

PUBLIC LAW BOARD NO. 7529

Case No. 135

PARTIES
TO THE DISPUTE

Brotherhood of Maintenance of Way Employees
Division of the International Brotherhood of Teamsters
System File: 300965

VS.

CSX Transportation, Inc.
Carrier File: 2016-210472

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, and that the parties were given due notice of the hearing.

Under date of August 22, 2016, Claimant, M. B. McKibben signed a request to submit this disciplinary matter for processing by Public Law Board 7529 (Special Board of Adjustment) for expedited handling.

FACTS

The Carrier hired Claimant M.B. McKibben on July 6, 2015. On May 27, 2016, Claimant was working as a Vehicle Operator. Claimant became upset over a payroll issue. He believed he was shorted 2½ hours of overtime. He and the rest of the crew were in the Section truck, when Claimant yelled he would not work until the shortage issue was resolved.

At this juncture, Claimant spoke with Jones, who on this crew was assigned as a machine operator, but on the date when Claimant believed he had been shorted the overtime, Jones served as the foreman of that crew. During the discussion between Claimant and Jones, Floyd, the Foreman on this crew interjected. He told Claimant he was acting in a childish manner. Claimant told Floyd to mind his own business. A verbal altercation ensued.

The rest of the crew exited the truck. Claimant approached them and informed them that he had thrown the keys to the Section truck into the woods. Roadmaster Jarrett was called to the job site.

At the direction of the Roadmaster's supervisor, after Jarrett had interviewed the other employees on the crew, he took Claimant in the Roadmaster's truck to return to the Depot in Bowling Green. As the truck approached Highway 31, Claimant asked the Roadmaster if he was removing Claimant from service. When Jarrett answered in the affirmative, Claimant asked to be immediately dropped off. The Roadmaster was just entering highway 31, as a result, he did not immediately stop, but Claimant began to exit the truck.

Claimant began to head in the direction in which the crew remained at work tamping the service track near the granary. Roadmaster Jarrett fearing further interactions between Claimant and the crew Foreman Floyd, Jarrett picked up the foreman and drove him away from the worksite. At the direction of his supervisor, Jarrett contacted CSX police. When they were not available, he contacted the local police. When Jarrett returned to the worksite with Foreman Floyd in the truck, the police had already spoken with Claimant. The Roadmaster then transported both men back to the Bowling Green Depot. Claimant was removed from service. Floyd returned to work.

By letter dated August 3, 2016, Division Engineer Crossman concluded that Claimant violated CSX Transportation Operating Rules 100.1, 103.1, 103.7, 104.1, 104.2, 104.3 and CSX Safety Rules GS – 1. He concluded that dismissal was the appropriate discipline for Claimant's conduct on May 27, 2016.

Rule 103.1 provides:

Employees must keep CSX electronic devices, tools, keys or other property

1. In a safe, clean and working condition;
2. Available for use as required; and
3. Protected against all unauthorized use or theft.

103.7 Employees must not:

- a. Restrict or interfere with the intended functions of any device or equipment;. . .

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

- b. Insubordinate; or

. . .

- d. Quarrelsome

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

- b. Altercations; . . .

During the on property hearing, the Organization representative objected to the presence of an observer, a staff engineer in training, who asked a question during the hearing. The Hearing Officer sustained the objection of the Organization representative to the observer asking

questions.

The Organization objected to the omission of any reference in the hearing Notice to the Rules allegedly violated by Claimant. The Hearing Officer refused to allow the Organization to enter into the record Notices that CSX had provided in other disciplinary matters involving other employees that specified the Rules allegedly violated. The Hearing Officer excluded the notices, because they concerned employees who were not the subject of this hearing.

The Hearing Officer excluded a waiver that CSX offered to another employee, who in the opinion of the Organization, was similarly situated to Claimant and under circumstances similar to this case. The Hearing Officer excluded the evidence on the same grounds that it did not involve McKibben.

The Carrier's Hearing Officer carried the hearing into a 2nd day to permit the Organization time to prepare a closing statement. Nonetheless, the Organization objected to the amount of time provided to the Organization to prepare closing argument.

The Carrier Argument

The Carrier argues that Claimant received a fair hearing. The Notice advised Claimant of the date, the location and the conduct that would be the subject of the hearing. Claimant was afforded the opportunity to cross-examine the Carrier's witnesses and to call witnesses. The Carrier complied with the procedural requirements of Rule 25.

The Carrier argues that it met its burden of proof. There is substantial evidence that Claimant was quarrelsome over his belief that the Carrier shorted him 2.5 hours of overtime pay. He threw the keys to the Section truck that the crew needed for its work on the track into the woods. Luckily, his fellow crew members observed where he had thrown the keys. There was no physical altercation. Yet, Claimant's loud voice and throwing his helmet in an aggressive manner is conduct that violates the Carrier's rules.

Since Claimant was a short term employee dismissal is an appropriate level of discipline for the disturbance and delay Claimant caused on May 27.

The Organization Argument

The Organization maintains that the Carrier failed to meet its burden of proof. The evidence clearly demonstrates that there was no physical altercation. The Foreman, Floyd egged on Claimant by referring to his conduct as childish. Claimant is a short-term employee. The appropriate level of discipline is a suspension rather than dismissal.

Board Findings

Procedural Issues

The Board concludes that the on property Hearing Officer improperly excluded the proffered evidence of prior instances in which the Carrier set forth the rules allegedly violated in the hearing Notice. However, the exclusion of this evidence does not rise to the level of denying Claimant a fair hearing. The exclusion of this evidence was not prejudicial. The Board in several awards has determined Rule 25 does not require the Carrier to specifically set out the Rules allegedly violated in the hearing notice.

On property, the Organization objected to the Hearing Officer's exclusion of evidence of an offer of a waiver to an employee in circumstances similar to those of Claimant in this case. Although the Board would have considered this evidence as relevant to the consideration of the level of discipline appropriate in this case, its exclusion is not prejudicial and does not prevent the Board from assessing the appropriate level of discipline.

The Board concludes that the Carrier provided Claimant with a fair hearing. The notice of the hearing apprised Claimant of the date and particular conduct that forms the subject of the investigatory hearing. He was afforded the opportunity to cross-examine the Carrier's witnesses. He had the opportunity to call witnesses. Although the Organization objected that it did not have sufficient opportunity to prepare a proper closing, the Board concludes that the on property Hearing Officer went out of her way to afford the Organization sufficient time to prepare a closing. The Hearing Officer delayed the closing of the hearing to the next day to afford the Organization sufficient time to prepare a closing.

The Merits

Although there are some inconsistencies in the testimony of Claimant, Roadmaster Jarrett and Foreman Floyd, in an attempt to provide Claimant with the benefit of any doubt, the Board considered the testimony of crew members, Mize, Jones, Foreman Floyd, Roadmaster Jarrett and Claimant in a light most favorable to Claimant. These findings follow from that analysis.

Claimant's anger over the shortage of pay for 2 ½ hours of overtime was disproportionate. He became loud and quarrelsome. Once Jones verified that they had worked overtime, Claimant should have pursued the overtime pay through the Carrier's procedures. In the final analysis, even if Roadmaster Jarrett's requirement that employees enter on a board when they work overtime if that served to deprive Claimant of overtime pay, his remedy could be found in the Carrier's administrative procedures and the grievance procedure, rather than by insisting that his claim for overtime pay be immediately resolved or he would hinder the performance of the day's work by the crew. He petulantly threw the keys to the Section truck into the woods. The Board finds this evidentiary record supports findings that Claimant violated

Rules 103.1, 103.7 and Rule 104.2. Claimant was quarrelsome. He prevented the crew from performing the day's work, for some period of time.

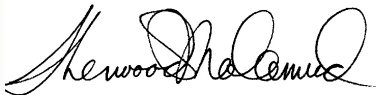
However, the evidence does not support a finding that Claimant engaged in an altercation, a violation of Rule 104.4. Foreman Floyd did not see Claimant throw his helmet at Floyd. The helmet hit the ground and then hit Floyd on the elbow. The accounts of the other employees present, confirm that Claimant threw his helmet on the ground. He did not deliberately throw it at Floyd. The Board finds that what transpired between Claimant and Floyd was not allowed to develop into an altercation. Roadmaster Jarrett took steps to prevent that from happening.

The Penalty

As a very short term employee of 10 months service, throwing the keys into the woods together with the tumult Claimant began with his insistence that his overtime claim be resolved on the spot, support the Carrier's decision to end Claimant's employment after 10 month's service.

AWARD

Claim denied.



Sherwood Malamud
Neutral Member
Date: 3/2/18