

PUBLIC LAW BOARD NO. 7529

Case No. 140

PARTIES
TO THE DISPUTE

Brotherhood of Maintenance of Way Employes
Division of the International Brotherhood of Teamsters
System File: D603216

VS.

CSX Transportation, Inc.
Carrier File: 2016-214221

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.

By letter dated November 23, 2016, Claimant, S.M. Kyser requested that this disciplinary matter be processed by Public Law Board 7529 (Special Board of Adjustment) for expedited handling.

FACTS

The Carrier hired Claimant S.M. Kyser on July 24, 2006. By letter dated August 30, 2016, Assistant Division Engineer (ADE) McLain notified Claimant to attend an investigative hearing, after mutually agreed to postponements, that occurred on October 19, 2016. The Notice stated the purpose of the hearing was:

“... to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 1000 hours, on August 23, 2016, in the vicinity of Marrow County [Ohio]. Over a two year period while performing duties as VO (log loader), you were taking used ties from the property and using them at your home for various purposes; also, giving the ties to neighbors. . .”

CSX Railroad Police Special Agent S. Studene notified ADE McLain that Claimant had a collection of banded and unbanded railroad ties on his property. On August 24, 2016 McLain and Studene met with Claimant. They confronted him about the ties on his and his neighbors' properties and they discussed MWI Policy 404.04. At the hearing, the Carrier charged Claimant with violating Operating Rules 103.1, 105.1, as well as MWI 404.04. These Rules and Policy provide, as follows:

103- CSX Property and Interest

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

- ...
3. Protected against unauthorized use or theft.
...

105- Reporting Conditions

105.1 Protect trains and on-track equipment against any known condition that may interfere with safe operations. Immediately report the following conditions to the proper authority:

- ...
4. Loss, damage, or theft of CSX or customers' property; and
5. Any condition that may affect safe and efficient operations.

MWI 404-04

Used Crosstie Management

Purpose: to properly manage storage and disposal of used crossties and other treated wood products generated from track maintenance activities system wide.

II. PROCEDURE

...
B. DIVISION, SLWT, AND ROADMASTER CROSSTIE REMOVAL

1. Coordinate used crosstie removal and disposal efforts with Manager Fleet Management . . . or Specialist Fleet Operations. . . prior to beginning work activities to ensure timely delivery of railcars for loading of used crossties or other removal methods.

D. Distribution of used crossties to the general public and outside parties other than those designated by the Fleet Manager or Specialist is strictly prohibited.

There were times, particularly when material was to be transported from the Southern to the Northern end of the territory, Claimant would take home the flatbed vehicle used to transport rail and ties. On those occasions that he had permission to take the vehicle home, he took a load of ties, as well.

When Special Agent Studene observed Claimant's property and that of his neighbors, he discovered that Claimant had transported 642 ties, that he counted on August 22, 2016, to Claimant's and his neighbors' properties. He believes the number taken to be approximately 700, both banded and unbanded over a period of approximately two years. Banded ties are committed to third party vendors. When Claimant took those it amounted to theft. The ties were the property of the third party companies.

Claimant did not have permission from a Manager or Specialist to store ties on his property or distribute them to his neighbors. At one point, approximately 2 to 3 years ago, Claimant did obtain permission from ADE McLain to take, transport and unload a number of ties to construct a shooting range backstop.

However, since that one point in time, Claimant did not have permission to take any other ties for any other purpose than building a shooting range backstop. ADE McLain did not give permission and there is no basis for Claimant to believe that he had carte blanche to take ties at any time that he wanted to.

After reviewing the on property record developed at the October 9, 2016 hearing, by letter dated November 8, 2016, Division Engineer for the Great Lakes assessed dismissal as the appropriate discipline for Claimant's conduct.

The Carrier Argument

The Carrier argues that Claimant received a fair hearing. Claimant admitted to taking the ties. Two years previously he had permission to take ties to build a shooting range back stop. He did not have permission to continue to take ties and supply them to his neighbors. The banded ties were the property of third party vendors. Taking those ties constitutes theft. Dismissal is the appropriate penalty for theft. In NRAB Third Division No. 36337 (BMW v. CSXT) (Kenis), dismissal was determined to be the appropriate penalty for taking a half full gas can.

The Organization Argument

The Organization argues that Claimant received permission to take ties. Claimant took ties for a long period of time without supervisory objection. Claimant acted within the scope of the authorization provided to him. In light of the prior authorization he received, the discipline imposed should be reduced to a lesser form other than dismissal.

Board Findings

Procedural Objection

At the on property hearing on October 9, 2016, the Organization objected to the August 30, 2016 notification letter's failure to set out the Rules allegedly violated by Claimant that would form the basis for the investigation. 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 August 30, 2016 notification letter.

At the on property hearing, the Organization objected to the Carrier's Special Agent Studene taking a statement from Claimant without advising him of his right to consult with an Organization representative before providing the statement. The Hearing Officer resolved this objection by removing the statement from the record. It was not available to the Board. The Board has not seen or relied on that statement in any way in making this decision. The Board concludes that Claimant received a fair hearing.

The Merits

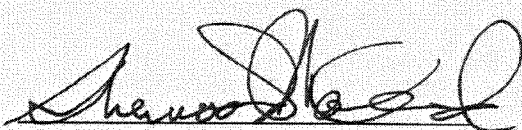
Claimant received permission to take some ties to construct a shooting range back stop on his property. He received that permission 2 to 3 years prior to the Carrier's notice to investigate his conduct. The Organization asks this Board to interpret the permission given once to an ongoing approval to take ties. The investigation brought that approval to an end. If there is to be discipline, it should be limited.

The Carrier has established by substantial evidence that Claimant received permission to take a sufficient number of ties to build the backstop. Claimant did not receive permission to distribute ties to his neighbors. Rules 103 and 105 are rules that are subject to annual training. Claimant did not ask for permission to continue to take ties. The Carrier's rules, MWI 404.04 prohibit the distribution of chemically treated ties to the general public.

Claimant had on his property banded ties. Those ties were the property of third party vendors. Those ties were awaiting pick-up by the vendors. Based on this evidence the Board finds that the Carrier has established by substantial evidence that Claimant violated Rules 103.1, 105.1 and MWI 404.04. As Referee Kenis noted in the award cited above, dismissal is the appropriate penalty for theft.

AWARD

Claim denied.



Sherwood Malamud

Neutral Member

Date: 2/27/2018