

PARTIES
TO THE DISPUTE:

Brotherhood of Maintenance of Way Employes
Division of the International Brotherhood of Teamsters

VS.

CSX Transportation, Inc.
Carrier File: 2016-204575

Arbitrator: Sherwood Malamud

FINDINGS

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute.

Claimant D. Yarosh signed an Attachment A expedited discipline handling form. Through this document, Claimant Yarosh elected to forgo the traditional on – property discipline process and instead submit the matter directly to arbitration.

FACTS

The Carrier hired D. Yarosh on September 5, 1975. At the time of his dismissal, April 12, 2016, Claimant had a clean disciplinary record. The Carrier determined that Claimant violated CSX Operating Rules 104.3a, b, 104.2b, d and the CSX Workplace Violence Policy for his conduct on February 22, 2016 at approximately 7:45 a.m. during a job briefing and the monthly overlap conducted by Roadmaster J. Brammell.

The Rules and policies the Carrier charges that Claimant violated are as follows:

Operating rule 104.2 provides:

Employee behavior must be respectful and courteous.

Employees must not be any of the following:

b. Insubordination, or

...

d. Quarrelsome

104.3 The following behaviors are prohibited while on duty, on CSX property, or when occupying facilities provided by CSX:

a. Boisterous, profane, or vulgar language; or

b. Altercations;

Violence in the Workplace

CSX Policy on Workplace Violence

Purpose

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

Threats or acts of violence may consist of, but are not limited to:

- * Infliction of bodily harm or physical intimidation;
- * Actual or implied threat of harm to any individual or group;
- * Loud, angry or disruptive behavior that creates fear or anxiety in the workplace;
- ...
- * Any other conduct that a reasonable person would view as threatening or potentially harmful.

Employees must not make any threats commit any acts of violence, even if done so in a joking manner. All threats or acts of violence be taken seriously and dealt with accordingly. Furthermore, CSX will not tolerate any threats or acts of violence by non-employees against its employees or property.

- * If any employee becomes aware of an emergency situation involving immediate violence or threat of immediate violence by CSX employee or not – CSX personnel, he/she must immediately call 911 and cooperate fully with law enforcement and medical personnel that respond to the call for help. The employee should call the Public Safety Coordination Center... as soon as it is as it is safe to do so.

During the investigatory hearing held on March 23, 2016, Roadmaster Brammell described Claimant's conduct, as follows:

"During the morning job briefing, after our big Monday call, I began to job brief the men on 100% rules compliance. I told the men this was your tap on the shoulder and that if I see non rules compliant acts, I would deal with these acts with O' tests. I continued with saying Mr. Bledsoe would be coming up this week to do O' tests as well, and at that point Mr. Yarosh got out of his seat and began to yell and curse at me about how managers are worthless, and no good. Mr. Yarosh got in my face, several inches from my nose and continued to curse at me. I

asked Mr. Yarosh to stop and leave the property. He walked away from me and tried to get other union employees to stand up against me. No one stood up so Mr. Yarosh came back to me and got right back nose to nose with me. I kept calm while Dave was cursing at me. I told Mr. Yarosh to leave the building and he told me "You make me leave."

At that point I felt threatened as if he might hit me or push me. He never touched me, I never touched him. Again, I told Mr. Yarosh to leave the property. He continued cursing at me saying you know "Fuck you, you and you a[re] fucking ass hole. All you managers are worthless, go fuck yourself."

Again I stayed calm, I did not get emotional or angry I politely asked Mr. Yarosh again to leave. He remained. I made it as professional as I could. I did not curse back at Mr. Yarosh. I did not touch Mr. Yarosh. After about 90 seconds Mr. Yarosh calmed down. Mr. Yarosh turned around and walked into the garage. When Mr. Yarosh walked past Mr. Pine, Mr. Yarosh told Mr. Pine "Fuck you managers."

During his testimony, Brammell acknowledged that he chuckled during Mr. Yarosh's tirade. Claimant considered Brammell's statement concerning 100% compliance with the rules as a threat both to himself and to the men. After a short period of time, Roadmaster Brammell sought out Claimant and invited him to attend the monthly overlap meeting. Roadmaster Brammell directed Claimant and the other men in his gang to an assignment in the field.

Later that afternoon, Assistant Division Engineer Bledsoe arrived. He attempted to speak with both Roadmaster Brammell and Claimant together. To avoid angering both men, Bledsoe spoke separately with Claimant for approximately 45 minutes. Bledsoe then removed Claimant from service.

THE CARRIER ARGUMENT

The Carrier argues that Claimant received a fair hearing. Although Claimant denies he violated the Carrier's Workplace Violence policy and the Operating Rules cited above, he acknowledged that he stood within inches of Roadmaster Brammell's face, cursed at him, attempted to rile up the other employees over the 100% compliance with the rules that was the subject of Brammell's talk. When the Roadmaster directed Claimant to leave to allow Claimant to calm down, instead, Yarosh challenged Brammell "make me." Claimant violated Operating Rules and the Workplace Violence policies of the Carrier.

The Carrier dismisses the Organization's attempt to shift the blame to Roadmaster Brammell for Claimant's conduct on February 22, 2016.

The Carrier argues that dismissal is the appropriate penalty in this case. Claimant cannot be allowed to return to the workplace. He attempted to instigate employees against their

supervisor. He was insubordinate. The manner in which he conducted himself was threatening to Brammell. Claimant was loud and angry. The Organization argues that Brammell's remarks contained a veiled threat. There is no evidence that anyone else perceived the Roadmaster's talk as a threat. Claimant's tirade loaded with profanity was delivered before many employees. He cannot return to this workplace. The Carrier points to Awards 18 and 20 (Miller) of this Public Law Board 7529 in support of its position.

THE ORGANIZATION ARGUMENT

The Organization argues that Claimant did not receive a fair hearing. The Carrier failed to specify the rules allegedly violated by Claimant in the notification letter. The Organization complains that the Carrier did not provide the Organization in advance of the hearing with a list of witnesses that would be called during the hearing. It argues that the Carrier violated Rule 25, when it failed to convene the investigatory hearing within 30 days of its first knowledge of the conduct that is the subject of the charge. Furthermore, the Organization protests that Claimant was removed from service without the benefit of a hearing.

As to the substance of this matter, the Organization points to the Roadmaster's conduct in the manner in which he treats the men he supervises. He frequently uses profanity when talking and instructing the men. He has used derogatory terms such as fag, when addressing some employees. Roadmaster Brammel has used the same language employed by Claimant, but he has never been disciplined for conduct that during cross-examination Brammell acknowledged violates the Carrier's rules and Workplace Violence policies. The Organization argues that principles of just cause dictate the imposition of a lesser penalty than dismissal.

BOARD FINDINGS

Procedural Objections

The Board first addresses the procedural issues raised by the Organization. The Carrier complied with Rule 25. The investigatory hearing was held on the 30th day, in compliance with the Rule.

The Organization did not cite any authority in support of its demand that the Carrier supply the Organization with a list of witnesses and/or exhibits the Carrier intends to present at the hearing. The Board dismisses this objection.

The Organization maintains that the notification letter was inadequate. It failed to alert Claimant of the rules he allegedly violated. The Organization objects to the February 24, 2016 notification letter. The letter failed to specify the rules allegedly violated by Claimant's conduct. This Board determined in Awards 106 (MacDougall) and 114 (Malamud); NRAB Third Division Award No. 35022, BMW v. BNSF (Kenis) that it was not necessary to specify the Rules allegedly violated. Under Rule 25, the Carrier had to provide sufficient information to alert Claimant of the conduct that is the subject of the investigation. The Carrier did so in the

February 24, 2016 letter.

Since Claimant is charged with a major offense, under the Carrier's IDPAP policy, it may take the employee out of service pending hearing and decision. The Board denies all of the Organization's procedural objections.

The Merits

The Carrier met its burden of proof. Claimant used profanity, and he was insubordinate when he attempted to instigate other employees against what Roadmaster Brammell said during the job briefing/overlap. The record evidence establishes that no one else other than Claimant viewed Brammell's remarks as a threat.

The thrust of the Organization's argument concerns the penalty imposed by the Carrier. Contrary to the Carrier's arguments, the Board finds that Roadmaster Brammell's frequent use of profanity in speaking with the men, his use of degrading language to them, creates an atmosphere and context in which an employee who wishes to express disagreement with a supervisor's statement might employ profanity. There is no evidence in this record that Roadmaster Brammell received any instruction to conduct himself in a more courteous manner that conforms to the Carrier's policies.

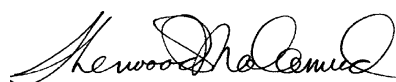
Roadmaster Brammell's conduct on February 22 served to inflame the situation. Employees noticed that he snickered while Claimant was attempting to voice his concern over the 100 % compliance with the rules policy. Brammell acknowledged in his testimony that he chuckled during Claimant's statements. The Roadmaster's conduct was not courteous, nor was it respectful towards Claimant. In this regard, Brammell's conduct did not go unnoticed.

Certainly, Claimant's length of service of in excess of 30 years weighs heavily in the Board's analysis. Based on the totality of the record, the Board concludes that Claimant's conduct warrants severe discipline. He violated the Carrier's Workplace Violence policy. He admitted what he did. He did not recognize or accept that his conduct is prohibited by the Carrier's policy.

The unchecked conduct of the Roadmaster, particularly his failure to take seriously the concern of a senior employee, contributed to the demeaning of the Carrier's policy. The Board concludes that reinstatement of Claimant, with seniority, but without back pay provides him the opportunity to retain employment until his retirement. It presents the Carrier with the opportunity to emphasize and educate its workforce as to the importance of its Workplace policies.

AWARD

Claim sustained and denied in part. The Carrier shall implement this Award in accordance with the findings.

A handwritten signature in black ink, appearing to read "Sherwood Malamud". The signature is fluid and cursive, with the first name "Sherwood" and last name "Malamud" clearly distinguishable.

Sherwood Malamud
Neutral Member
Date: November 8, 2017