

PUBLIC LAW BOARD NO. 7529

Case No. 16
Award No. 16

Brotherhood of Maintenance of Way Employee Division
IBT Rail Conference

vs.

CSX Transportation, Inc.

Statement of Claim:

1. "The Carrier's decision to impose discipline upon employee D. Wirick in the form of a thirty (30) day actual calendar suspension beginning on Sunday, September 9, 2012, and ending Monday, October 8, 2012, as well as fifteen (15) calendar day overhead suspension for a period of one (1) year beginning on October 9, 2012, and ending October 8, 2013, and being required to contact the CSX Employee Assistance Program (EAP) for an evaluation and successfully complete any program if referred, under letter dated September 8, 2012, for the alleged violation of CSXT Operating Rules – General Rule A. Rules GR-2 and GR-3A, as well as CSX Policy on Violence in the work place and CSX Code of Ethics, in connection with an incident at approximately 0945 hours on June 19, 2012, wherein Claimant allegedly became angry, made an inappropriate hand gesture and drove off at a high rate of speed, kicking up rock and debris that struck Manager Steele and another employee that was in the area, is on the basis of unproven charges, unwarranted and in violation of Agreement (Carrier's File 2012-132882).
2. "As a consequence of the Carrier's violation described in Part 1 above, Claimant D. Wirick shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement."

Procedural Issues:

Before addressing the merits of this dispute, this Board must resolve several procedural issues raised by the Organization. Rule 25, as modified by Side Letter 22 requires that hearings "be scheduled to begin with thirty (30) days from the date management had knowledge of the employee's involvement." In the instant matter, management had knowledge of the incident on June 19, 2012, and the hearing was scheduled to be held on July 19, 2012. The Organization argues that the hearing was scheduled thirty-one (31) days after management had knowledge of the incident. However, the time to begin counting commences the day following management's knowledge of the incident which is June 20, 2012. Accordingly, the hearing was within thirty (30) days.

The Organization also argues that Claimant was denied a fair hearing as the result of Carrier only calling two (2) employee witnesses, who reported directly to the charging officers, while failing to call five (5) other employees who were members of a crew temporarily assigned

to assist on the date in question. The Organization argues that these employees likely witnessed the same incident about which the two (2) employees called as witnesses testified. The Organization maintains that Carrier is obligated to produce all witnesses with pertinent information.

However, Carrier's obligation to provide a fair and impartial investigation does not extend to calling multiple witnesses to the same event. The Organization had an opportunity to request these additional witnesses prior to the investigation but did not do so. Claimant forthrightly testified that, "I didn't think that they could do anything to help me out is the reason I didn't try to get a hold of any of them." (Transcript at p. 37, lines 19-20).

Findings and Opinion:

The Carrier and Employee involved herein are Carrier and Employee as defined in the Railway Labor Act, as amended. This Board has jurisdiction over this matter.

On June 18, 2012, Claimant, D. M. Wirick (ID No. 770615), a Rail Train Operation with over thirty (30) years of service, requested that he be able to take a few days off to see his doctor. Claimant was not scheduled to work the following day. Notwithstanding, Claimant's supervisor, Manager Rail Distribution Shelby Steele, told Claimant to meet him the following day at the job site located near the fairgrounds in Wellington, Ohio.

Claimant went to that site the following day and, according to him, had to wait quite some time for Steele and was getting "antsy" because he was not being compensated. Steele testified that when he met with Claimant he told him that because of his shortness of breath, inability to communicate on the radio, and complaints about chest pain, he was giving Claimant time off to see his doctor and was holding him out of service pending medical clearance. Steele then gave Claimant a MD-3 form to be filled in by his doctor. According to Claimant, after giving him the MD-3 form, Steele stated that his doctor would probably clear him to report back to work, but that Carrier's medical department would not do so.

Steele testified that at the conclusion of this conversation, Claimant was "very angry". He walked past two (2) company vehicles and a crew of five (5) employees assigned temporarily to assist Steele's team. These employees were waiting under some shade trees where Claimant had parked his van. Claimant then drove away on a gravel road which was not on the Carrier's property. Claimant got into the van and took off "with horn down and spinning rock" (Transcript at p. 7, line 21), some of which "brushed" his pant leg. (Transcript at p. 13, line 16). T. A. Carreker, Rail Train Operator, who was standing near Steele, testified that Claimant left "kind of fast and blowing horn." (Transcript 14, lines 8-9). He also stated that Claimant was throwing gravel and that he could hear it hitting the bottom of Claimant's van. (Transcript at p. 21, lines 5-7).

James Owens, Rail Train Operator who was also standing near Shelby, testified that Claimant drove his car "at high rate of speed, fast enough so that he was throwing mud, rocks, and whatever as he went by." (Transcript at p. 21, lines 39-40). The road was made up of crusted stone held in place by road tar.

Owens also testified that he observed Claimant make an obscene gesture by holding up his middle fingers as he drove away. (Transcript at p. 21, lines 42-43). However, Carreker testified that he could not see Claimant's face because the windows were tinted. (Transcript at p. 32, lines 39-41). Steele testified that he could see Claimant behind the wheel when he drove by, but that he did not observe any hand gesture because he had his back turned to him. (Transcript at p. 34, lines 12-20). Shelby testified that he was about fifteen (15) to twenty (20) feet away from Claimant as he drove by. Carreker and Owens were standing near Shelby. Owens, however, testified that he was twenty (20) to twenty-five (25) feet away when he observed Claimant's hand gesture.

Claimant testified that he did blow the car horn "a little bit" to warn the five (5) employees standing nearby that he was coming through but he did not take off at a high rate of speed. He maintained that he could not have possibly thrown up stones or gravel because he was driving cautiously by the other employees. Claimant denied making an obscene gesture and testified that the car windows were tinted and the tires had a mud flap. According to Claimant, Steele, Owens and Carreker were standing about thirty (30) feet from the roadway as he passed them.

Steele, Carreker and Owens each testified that Claimant drove away at a speed high enough to kick up gravel, rocks, pebbles, etc. from the road. Steele and Carreker each also testified that Claimant was blowing his horn the entire time he was driving away. Claimant acknowledged blowing his horn "a little bit", but denied taking off at a high rate of speed, or throwing up stones or gravel.

The testimony of Steele, as corroborated by Carreker and Owens, is sufficient to meet Carrier's burden to establish by substantial evidence that Claimant drove away at a rate of speed high enough to throw up stones, gravel, etc. while blowing his horn. However, Owens testimony that he observed Claimant through tinted car windows making an obscene gesture as he drove at a high rate of speed was contradicted by Carreker who testified that he could not see Claimant through the tinted windows. Steele testified that he could see Claimant through the van's tinted window but had his back turned so as not to be able to see the claimed obscene gesture. Claimant denied making an obscene gesture, and Owens' testimony on this point is insufficient to establish that he did so.

Carrier found Claimant to have violated Rule A, GR-2, and GR-3A, as well as its Policy on Violence and Code of Ethics. Rule A simply states that employees must know and obey all rules and special instructions that relate to their duties. GR-2 requires that employees act in a civil and courteous manner. By driving away fast enough to throw up dirt, gravel, etc. while blowing his horn, Claimant violated this rule when he failed to act in a civil and courteous manner as required by GR-2.

GR-3A states that employees must not participate in unauthorized activity while on duty or while on company property that may interfere with the work of other employees. Claimant was neither on duty nor on company property when he drove away. Moreover, there was no

testimony indicating how he may have interfered in the work of other employees. Accordingly, Claimant did not violate Rule GR-3.

The Carrier's workplace violence policy prohibits violence against co-workers, managers, or supervisors. Examples given in the policy of workplace violence, in addition to violent acts, include harassment, emotional abuse, domestic violence, stalking, bullying, threats, intimidation, and other acts that create fear in the workplace. Speeding in a car while blowing a horn is not a violent act and does not fall within any of these categories. There was no testimony that Claimant's acts caused anyone to fear for their safety. Claimant did not violate Carrier's violence policy.

The Carrier's Ethics Policy requires that employees treat colleagues with respect. By driving away while blowing his horn, Claimant showed a lack of respect for Steele. The Code of Ethics also states that each employee is responsible for his own safety and the safety of others. It admonishes employees to know the safety requirements of his job and to follow all safety and operating rules. While there was testimony that Claimant was driving at a high rate of speed, there was no testimony as to the rate he was traveling. The clear emphasis was that he was traveling at a rate sufficient to kick up rocks, gravel, etc. on a gravel road. There was no testimony that anyone was hit by this material or that anyone came close to being hit by this material, other than Steele's testimony that some of it "brushed" his pant leg. In the absence of reference to any specific safety rule, the foregoing is insufficient to establish that Claimant violated the safety concerns in the Ethics Policy.

Carrier has established by substantial evidence that Claimant violated Rules A and 2, as well as the Ethics Policy by being uncivil, discourteous, and disrespectful when he drove at a speed sufficient to kick up dirt, gravel, etc. while blowing his horn.

Claimant has two (2) prior violations for poor driving, as well as a major violation for speeding on numerous occasions. Notwithstanding, a thirty (30) day suspension and a fifteen (15) day overhead suspension under the circumstances of this case are excessive. Said penalty shall be reduced to a fifteen (15) day suspension.

Award:

Claim sustained only to the extent set forth in the above findings and opinion.

February 28, 2013
Date



Mitchell M. Kraus
Referee

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Interpretation

By decision dated February 28, 2013, this Board found that Claimant failed to act in a civil and courteous manner in violation of GR-2, and acted disrespectfully toward his colleagues by driving away from an area where they were working with horn blowing, at a sufficient rate of speed to kick up rocks and gravel. The Board found that Claimant had not violated Carrier's workplace violence policy. It reduced Claimant's penalty from a 30 to a 15-day suspension. The Board did not discuss Carrier's requirement that before reinstatement, Claimant had to contact its Employee Assistance Program (EAP) for an evaluation and successfully complete any program if referred.

The Organization sought an interpretation of the award urging that it was not the Board's intent that Claimant be required to contact EAP and successfully complete any program to which referred inasmuch as the Board reduced the discipline assessed. Carrier responds that since the Board did not address the EAP issue, it must have determined to let it stand.

While this Board found that there was insufficient evidence to establish that Claimant had made an obscene hand gesture, the evidence otherwise established that Claimant had engaged in the charged conduct. This Board does not find under these circumstances that Carrier's requirements as to its EAP department is clearly unwarranted. Accordingly, the award stands as written, with no modification of the Carrier's EAP requirements.

July 23, 2013

Date



Mitchell M. Kraus
Referee