PUBLIC LAW BOARD NO. 7529

Case No. 136

PARTIES
TO THE DISPUTE

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

vs.

CSX Transportation, Inc.

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 September 12, 2016, Claimant, D. R. Neuspickel 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 D.R. Neuspickel on July 2, 1976. In a Notice dated July 7, 2016, the Carrier directed Claimant to participate in an investigatory hearing that related to his conduct at 1100 hours in the vicinity of Finney Ohio on June 29, 2016 for making racially disparaging remarks on a public social media site. An investigatory hearing was initially scheduled for July 28, 2016. It was held on August 10, 2016. By letter dated August 30, 2016, Division Engineer Crossman imposed dismissal as discipline for Claimant's violation of the Carrier's Social Media Policy and the CSX Code of Ethics.

On Sunday, June 26, 2016, while at home in Sanders Kentucky, off duty and off payroll, Claimant posted the following to the wall of a person who is not an employee of the Carrier, in a conversation in which none of the participants are employees of the Carrier. The first comment posted by the Facebook account holder Ray Marcum on June 25, 2016 states:

> "Obama just admitted he want total gun confiscation you will never get it you Muslim scum unless you want the hot end"

Ray Kd responds, the Facebook program identifies him as Oak Lawn Community High School:

> "Haha u dumb Honkeyyyy....U have to give up ur little bb gun.. Do it with a smile on ur face bitch"

Then, on Sunday June 26, 2016, Claimant posts, and the Facebook program identifies Claimant as, Engineering Department CSX Transportation:

> "Ray K your black welfare ass will never be able to equal the intelligence of the white man."

The screen shot of these series of postings sets out the response of Laura Jones without any further identification as occurring on June 27, 2016 at 1:16 a.m.:

> Don Neuspickel hay at least Ray is for lent to the farms for buck breeding purposes for a few dollars Obama gotta get some of that welfare money back some how. Being a democrats Obama loves slavery.

The Carrier charges that Claimant's posting violates the Carrier's Social Media Policy which provides:

Objective

This policy (a) sets out guidelines for employee personal use of Social Media and (b) describes how to obtain access to Social Media using CSX Computer Resources when necessary for business purposes.

. . .

"Social Media" means online technology tools that facilitate communications over the internet and enable individuals to create and share electronic content and includes, but not limited to, . . message boards such as Facebook. . .and You Tube.

Policy

CSX recognizes that Social Media plays an important role in business communications and in the daily lives of our employees, customers and the communities we serve. CSX encourages its employees to interact responsibly in the online community and has published Social Media Guidelines to help foster constructive engagement.

. . .

Employees who use Social Media, whether on or off the job, or subject to the same rules for online communications about CSX that apply to any other communications:

- Do not post confidential CSX trade secrets, proprietary information, attorney – client privileged information, personal information about CSX employees or other confidential information. If you have a question about whether particular information can be disclosed in social media, refer to the data classification and handling policy will consult the law department.
- Unless you are expressly authorized to speak for the company in social media, clearly identify any messages, sites or groups relating to CSX as personal and not official

CSX communications. You must include a disclaimer that says, "The postings on this site are my own and do not necessarily reflect the views, positions, strategies, or opinions of CSX.

. . .

Nothing in this policy is intended to interfere with an employee's rights under the Railway Labor Act including criticism of CSX's labor policies, wages and working conditions, treatment of employees and the terms and conditions of employment.

Enforcement

Violations of this policy are taken seriously. Violations of this policy will be addressed pursuant to CSX's disciplinary practices and other actions which CSX deems appropriate. If you violate this policy, you will be subject to discipline, including discharge (for employees) and termination of contracts with CSX (for independent contractors).

. . .

The Carrier's Individual Development and Personal Accountability Policy for Engineering Employees (IDPAP) makes no reference to the Social Media Policy.

The Carrier's Employee History for Claimant reflects incident standing levels under the IDPAP for: Attendance, Minor, Serious, Egregious/Major are all at zero "0" level. At the on property hearing, Roadmaster Ducharme, when asked, testified that Claimant was an excellent employee.

The Carrier Argument

The Carrier argues that Claimant received a fair hearing. Claimant admitted making the racist posting. In light of the admission, the well established rule applies that an admission to rule violations negates procedural errors. The Notice sets out the wrong date and location where the offensive posting was made. It directs Claimant to report for an investigatory hearing with reference to that conduct, PLB 6059, Award 498 (Lynch). The Organization raised no other procedural objections at the on property hearing. It is barred from doing so on appeal, NRAB Second Division, Award No. 7492 (Wallace). The Notice of charge was sufficient to alert Claimant as to the nature of the charge that served as the subject of the investigatory hearing.

The facts are not in dispute. Claimant posted the offending comments. He is identified as an employee of the CSX Engineering Department. The identification of CSX in his posting ties the Carrier to his remarks and provides a nexus between his remarks and the Carrier. Claimant's remarks violate the Carrier's Social Media Policy. Claimant did not include a disclaimer that his remarks were his alone and did not reflect the opinion of CSX. The Social Media Policy warns that postings should not violate the Carrier's Zero Tolerance Anti-Harassment policy. The posting leads the reader to believe that the views expressed by Claimant were the views of CSX.

The Carrier argues that dismissal is the appropriate penalty in this case that involve the violation of the Carrier's Social Media and Anti-Harassment policies, PLB 7529 Award 127 (Malamud), PLB 7255 Award 21 (Kohn). The violation falls within the IDPAP Major Offense

category, PLB 7529 Award 118 (Malamud).

The Organization Argument

The Organization argues that Claimant did not receive a fair hearing. The Notice of the investigatory hearing stated that the offending conduct occurred on June 29, 2016 in Finney Ohio. In fact, the substantial weight of the evidence establishes that Claimant posted the remarks at issue on Sunday, June 26 from his home in Sanders Kentucky, while Claimant was off-duty and not subject to Carrier supervision and control.

Claimant was unaware of the Carrier's Social Media Policy. His remarks were made to non-- CSX employees. The posting did not indicate that Claimant spoke for or was making his remarks as an agent of the CSX Engineering Department. In the course of its argument during the appeal, the Organization argued that the Carrier's Facebook policy, exhibit number 6 at page 2, was not introduced into the record at the on property hearing. The record establishes that the individuals who participated and posted remarks to this Facebook site were all speaking with the same racial orientation.

Claimant is a 40 year employee with a clean disciplinary record. The Organization argues that the Carrier failed to make its case by substantial evidence. It argues that the Board should sustain this claim, in its entirety.

Board Findings

Procedural Issue

The Carrier maintains that Claimant admitted to violating the Social Media Policy. Claimant admitted to posting the remarks to Marcum, a non-CSX employee's, Facebook wall. Claimant denied any knowledge of the existence of the Carrier's Social Media Policy prior to the conference call among Matt Charron, identified as an employee in the CSX Human Resources Department, Roadmaster Ducharme and Claimant.

The only evidence that suggests that Claimant was aware of the Policy prior to the conference call is the notation in Claimant's training history that he participated in "Ethics Training" on October 8, 2015. Roadmaster Ducharme did not participate in that training. There is no evidence that the Carrier's Social Media Policy with an effective date of September 15, 2012 was the matter on which attendees were trained on October 8.

The on property Hearing Officer did not make any credibility findings. The Board concludes that the Carrier failed to establish by substantial evidence that Claimant had any knowledge of the Carrier's Social Media Policy. Since that Policy requires the use of specific disclaimer language with postings, or in the alternative, the deletion of CSX from an individual's Facebook profile, the Board finds that Claimant was unaware of and therefore, the Carrier failed to establish that Claimant knowingly violated the Carrier's Social Media Policy.

The Carrier claims that under Board precedent, Claimant's admission negates any

procedural errors. Since the Board finds that Claimant could not admit to violating a policy that he did not know existed, the Board must consider the procedural errors extent in the Notice that directs Claimant to report to the investigatory hearing.

The Notice refers to conduct that Claimant allegedly committed on June 29, 2016 in Finney Ohio. There is no evidence that Claimant violated any Carrier Rule or Policy on that date in that location. The Notice was defective and did not conform to the requirements of Rule 25. The conduct that was the subject of the investigatory hearing occurred on Sunday, June 26 in Sanders Kentucky, while Claimant was off duty at home participating in a Facebook discussion. The Board entertains a motion to conform the charges to the evidentiary record to avoid the procedural flaws in this record. Neither Claimant nor the Organization were surprised by the issues raised at the investigatory hearing. The intent and protections afforded by Rule 25 were afforded Claimant.

Merits

The Board finds that the Carrier failed to establish by substantial evidence a nexus between Claimant's posting that may be characterized as racist and the Carrier. With the exception of Claimant, all of the participants posting to the Facebook site were not CSX employees. There is no evidence that those who posted comments to this discussion had any connection to CSX.

The Carrier argues that the reference to CSX that Facebook lifts from an individual's profile and includes with that individual's postings provides the nexus between the Carrier and Claimant's posting. The discharge divorces the Carrier from Claimant's racist remarks.

Charron asked Claimant to delete reference to CSX from his profile. Claimant immediately complied with that request. However, the record contains no evidence that anyone other than Charron saw this posting or that the posting had any impact on the Carrier's operation or reputation.

There is no evidence that any CSX employee objected to this posting or refused to work with Claimant as a result of this posting. The only CSX individual who noticed the posting is Matt Charron, who is identified in the record as an employee in the CSX Human Resources Department in Jacksonville Florida. Neither the Carrier nor the Organization objected to Charron's participation in the hearing by phone, yet, neither the Carrier nor the Organization called him to testify at the on property hearing. The Board does not have the benefit of his testimony to establish an evidentiary basis for the Board to infer a relationship between Claimant's posting and the Carrier.

There is no evidence that the posting resulted in any canceled orders or lost customers. The posting is not coupled to any Carrier function or activity. There is no evidence that any community official or organization objected to the posting. There is no evidence of any news coverage of this posting that would impact the Carrier's standing in the communities it serves. Consequently, the Board concludes that the Carrier failed to establish a nexus between the posting and any corporate or operational interests of the Carrier.

The central matter on which this case turns is the Carrier's Social Media Policy. It encourages employees to add a disclaimer to their postings. The disclaimer alerts the reader that the remarks are those of the employee, in this case Claimant, and not the Carrier, CSX. Without training on the policy, a Trackman would not know the significance of a disclaimer nor the need for a disclaimer for any personal comments the employee makes on his social media.

Mere reference to Ethics training on October 8, 2015 in Claimant's training history, does not establish that the Carrier trained Claimant on the Carrier's Social Media Policy. There is no evidence in this record to indicate that Ethics training includes training on the 2012 Social Media policy. In unrebutted testimony, Claimant asserted no knowledge of the Carrier's Social Media policy. It is the Social Media policy that is the basis for the Carrier's action. Without evidence of training on a policy that requires Claimant to undertake fairly specific and technical action by attaching a disclaimer to his social media postings, the Carrier has failed to place Claimant on notice of the Carrier's expectations. The Carrier has no basis to discipline Claimant, and it has failed to establish a nexus between employee off-duty conduct and the Carrier.

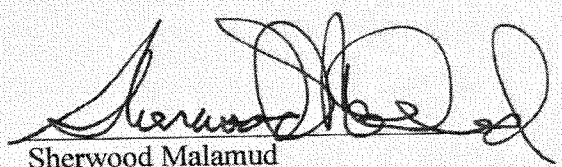
The Carrier cites two Awards of this Board, PLB 7529 Awards 127 and 118 (Malamud) and Award 21, PLB 7255 (Kohn). In those Awards, the complained of conduct occurred on property while the offending employees were on paid duty. Here, Claimant was at home on his own time.

In the absence of sufficient proof that Claimant's conduct had any bearing on or relation to the Carrier, the Board does not reach the issue of whether the penalty imposed conforms to the Carrier's IDPAP.

The Board sustains the claim. The Board understands that an award of "Claim sustained" means the Carrier should reinstate Claimant with backpay (according to the manner in which the parties calculate backpay), with full seniority for the period that Claimant was removed from service to the date of reinstatement, benefits, and removal of the reference to the penalty in the Employee's history by the Carrier in the manner it effectuates that removal in cases in which a discharge claim is sustained.

AWARD

Claim sustained.



Sherwood Malamud
Neutral Member
Date: 2/19/2018

PUBLIC LAW BOARD 7529

Brotherhood of Maintenance of Way Employes, Division of the International Brotherhood of Teamsters	)	Award No. 136 Carrier File: 2016-211580
and	)	
CSX Transportation, Inc.	)	

CARRIER MEMBER'S DISSENT

The Carrier respectfully dissents to the Award 136. Further, the Carrier rejects the judgment of the Board and the rationale used to reach its conclusion.

I. BACKGROUND

On June 26, 2016, D.R. Neuspickel ("Claimant") was off-duty and posted a Facebook styled message on another Facebook styled comment of an African America, non-csx civilian. The specific message provided, "Ray K your black welfare ass will never be able to equal the intelligence of the white man." Moreover, the post displayed "Engineering Department CSX Transportation" directly under Claimant's name on the post. The post came to the attention of the Carrier and a Carrier Human Resource Officer interviewed Claimant to see if Claimant had actually made the posting. Claimant admitted to making the post and the Carrier HR Officer asked Claimant to remove the post; Claimant complied. Claimant was charged with violating the Carrier's social media policy. Claimant agreed he made the posting during the investigation and further admitted to violating the Carrier's social media policy. Claimant did testify he was unaware of the Social Media policy, despite being a long tenured employee and undergoing ethics training. Claimant was found culpable for making racially disparaging remarks while being identified as a CSX employee in an internet posting. Claimant was dismissed from the Carrier's service.

On December 11, 2017, Public Law Board ("PLB") 7529 heard Case Number 136 concerning the dismissal of Claimant. On February 20, 2018, Sherwood Malamud, Neutral Member of PLB 7529, issued Award Number 136, which fully sustained Claimant's claim and afforded full back pay. Neutral Malamud found the Carrier failed to show Claimant was aware of the relevant policy or establish a nexus between Claimant's conduct and any legitimate Carrier interest.

II. ARGUMENT

The Carrier is shocked and dismayed by this outcome. Despite Claimant's off-duty status, he made horrific racial remarks and specifically associated himself to the Carrier while making those comments in a public forum: Facebook and the internet. Here, the Carrier did establish a nexus and proved by substantial evidence Claimant knew or should have known his actions violated Carrier policies.

A. The Carrier established a nexus.

While there is significant dicta contained throughout the award, the issue was clearly outlined by Neutral Malamud. He found there was no connection between Claimant's conduct and any legitimate Carrier interest.

Neutral Malamud came to that conclusion because he found the recipient of the harassing and racist remarks was not a Carrier employee. Further, the Carrier did not produce a customer during the investigation to testify it was offended or would refuse to do business unless the Carrier took action against Claimant. Neutral Malamud also found erroneously no Carrier employee took offense to the remark – the Carrier HR employee obviously took issue and had the comment removed. The fact Claimant identified himself as Carrier employee while making the remark was completely disregarded. According to this neutral, employees can say or do anything under the

banner of CSX as long as customers are not complaining. Further, this decision, with full back pay, rewards Claimant's actions, advised he committed no offense, and can continue his racist and discriminatory actions.

Here, Claimant chose to identify with the Carrier when he made those comments. No one forced him or twisted his arm. Claimant is in complete control of that information and his actions. The Carrier did not ask to be associated with such foul comments and should not be forced to associate with bad actors such as Claimant. Claimant created the nexus when he dragged the Carrier into the Facebook conversation and communicated such hateful speech to members of the public. The Carrier has a legitimate interest in not being associated with racist and discriminatory remarks. This neutral has created an impossible standard for the Carrier to meet. Customers do not complain because the Carrier takes appropriate action to remove racist and discriminatory employees. Especially in the current social climate which impacts customer relations, the Carrier need not be compelled to tolerate such behavior.

B. The Carrier proved by substantial evidence Claimant knew or should have known his actions violated Carrier policies.

While the central issue was actually the nexus between Carrier interests and Claimant's actions, Neutral Malamud attempts to complicate and confuse future readers by suggesting the outcome hinged on Claimant's knowledge of the Social Media Policy. Despite the fact that was a peripheral issue during the on-property investigation and at the arbitration hearing, Neutral Malamud made a credibility determination and found the Carrier failed to prove Claimant actually knew about how his actions were governed by the Social Media Policy.

Such a determination is convenient and problematic. Claimant is a 40 year employee and had recently taken ethics training. The Anti-harassment and Social Media Policy is contained within the Carrier's Code of Ethics. While it is true the Carrier witness could not identify

specifically what was covered in ethics training, there is no doubt Claimant had an overview of acceptable ethics behavior. Further, Claimant should absolutely know better. He is a 40 year employee and his self-serving ignorance that his actions were unacceptable is literally unbelievable. It doesn't take an expert in social relations to know one should not identify with their employer when saying African Americans are intellectually inferior to Caucasians. Especially in a public forum with "CSX" in the comment. Further, the policy is posted on the Employee Gateway; an internal website freely accessible to all employees who can turn on a computer and click a mouse. It is evident by his actions Claimant is competent to find such a policy. Moreover, it is standard arbitration precedent that ignorance of a posted rule is not a defense. It is not surprising Claimant denied knowing about the Social Media Policy and the fact Neutral Malamud took that testimony at face value is astounding and contrary to arbitration precedent. If an employee need only deny knowledge of a rule, the Carrier would be unable to discipline anyone.

Here, there is sufficient evidence Claimant either knew or should have known his actions ran afoul of Carrier policies. The discussion by Neutral Malamud on this issue is transparent. It is an attempt to find a way out for Claimant because he is a 40 year employee with an otherwise clean discipline record. Such a decision is unacceptable and suggests employees can build up enough good credit to be immune from despicable and discriminatory conduct. Not only is this reasoning plain wrong, it is offensive.

III. CONCLUSION

Despite the ill-reasoned decision, the Carrier did prove by substantial evidence there was a nexus between Claimant's actions and a legitimate Carrier interest. Further, there is substantial evidence Claimant either knew or should have known his actions were in violation of Carrier policies. Neutral Malamud has fashioned his own remedy regardless of the case facts. Further, he

has incentivized this behavior. What is to prevent Claimant from committing the same act? Here, he was paid for such speech and rewarded by alleging ignorance. This outcome is unreasonable, problematic, contrary to industry standards, and contradicts public policy.

Accordingly, for the reasons set forth above, the Carrier respectfully dissents from PLB 7529, Award Number 136.

Respectfully submitted,

Macon Jones
Carrier Member
February 20, 2018