, we reference National Railroad Adjustment Board (NRAB) Third Division Awards 32707 and 33396, inter alia, where serious charges of "moral turpitude" required not just "substantial" but "clear and convincing" evidence, or more. NRAB Third Division Award 32890 adds that dismissal cases, such as is involved herein, additionally place a greater burden of proof on the Carrier than would otherwise obtain. It is a fundamental principle that clear and convincing evidence must be established by the Carrier to uphold that charge. In this regard, we direct attention to Third Division Award 16154 which, in pertinent part, held:

> "*** the essence of the Carrier's charge against the claimant is an accusation of dishonesty and not merely unauthorized preparation and execution of various documents. Consequently, Carrier must support such an accusation of dishonesty with clear and convincing evidence of alleged misconduct as the offense charged implies an element of moral turpitude if not criminal Liability. **How Arbitration Works, Revised Edition** by Elkouri and Elkouri pp. 416-8.
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> After thorough examination of the entire record in this case, we find the evidence not sufficiently convincing to satisfy the Board that the requisite degree of proof has been met by the Carrier to support the disciplinary action invoked. Accordingly, the Claimant shall be reinstated with all rights unimpaired and be reimbursed for any loss of earnings sustained as a result of Carrier's action."

Secondly, the Majority further erred when it found that the Notice of Investigation in this case sufficiently informed the Claimant of the purpose and scope of the investigation and that there is no evidence the Claimant was hindered in the preparation of his defense. These findings are contrary to the clear language of Rule 25, Section 1(d) and the on-property precedent interpreting and applying its provisions.

Lastly, the Majority's determination that the Claimant was not denied due process because the Carrier witnesses discussed the case prior to the investigation constitutes a complete disregard for the Claimant's due process rights. Conversations between Carrier witnesses just before or during investigations shatter the perception of impartiality regardless of the content of those conversations. In this case, the Majority committed an egregious violation of the Claimant's due process rights when it ignored the impropriety of the Carrier witnesses' behavior and the Carrier's failure to hold a fair and impartial hearing. NRAB Fourth Division Award 1588 was cited to the Board for the proposition that management must not only avoid actual due process issues but even the "mere" appearance of the same, for the obvious reasons that still other awards also impose this standard upon carriers - such "near occasions of sin", even in the absence of "smoking gun" evidence of undeniable unfairness and partiality, yet vitiate the minimum standard of respect that the process must enjoy if confidence in the administration of discipline is not to become routinely wanting.

For these reasons, I must dissent.

Respectfully submitted,

David M. Pascarella

David M. Pascarella
Employe Member