

PUBLIC LAW BOARD NO. 7529

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

Case No. 69
Award No. 69

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

1. The Carrier's discipline of Claimant C. Delano for the alleged violation of CSX Transportation Operating Rules – General Rules A and D was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File D21001114/Carrier File 2014-170428).
2. As a consequence of the violation referred to in Part 1 above, Claimant C. Delano shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement."

Background

On January 15, 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 incidents that occurred at various times during Safety Certification Classes, in the vicinity of Jacksonville, Florida, when you were observed sleeping in class several times on January 6, 7, 8, and 9, 2014. After you were observed sleeping in class on two (2) occasions on January 9, 2014, you were removed from class and sent back to the hotel.

In connection with this incident, you are charged with sleeping on duty, failure to properly perform the responsibilities of your position, and possible violations of, but not limited to, CSXT Operating Rules – General Rule A and D.

General Rule A requires employees to know and obey rules and special instructions related to their duties and "when in doubt as to the meaning and application of any rule or instruction, employees must ask their supervising officer for clarification."

General Rule D – Sleeping While on Duty states "employees must not sleep while on duty, except as outlined under Operating Rule D-1. An employee lying down or in a reclining position with eyes closed, covered, or concealed will be considered to be sleeping."

On April 23, 2014, an investigative hearing convened wherein Claimant and his representative were afforded the opportunity to present witnesses, cross-examine Carrier witnesses and introduce for inclusion the record information or exhibits pertinent to the matter under investigation.

On May 5, 2014, the Chief 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[.]

Accordingly, based upon finding of guilt, and the seriousness of the offenses, it is my determination that the discipline to be assessed is a thirty (30) calendar day actual suspension which will be served in conjunction with a five (5) day overhead suspension for an incident on January 17, 2013, for a total of thirty-five (35) calendar days[.]

On May 27, 2014, Claimant elected to proceed with a review of the imposed discipline (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 acknowledged sleeping in class on January 6 and 7, 2014; however, Claimant did not sleep in class on January 8 and 9, 2014, because he was not present on those dates. On January 9, 2014, Claimant received a medical discharge and was instructed to see his personal doctor and a counselor before he would be permitted to return to duty. The Carrier failed to meet its burden of proof on half of the dates where it charges Claimant with rules violations. In Award 29 of this Board as well as Third Division Awards 33432 and 39875, discipline was reduced where the Carrier failed to meet its burden of proof on all charges.

Mitigating factors show that the discipline is excessive and unwarranted. In this regard, Claimant has encountered difficulty sleeping due to an accident he witnessed while on-duty. When Claimant was observed sleeping the second time, he met with Director Spatafore, Production Tie Team, and based on Claimant's explanation for his sleeping, the Director arranged for Claimant to meet with a counselor. On the last day of training (January 9, 2014) Claimant was medically discharged and, as noted, ordered to see his physician and counselor before he would be allowed to return to work. Notwithstanding the Carrier knowing about Claimant's medically-related sleeping difficulties, Claimant was suspended.

Additionally, Claimant observed his supervisor (Manager Brooks) sleeping in the same training class. Claimant recorded the Manager's sleeping on a video and shared it with Director Spatafore. In retaliation, Manager Brooks suspended Claimant. Others attending the safety training class were also observed sleeping but only Claimant was subjected to discipline. Thus, Claimant has been subjected to disparate treatment.

Carrier's Position

Manager Brooks, Claimant's supervisor, observed Claimant sleeping four (4) or five (5) times during the training course held January 6, 7, 8, and 9, 2014. He took Claimant aside, in privacy, and advised him that sleeping in class was inappropriate and, should Claimant find himself falling asleep, to stand up

during the class. Claimant acknowledged sleeping in class on two (2) class days and violating General Rules A and D.

The thirty-five (35) day calendar day actual suspension is appropriate because sleeping while on duty is a serious offense and this is Claimant's second serious offense within the past three (3) years. Contrary to the Organization's assertion that Manager Brooks "perjured himself" because he was sleeping, the Manager testified that he was not sleeping. "Inside the Convention Center it has very poor Verizon data service. My jetpack from my internet as you can see in my computer is up, my printer's up there. My internet pack is inside my backpack right against the wall. It had disconnected 3 or 4 times throughout the day. So I gotta keep reaching down to turn it back on and rest it. That's what I was doing."

As for others sleeping in the class as alleged by Claimant, Manager Brooks testified that those he observed sleeping he treated in the same manner as Claimant. That is, he advised them in private that it was inappropriate to sleep in class. Even if other employees were sleeping in class as Claimant alleges and no action was taken towards them, does not prohibit the Carrier from initiating discipline against Claimant.

Consistent with this Board's precedent in Award 4, the 35-day suspension is appropriate for a second serious offense based on the violation of General Rules A and D.

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 acknowledges sleeping in class on January 6 and 7, 2014 and he acknowledges his conduct violates General Rules A and D. Claimant was not in class on January 8 and 9, 2014, so the charged rules violations on those dates is not sustained. The charging notice also states that "after you were observed sleeping in class on two (2) occasions on January 9, 2014, you were removed from class and sent back to the hotel." Claimant was not in class on January 9 so he could not have been observed sleeping "on two (2) occasions" that day; this part of the charge is unproven.

In seeking to have the suspension rescinded or at least minimized, Claimant argues that Manager Brooks and others were sleeping in class but only Claimant was suspended so he has been subjected to disparate treatment and retaliated against by the Manager. Claimant fails to prove disparate treatment or retaliation; the Manager testified to his actions in class demonstrating he was not asleep and for others he observed sleeping during class he addressed the issue with them in the same manner as Claimant. As for Claimant's sleep difficulties as a mitigating consideration, there is insufficient evidence that Claimant shared this matter with Manager Brooks during the investigation.

The Carrier states that sustaining the suspension for a second major offense is consistent with this Board's precedent in Award 36 where all charges were proven. In addition to Award 36 there is Award

29 by this Board where the claim was sustained in part and denied in part which led the arbitrator to reduce the penalty imposed by twenty-five percent (25%). In this claim the charged rules violations are proven in their entirety although the number of occasions Claimant repeated the major offense was proven to be overstated by the Carrier. Using Award 29 as a parameter and considering this is the second major offense for Claimant, the Board reduces the 30-day actual suspension to a 25-day actual suspension.

Award

Claim sustained in part, denied in part.

Patrick J. Halter

Patrick J. Halter
Neutral Member

Dated on this 2nd day of
December, 2015