

PUBLIC LAW BOARD NO. 7529

Case No. 130

PARTIES

TO THE DISPUTE:

Brotherhood of Maintenance of Way Employes
Division of the International Brotherhood of Teamsters
System File: D17907316

VS.

CSX Transportation, Inc.
Carrier File: 2016-207677

Referee: 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.

Under date of June 9, 2016, Claimant J.M. Butler signed an Attachment A expedited discipline handling form. Through this document, Claimant Butler elected to forgo the traditional on – property discipline process and instead submit the matter directly to arbitration.

FACTS

The Carrier hired Track Inspector J. M. Butler on July 12, 2004. The incident that gives rise to the Carrier's decision to order Claimant's dismissal occurred on February 24, 2016. Claimant was hy-railing in a track inspector truck. He followed the backhoe to occupy the track. The backhoe operator stopped the backhoe to clean its windshield. Claimant stopped approximately 70 feet behind. When the operator got back on the backhoe, the following occurred, as Claimant describes it, in relevant part, in the written statement he provided on February 25, 2016:

As he began rolling I released the brake on the high Hy – rail vehicle. As I started rolling, I rolled the windows up and looked down at the heater controls to turn it up. As I did so, I struck the back of the backhoe. There was no damage to the backhoe. The truck's front bumper, grille, headlights, hood, and engine were damaged.

The accident resulted in \$10,000 damage to the truck.

By letter dated March 3, 2016, the Carrier directed Claimant to report to an investigatory hearing. After postponements, the investigatory hearing convened on May 17, 2016. By letter

dated June 6, 2016, Division Engineer R.B. Elliott determined that substantial evidence was presented at the investigatory hearing to support a finding that Claimant violated Operating Rules: 100.1, 104.3, 712.17, and CSX Safe Way ES-14 b and e. Division Engineer Elliott concluded that dismissal was the appropriate penalty.

Rule 100.1 Employees must know and comply with rules, instructions, and procedures that govern their duties. They must also comply with the instructions of supervisors. When there is uncertainty, employees must:

1. Take the safe course, and
2. Contact a supervisor for clarification.

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

...

- e. Behavior that endangers life or property.

Rule 712.17 When operating on-track equipment, operate at a speed that permits stopping within one-half the range of vision. . .

Claimant's disciplinary record reflects the following IDPAP incidents. On February 14, 2016, Claimant was involved in an at fault collision for which he received a 30 day suspension and a waiver. The incident that is the subject of this appeal occurred 10 days later on February 24, 2016.

The last IDPAP incident that occurred prior to 2016, took place on June 5, 2013. Reference to this 2013 incident was removed on June 6, 2016, the date on which the Carrier mailed the disciplinary letter dismissing Claimant and that is the subject of this appeal.

THE CARRIER ARGUMENT

The Carrier asserts that Claimant received a fair hearing. Since Claimant admitted that the Hy-rail truck he operated on February 24 struck the backhoe, the Carrier met its burden of proof. Claimant hits other equipment. Dismissal is the appropriate penalty. Claimant's return poses a danger to himself and other employees. The Carrier followed progressive discipline. Claimant was involved in three incidents in which he struck other equipment. The Carrier demonstrated leniency towards Claimant, when it offered a waiver for the incident that occurred on February 14, 2016. The Carrier concludes that the Board should deny this claim.

THE ORGANIZATION ARGUMENT

In its on property argument, the Organization maintained that Claimant was denied a fair hearing, because the Carrier failed to list the rules that Claimant allegedly violated in the March 3, 2016 notification letter.

The Organization argues that the Carrier failed to follow progressive discipline, when it

imposed the dismissal penalty for the February 24 incident. The Carrier may not rely on discipline that is removed from an employee's history in assessing discipline. That is precisely what the Carrier did, when it treated the February 24 incident as the third instance in which Claimant was involved in an at fault accident. It should not have considered the 2013 incident which was removed. In addition, the Organization points out, that the Roadmaster who brought the charges against Claimant expressed satisfaction with his work, and he would welcome Claimant back.

BOARD FINDINGS

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 March 3, 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 March 3, 2016 letter.

The gravamen of this dispute is whether dismissal is the appropriate penalty. The Carrier met its burden of proof. Claimant admitted his negligence. He was distracted by rolling up his window and adjusting the heater, as he took his foot off the brake and rolled into the backhoe.

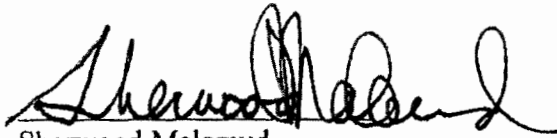
The Carrier considered this incident to be the third at fault accident in which Claimant was involved in a period of three years. The June 5, 2013 incident that was removed from Claimant's history on June 6, 2016 would have to serve as the third incident. The Carrier made the decision to follow progressive discipline, in this case. Although the Carrier argues as a major offense under the IDPAP policy, it may remove Claimant for a first offense.

Although it is a close question whether the Carrier may rely on an incident that is effectively removed on the very date on which the disciplinary letter of dismissal was mailed, the Board finds that in this case, the Carrier followed a course of progressive discipline. As an appellate body, the Board must determine whether the 2013 incident should have been included as a basis for following progressive discipline. The Board concludes it should not. It was removed on June 6, 2016, the date the decision to dismiss Claimant was mailed. The date it was made.

The two incidents that occurred in February 2016, the one on the 14th and the one at issue, here, that occurred on the 24th, standing alone, the Carrier argues, justifies the imposition of the dismissal penalty. Here, the operational supervisor, Roadmaster Johnson would welcome Claimant back. Under the unique circumstances of this case, the Board concludes that upon consideration of all the factors in this case, Claimant's honesty and admission of his negligent conduct, the acceptability of his work to his supervisor, dismissal is not warranted. Instead, the appropriate penalty is Claimant's reinstatement with seniority, but without back pay.

AWARD

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

A handwritten signature in black ink, appearing to read "Sherwood Malamud". The signature is fluid and cursive, with a large initial "S" and "M".

Sherwood Malamud
Neutral Member

Date: 11/22/2017