

PUBLIC LAW BOARD NO. 7529

Brotherhood of Maintenance of Way)	
Employes Division - IBT Rail)	
Conference)	
)	
and)	Case No. 57
)	Award No. 57
)	
CSX Transportation, Inc.)	

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's dismissal of Claimant T. Carroll for the alleged violation of CSXT Operating Rules 100.1, 104.1, 104.3, 106.3 and 111.1 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File D16000414/ Carrier File 2014-164586).
2. As a consequence of the violation referred to in Part 1 above, Claimant T. Carroll shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement."

Background

On February 6, 2014, the Carrier issued a notice of investigation to Claimant stating:

The purpose of this formal investigation is to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 0645 hours, on January 24, 2014, in the vicinity of milepost A649.1, when you were observed sleeping in the bridge house while on duty and an alcoholic beverage, as well as an ashtray with cigarette butts were also found in the bridge house.

In connection with the above incident, you are charged with failure to properly and safely perform the responsibilities of your position, sleeping on duty, having alcoholic beverages in your possession while on duty, unauthorized use of tobacco products and possible violations of, but not limited to, CSXT Operating Rules 100.1, 104.1, 106.3, and 111.1; as well as the CSX Smoke Free Workplace Policy.

Rule 100 – Application of Rules and Special Instructions, requires employees to know and comply with rules, instructions and procedures governing their duties and to take the safest course but to contact a supervisor should there be a need for clarification on the safest course (Rule 100.1).

Rule 104 – Employee Behavior, states that on-duty employees "must: 1. Devote themselves exclusively to the service of CSX, ... 3. Perform duties in a safe and efficient manner that prevents unnecessary delays to customers, ... 5. Take the safe course when conditions are not covered by rule" (Rule 104.1) and Rule 104.3 prohibits "carelessness, incompetence, or willful neglect of duties; or behavior that

endangers life or property” when an employee is “on duty, on CSX property, or when occupying facilities provided by CSX.”

Rule 106 – Drugs and Alcohol, prohibits an employee from “possessing, using, or being under the influence of alcoholic beverages or intoxicants when: a. Reporting for duty, or b. On duty, or c. On CSX property, or d. Occupying facilities provided by CSX” (Rule 106.3).

Rule 111 – Sleeping and Napping While on Duty states that “Employees must not sleep while on duty, except train and engine service employees who are allowed to nap. An employee lying down or in a reclined position with eyes closed, covered, or concealed is considered to be sleeping or napping” (Rule 111.1).

The Smoking Policy states that “Smoking is prohibited in all fully enclosed buildings used by CSX employees in the course of their employment. Prohibited areas include offices, meeting rooms, break rooms and classrooms.”

On February 20, 2014, an investigative hearing convened wherein Claimant and his representative were afforded the opportunity to present witnesses, cross-examine Carrier witnesses and introduce into the record information or exhibits pertinent to the matter under investigation.

On March 11, 2014, the Division Engineer notified Claimant as follows:

A review of the evidence, testimony, and all other documents associated with the hearing demonstrate that the charges against you were proven[.]

Based on my finding of guilt, coupled with the serious nature of the offenses, it is my decision that the discipline to be assessed is your immediate dismissal[.]

On March 17, 2014, Claimant elected to proceed with a review of the imposed discipline (dismissal) by submitting a claim to this Special Board of Adjustment No. 7529. In doing so, Claimant acknowledged that the decision of the Neutral Member of the Board is based on the notice of investigative hearing, transcript of hearing, notice of discipline, Claimant’s prior service record and Rule 25 of the Agreement.

Organization’s Position

Claimant was the bridge tender at McGirts Creek Bridge near Mile Post A649.1. He has nineteen (19) years of seniority and, for purposes of arbitration, no prior discipline. This incident is Claimant’s first positive test for drugs and alcohol; the Carrier did not offer a waiver or alternative handling as it has for other employees subjected to similar charges. This Board’s precedent in Award 35 shows that the Carrier’s refusal to provide first-time offender Claimant a bypass waiver violated the Agreement.

Claimant was assigned the third shift which commenced on the evening of January 23 and continued to the morning of January 24, 2014. Towards the end of his shift he developed a headache. When Bridge Tender Rainey arrived they discussed a dispute they had concerning overtime and then Claimant left. Rainey’s testimony is not reliable given the dispute between them and it renders her photo of Claimant allegedly sleeping as subject to manipulation. There is no evidence that Claimant was sleeping on duty. As for the alcoholic beverages, Claimant inadvertently brought the beverages to work as they were in his computer bag. To cool them, he placed them in the refrigerator.

Claimant accidentally violated Rule 106. Despite the inadvertent presence of alcoholic beverages on property, there is no evidence that Claimant was unsafe, failed to follow instructions or failed to properly perform his duties. Claimant denies consuming alcohol while on duty or smoking inside the bridge house. Finally, Claimant sought employee assistance to deal with an alcohol issue shortly after Manager Spurlock commenced his investigation.

With no prior discipline and nineteen (19) years of service, dismissal is unwarranted and punitive. Awards 16 and 39 of this Board affirm its authority to review and reduce, if not rescind entirely, any discipline imposed by the Carrier.

Carrier's Position

On January 24, 2014, Claimant was the bridge tender on a railroad draw bridge. Bridge Tender Rainey arrived for her shift and discovered Claimant asleep in his chair with an opened can of beer next to him which she captured in a photo and confirms in her written statement to Manager Spurlock, the charging officer investigating this matter. Manager Spurlock, during his investigation, discovered another beer in the refrigerator at the bridge house.

Claimant received a fair and impartial investigative hearing. Bridge Tender Rainey and Manager Spurlock identified the picture taken by Rainey and received by Spurlock; the only incident of sleeping at issue in this claim is the incident of January 24, 2014. The Carrier is not required to offer Claimant the Rule G bypass, an argument belatedly suggested by the Organization during the hearing. Consistent with Award 35 of this Board, the Carrier exercised its discretion to proceed with charges for the Rule G violation (now Rule 106) in addition to other rules violations.

There is substantial evidence of Claimant's rules violations. Bridge Tender Rainey observed Claimant sleeping while on duty which resulted in him not performing his duties to inspect the bridge for passing trains or ensuring that boats pass safely. This willful neglect of his duties resulted in Claimant's endangering life and property. Claimant testified he was asleep; he subsequently changed his testimony stating he only closed his eyes; Rainey testified Claimant did not awaken until after she cleared her throat several times. Claimant acknowledged possessing alcoholic beverages on Carrier property.

Claimant's violation of Rule 106 is a major offense warranting dismissal for a first time offender as established by Award 24 of this Board. Rule 104.3 is another major offense. After considering Claimant's nineteen (19) years of service, the Carrier determined that the multiple major offenses justified Claimant's dismissal.

Findings

Public Law Board No. 7529, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

A decision by this Special Board of Adjustment No. 7529 is based on the notice of investigative hearing, transcript of hearing, notice of discipline, Claimant's prior service record and Rule 25 of the Agreement. Within that evidentiary framework, the Board renders these findings.

Claimant received a fair and impartial investigative hearing. As a result of that hearing, there is substantial evidence that Claimant was sleeping on duty as the picture show him reposed in a convenient position with eyes closed. He testified that he “woke up” when he heard co-worker Rainey clear her throat. The picture of Claimant sleeping in the chair was authenticated by Rainey and has not been shown to be manipulated in any manner. Claimant acknowledged that he possessed alcoholic beverages on the Carrier’s property and acknowledged having a problem with alcohol. The Board concludes that Claimant did not inadvertently find himself with alcoholic beverages at work. In addition to violating Rule 111.1 (sleeping) and Rule 106 (alcohol), Claimant violated Rule 104.1 as he was not devoted exclusively to CSX services while sleeping which resulted in him neglecting his duties (Rule 104.3). These violations show Claimant’s failure to comply with the rules -- required by Rule 100.1 -- and are major offenses. Finally, there is insufficient evidence to find a violation of the Smoking Policy.

The penalty of dismissal is punitive, the Organization asserts, given Claimant’s 19-year tenure with the Carrier and clean disciplinary record at the time of the hearing. Claimant has an alcohol problem; he acknowledged it as a problem only after he became aware of Manager Spurlock’s investigation into the incident of January 24, 2014, which led him to enter the employee assistance program (EAP). Entering EAP shortly after having knowledge of being under investigation for wrongdoing tilts towards a self-preservation initiative by Claimant rather than a pro-active initiative undertaken without the overhang of an investigation.

The Carrier is not obligated under the Agreement to offer Claimant a bypass arrangement. In this claim there are multiple major offenses and a belated, if not reluctant, recognition by Claimant of alcohol as a problem. Claimant’s recognition was spurred, based on this record, solely by knowledge of the ongoing investigation. The Organization notes that other employees facing similar charges as Claimant have been offered assistance by the Carrier. The circumstances presented by those employees are unknown such that a comparability conclusion cannot be reached. In this proceeding, the Organization has not established that the Carrier’s decision not to exercise its discretion to offer the bypass was motivated by discrimination or other impermissible consideration or was a capricious and arbitrary act. Given this finding, and having found that the charged rules are proven, the penalty of dismissal is not arbitrary or excessive. Accordingly, the claim is denied.

Award
Claim denied.

Patrick J. Halter /s/
Patrick J. Halter
Neutral Member

Dated on this 2nd day of
December, 2015