

PUBLIC LAW BOARD NO. 7529

Case No. 131

PARTIES
TO THE DISPUTE:

Brotherhood of Maintenance of Way Employes
Division of the International Brotherhood of Teamsters
System File: D70802416

VS.

CSX Transportation, Inc.
Carrier File: 2016-207678

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 13, 2016, Claimant R. E. Goodman signed an Attachment A expedited discipline handling form. Through this document, Claimant Goodman elected to forgo the traditional on – property discipline process and instead submit the matter directly to arbitration.

FACTS

The Carrier hired Claimant R. E. Goodman on April 13, 1981. At the time he was disciplined, Claimant maintained seniority as an Assistant Bridge Foreman. The incident that gives rise to the discipline imposed which is the subject of this appeal occurred on December 8, 2015. On that date, Claimant was arrested and charged with two felony counts in Henrico County Virginia for conduct alleged to have started in 2011 and continued into 2015: 1) sexual abuse of a child by an adult in a custodial relationship; 2) endangering a child's life while having custody.

On December 10, 2015, CSX employees, who learned of the arrest in a news broadcast, alerted the Carrier. By letter dated December 22, 2015, Claimant's Roadmaster directed him to attend an investigation related to his arrest on the above criminal charges. On May 5, 2016, the felony charges were reduced to 2 Class 1 misdemeanors. After postponements, the investigatory hearing was held on May 11, 2016. By letter dated May 31, 2016, Division Engineer J.R. Peterson concluded that on the basis of the criminal charges lodged against him, Claimant violated Operating Rules 100.1 and 104.4. Claimant received discipline in the amount of time

served.

Rule 104.4 The following behaviors are prohibited at all times:

...
Criminal conduct that may damage CSX's reputation or that endangers CSX property, employees, customers, or the public.

THE CARRIER ARGUMENT

The Carrier notes that it learned of the charges filed from employees, who saw the ABC December 9, 2015 newscast. They reported to the Carrier the charges filed and arrest made. At the time the decision was made to discipline Claimant with a time served penalty, the charges remained pending. The December 22, 2015 notification letter reflects the original felony charges filed in this case. The Carrier maintains that there is a nexus between the criminal charges filed, whether felony or misdemeanor, and Claimant's employment with the Carrier. Employees were concerned. They were the ones who brought it to the Carrier's attention.

THE ORGANIZATION ARGUMENT

On the property, the Organization argued that Claimant was denied a fair hearing, because of the Carrier's failure to specify in the notification letter the rules allegedly violated by Claimant. The Organization argues there is no evidence that Claimant committed a criminal act. Further, there is nothing in the record that establishes a nexus between the charges and the Carrier's reputation. The only evidence adduced at the investigatory hearing concerning the charges came from Claimant. He denied the charges against him. He noted at the hearing that the felony charges were reduced to two Class I misdemeanors. No testimony was produced at the hearing to suggest that the misdemeanor charges impact the Carrier's reputation. No evidence was presented at the investigatory hearing that established that the public was aware that Claimant was a CSX employee.

The Carrier presented no evidence that Claimant engaged in prohibited sexual conduct. The Carrier could not and did not meet its burden of proof. The Organization argues that the Board should set aside the finding that Claimant violated Rules 100.1 or 104.4. The Board should issue an award that makes Claimant whole for the period he lost pay and benefits.

BOARD FINDINGS

Procedural Objection

The Organization maintains that the notification letter was inadequate. It failed to alert Claimant of the Rules he allegedly violated. 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 December 22, 2015 letter.

The Merits-Nexus

By the time the investigatory hearing was held on May 11, 2016, the 2 felony charges had been reduced to 2 Class 1 misdemeanor charges. However, the 2 Class 1 misdemeanor charges had not been adjudicated. The Carrier presented, no evidence at the May 11 hearing concerning Claimant's guilt or innocence on those charges.

The only evidence concerning nexus presented at the hearing came from the investigating CSX police officer, East. He conducted an investigation. He obtained copies of the felony arrest warrants issued. He testified that his investigation uncovered that Claimant's conduct did not result in damage to CSX's reputation. Furthermore, CSX police officer East found no evidence that Claimant's actions endangered CSX property, customers or employees.

The Carrier cites an Award in which the charged employee was found guilty of sexual abuse of a daughter. NRAB Third Division Award No. 32262, Referee John C. Fletcher stated on behalf of the Board:

The offense in our present case was sufficiently reprehensible to justify the Carrier in taking the action that it did. The Claimant was guilty of aberrant and criminal behavior. The Carrier is not required to continue such an individual in its service. The claim will be denied.

Accord, PLB 7529 Award No. 102, (MacDougall) Claimant was convicted of using a computer and traveling to lure a child for sex. He was placed on a sex offender registry. The Carrier dismissed him, and the Board denied the claim.

PLB 7751 Award No. 83, Thomas N. Rinaldo, Referee addressed a case in which Claimant's off-duty conduct, a charge without conviction of felony manslaughter stemming from the operation of a motor vehicle while under the influence, resulted in a dismissal that was upheld by the Board.

In this case before this Board, the felony charges were reduced to Class 1 misdemeanors. At the investigatory hearing, Claimant vigorously denied any misconduct. The 17-year old juvenile whose statements to the police formed the basis for the charges did not testify at the investigatory hearing.

During the Board's deliberations, the Carrier learned that Claimant entered a "no contest" plea. Claimant was convicted of contributing to the delinquency of a minor. He was ordered to have no contact with the minor. He was sentenced to 12 months of imprisonment, suspended for a period of 3-years.

The real issue here is nexus. The Carrier's case rests on the argument that criminal charges standing alone are sufficient to impugn and sully the Carrier's reputation. The cases cited involve convictions for soliciting minors for sex and sexual abuse. Here, the Carrier presented no evidence that the public had any way of connecting Claimant to his employment

with the Carrier. He is an employee with the Carrier with over 30-years seniority, and without a record of any current discipline.

To find nexus, if the story of the crime makes no reference to the Carrier, there must be testimony from a member of the public concerning the individual's knowledge of both, his employment with the Carrier and of the alleged crime. In the alternative, the Carrier must present testimony from employees, supervisory or managerial personnel to the effect that the knowledge of the charges against Claimant puts them in fear of reporting to work or causes them embarrassment.

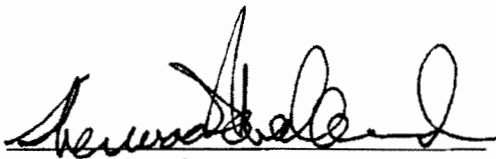
In this case, there is no link between Claimant, the alleged off duty conduct, and Claimant's employment status with the Carrier. The Carrier points out that employees alerted the Roadmaster to the arrest. However, the employees who did so, did not testify at the hearing.

The parties' Agreement requires that the Carrier establish the basis for its disciplinary action by substantial evidence. In this case, the existence of a nexus between Claimant's employment and Claimant's off-duty conduct is supported by no evidence. The Board would have to draw an inference of nexus without any evidence on which to base that inference. The Carrier has not met its burden of proof by establishing nexus by substantial evidence, Consolidated Edison v. NLRB, 305 U.S. 197 (1938).

Without a nexus finding, there is no basis for concluding that Claimant violated Rule 104.4, that he engaged in criminal conduct that damaged the Carrier's reputation. There is no basis for the imposition of any discipline.

AWARD

Claim sustained in its entirety.



Sherwood Malamud

Neutral Member

Date: 11/27/2017

PUBLIC LAW BOARD NO. 7529

New Case No. 167; Old Case No. 131

PARTIES

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INTERPRETATION TO AWARD NO. 131 (Case No. 167)

FINDINGS OF THE BOARD

On 11/29/2017, the Board sustained the claim of R.E. Goodman, when it found no nexus between 2 misdemeanor charges arising out of Claimant's custodial care of a minor and his position in which he maintained seniority as an Assistant Bridge Foreman. Claimant was removed from service on May 31, 2016, based on the pending charges that had begun as felony allegations and were reduced to misdemeanors. The charges had not been adjudicated at the time of Claimant's removal. Carrier employees alerted the Carrier to the charges brought against Goodman.

The Organization objected to the Carrier's failure to include overtime in its calculation of back pay under Rule 25 Section 4, which reads, as follows:

**Rule 25- Discipline, Hearings and Appeals
Section 4-Exoneration**

"If a disciplined employee is exonerated on appeal, the discipline shall be stricken from his record. If an employee has lost time due to such discipline, he shall be paid the difference between the amount he would have earned had he not been disciplined and the amount he earned or received during the discipline period."

The Carrier argues that the language of Section 4 is quite clear. It makes no reference to the inclusion of overtime in the calculation of back pay. If the Board concludes that the language of the Rule is ambiguous, the practice between the parties is to pay straight time hours and not overtime in calculating the make whole remedy. The Carrier cites 8 instances in which employees were reinstated. They were paid only straight time hours.

The Carrier maintains that the remedial issue is part of the Organization's claim. Therefore, it has the burden of proof to establish its claim. If the Board concludes that Claimant is entitled to overtime pay, it should be only a reasonable amount of overtime.

The Organization cites the example of reinstated employee Black to whom the Carrier did include overtime in the calculation of the back pay the Carrier paid him.

ANALYSIS

Overtime

The Carrier cites many Third Division and Public Law Board Awards on the issue of burden of proof. In most of the cases cited the matter of burden involved a determination of the claim itself. In this case, the Board sustained the claim. In other words, the Board already determined the burden of proof issue. The Carrier has the burden to establish the basis for removal. Here, it failed to establish a nexus between Claimant's off duty conduct and the reputation of the Employer and/or the safety of the Carrier's employees.

In this Interpretation, the issue is remedy. The fashioning of a remedy lies well within the scope of the Board's discretion. To the extent there is a "burden" issue, it follows the party in whose possession the necessary records reside in order to consider and determine the remedial issue.

Claimant has his tax records and documents, such as the W-2 from the interim employer that are necessary to calculate the amount of the offset against back pay. The Carrier has Claimant's time records and assignment

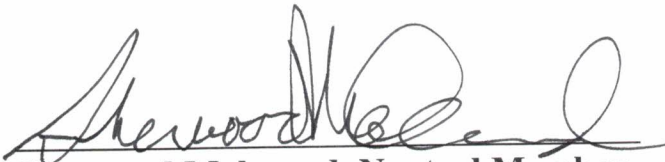
history necessary to calculate how much Claimant would have earned had he not been removed. To the extent there is a burden, it follows the party with the necessary records.

Rule 25 Section 4 provides that the make whole remedy for the reinstated employee “. . . be paid the difference between the amount he would have earned had he not been disciplined and the amount he earned or received during the discipline period.” The Carrier is correct that this language does not specifically reference overtime. However, it is broad in scope; it speaks in terms of earnings instead of wages or straight time hours. The Board concludes that the breadth of this language incorporates the inclusion of overtime in calculating a back pay remedy.

This Board agrees. On the property, the Organization demanded \$28,215 in back pay for his straight time hours and \$7011 for overtime for a total of \$35,226. The Organization’s demand is reasonable. The Carrier paid Claimant the straight time hours. The Board directs that the Carrier pay the overtime claim of \$7011.

INTERPRETATION OF AWARD NO. 131 (CASE NO. 167)

The Carrier shall implement the remedy as stated above. The Carrier is directed to comply with this Award on or before thirty (30) days following the Award date below.



Sherwood Malamud, Neutral Member

Date: February 9, 2021