

PUBLIC LAW BOARD NO. 7529

Brotherhood of Maintenance of Way)
Employes Division - IBT Rail)
Conference)
)
and)
)
)
CSX Transportation, Inc.)

Case No. 58
Award No. 58

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

1. Carrier's imposition of discipline in the form of a forty-nine (49) day actual suspension upon Claimant G. Yow for the alleged violation of CSXT - General Rule A, General Regulation GR-2, CSX Code of Ethics and CSX Policy Statement on Sexual Harassment was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File D16000913/Carrier File 2013-146422).
2. As a consequence of the violation referred to in Part 1 above, Claimant G. Yow shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement."

Background

On March 28, 2013, 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 information that was received on Tuesday, March 12, 2013, alleging that you harassed a Holiday Inn Express hotel associate beginning in December 2012 and continuing.

In connection with the above incident, you are charged with conduct unbecoming a CSX employee, failure to properly perform the responsibilities of your position, participating in unwarranted and unwanted inappropriate behavior towards hotel staff, and possible violations of, but not limited to, CSXT Operating Rules – General Rule A; General Regulations GR-2; the CSX Code of Ethics and the CSX Policy Statement on Harassment.

CSXT Operating Rules - General Rule A states that employees "must know and obey rules and special instructions that relate to their duties" and clarification of such rules can be obtained from a supervisor. General Regulation GR-2 states that "all employees must behave in a civil and courteous manner when dealing with customers, fellow employees and the public." The CSX Code of Ethics states that harassment in any form - verbal, physical or visual - is not tolerated as it is "personally offensive, lowers morale and interferes with employee's ability to work" therefore employees are to respect coworkers, vendors and customers. The Policy Statement on Harassment is "zero tolerance for sexual or any other form of harassment."

On April 18, 2013, an investigative hearing convened wherein Claimant and his representative cross-examined Carrier witnesses and presented testimony and evidence on the incident of March 12, 2013, and the alleged rules violations.

On May 6, 2013, the Division Engineer notified Claimant as follows:

A review of all the documents associated with the hearing demonstrate that the charges against you were proven[.]

Because all the information, evidence and testimony associated with this hearing prove that you violated company rules and policy, it is my decision that the discipline to be assessed is forty-nine (49) days actual suspension[.]

On July 16, 2013, Claimant elected to proceed with a review of the imposed discipline (forty-nine (49) day actual suspension) 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 denied a fair and impartial investigative hearing. In this regard, the charging notice was vague with no specific dates or particular acts recounted and provided only general reference to rules violations. The pivotal witness against Claimant did not present herself for testimony. In person testimony is critical for assessing character and credibility. Also, the witness testified she would have been present if requested as she was not afraid of Claimant.

In addition to its failure to comply with Rule 25, the Carrier did not meet its burden of proof for the charged rules. Claimant testified he was not uncivil, discourteous, rude or harassing towards the female breakfast attendant at the hotel. Since he had stayed at the Holiday Inn Express over the course of three (3) years he was friendly with staff. This harassment allegation surfaced only after Claimant complained to hotel management that he was not receiving his reward points for staying there.

With thirty-three (33) years of service and, for purposes of arbitration, no prior disciplinary record, the forty-nine (49) day actual suspension is arbitrary, excessive and unwarranted. There is no dispute that the Board's authority encompasses rescinded or, at least, minimizing the suspension with progressive discipline.

Carrier's Position

In February 2013 hotel management notified the Carrier that Claimant was harassing a female breakfast attendant by making inappropriate comments, placing his head near her neck to smell her and leering at her. The breakfast attendant informed her supervisor that she was scared of Claimant as she anticipated he may retaliate against her. Based on an investigation by the Carrier's Employee Services Manager (ESM), the Carrier's charging officer initiated a formal disciplinary hearing.

Claimant received a fair and impartial investigative hearing. Contrary to the Organization's arguments and consistent with Awards 1 and 29 of this Board, the Carrier is not required to disclose its evidence to the Organization prior to the hearing. The charge letter is not vague but sufficiently specific enabling Claimant to prepare and present a defense. As he had been interviewed by employee services, Claimant knew the specifics of the harassment alleged against him. The breakfast attendant testified by telephone; the Organization cross-examined her; the collective bargaining agreement does not prohibit testimony by telephone. Finally the ESM investigated the complaint filed by the breakfast attendant and forwarded his report to the operating department. Claimant's supervisor reviewed that report and the ESM's view that Claimant did not act in accordance with the rules and Policy. Claimant's guilt was not pre-determined; he was accorded an investigative hearing where he examined the evidence and cross-examined the witnesses.

There is substantial evidence that Claimant committed the charged rules violations based on witness testimony. A violation of GR-2 is a major offense which could have led to Claimant's dismissal and the Policy Statement on Harassment states an employee may be subject to discipline up to dismissal. The Carrier considered Claimant's tenure and disciplinary record; the suspension is the proportional penalty for the proven infractions by Claimant.

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.

Regarding Rule 25, the Board finds that Claimant received a fair and impartial investigative hearing. In accordance with this Board's precedent (Awards 1 and 29), the Carrier is not required to disclose its documents prior to hearing for the Organization's review and the charge letter was sufficiently specific (dates and location, general description of alleged misconduct, rules and policies) to enable Claimant to prepare and present his position at hearing. Furthermore, receipt of testimony by telephone is permissible under Rule 25.

Although the Carrier met its contractual requirements under Rule 25, the Carrier has not met its burden of proof to establish the facts to support the charged rules violations against Claimant. The breakfast attendant testified to actions or statements by Claimant that she found offensive and would be, if proven, harassment under the Carrier's Policy. Claimant denied the statements and conduct. There is conflicting testimony as to the Claimant's purchase of perfume which the Carrier links as showing Claimant's personal interest in the breakfast attendant. Claimant testified he purchased perfume for all female staff at the hotel given the extended period of time he stayed there (approximately three (3) years) whereas the breakfast attendant testified she did not receive perfume from Claimant and the ESM testified Claimant's gifting perfume to hotel staff was not a concern. Given the shortfall in evidence and conflicted testimony as it pertains to Claimant's personal interest in the female attendant, the Board finds insufficient evidence for the Carrier's case against Claimant.

In view of the Board's evidentiary finding, the suspension is rescinded in its entirety and the remedy prescribed in Rule 25, Section 4 of the Agreement is granted.

Award

Claim sustained in accordance with the findings.

Patrick J. Halter /s/

Patrick J. Halter

Neutral Member

Dated on this 4th day of
December, 2015