

PUBLIC LAW BOARD NO. 6564

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

CSX TRANSPORTATION, INC.

Case No. 17

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

1. The discipline (withheld from service and subsequent dismissal) imposed upon R. D. Lovell in connection with charges of conduct unbecoming a CSX employee in regard to an allegation of sexual harassment, crude and vulgar behavior, most recently on November 21, 2000, was unwarranted, excessive and in violation of the Agreement.
2. As a consequence of the violation referred to in Part (1) above, R. D. Lovell shall now be reinstated to service, paid for all time lost, and have his record cleared of all charges.

Background

On November 21, 2000, while Claimant R. D. Lovell was on duty and operating a CSXT vehicle, he allegedly exposed his genitalia to Ms. Kellie Armstrong, Ms. Armstrong, who does not work for CSXT, is a resident of Rensselaer, Indiana and lives near the Carrier's right-of-way. Armstrong reported the incident to the Jasper County Sheriff's Department. Shortly thereafter, the investigating officer, Deputy David Hickman, found Claimant sitting in his truck approximately one mile from Armstrong's residence. When Claimant emerged from his vehicle, Officer Hickman observed that he was wearing overalls and the buttons on the side were undone. Additionally, Claimant's

fly was undone, his underwear was open, and his penis was exposed. According to Officer Hickman, Claimant had "no logical explanation" for his condition. (Carrier Ex. B, at 22-23).

By letter dated December 21, 2000, Claimant was notified to attend a formal investigation on January 4, 2001 concerning the charges of "conduct unbecoming an employee of CSXT," as well as sexual harassment and crude and vulgar behavior while on duty. The investigation began on January 4, 2001, but was recessed until January 8, 2001 in order to obtain testimony from Ms. Armstrong and Deputy Hickman inasmuch as Claimant denied any wrongdoing, and these key witnesses were not present on January 4.

As a result of the investigation, Claimant was found guilty of the charges. He was dismissed from the Carrier's service, effective January 23, 2001. By letter dated January 31, 2001, the Organization appealed the discipline on two grounds. First, it argued that it was inappropriate for the Carrier's hearing officer to recess the investigation in order to obtain testimony from Claimant's accusers. Additionally, the Organization asserted that inasmuch as Claimant was neither arrested nor convicted of a crime under Jasper County laws, there was no merit to the Carrier's charge of "conduct unbecoming a CSXT employee." The matter was discussed in conference but the parties were unable to resolve the dispute, and it was therefore submitted to this Board for adjudication.

Findings

With respect to the Organization's procedural claims, the Record clearly demonstrates that Claimant's due process rights were fully protected. He was given proper notice of the charges, time to prepare a defense, the right to representation, and

opportunity to produce testimony and evidence, as well as the chance to cross-examine the Carrier's witnesses and evidence.

Moreover, Claimant had a fair hearing and was not prejudiced by virtue of the fact that the hearing officer recessed the proceedings in order for a complete Record to be made. Once Claimant challenged the Carrier's evidence and denied the charges in every material way, the hearing officer correctly decided that Ms. Armstrong and Deputy Hickman needed to be present to give live testimony and to subject themselves to cross-examination. Had Claimant not denied their accusations, there would have been no need to call them as witnesses.

As to the merits of the case, this Board finds that the Carrier has fully met its burden of proof. Ms. Armstrong credibly explained the events of November 21, 2000. Moreover, her testimony was consistent with her prior written statements and oral reports to the authorities.

Apparently, Armstrong had extended a kindness to Claimant once in the past by giving him some beer that was left over from a party. Thereafter, he appeared near her residence on two occasions. The first time, he asked Armstrong if she had anything to help with a bee sting. When she inquired where he was stung, he pointed to his crotch. On November 17, 2000, Armstrong noticed that Claimant was parked by the railroad tracks near her house. As she drove out of her driveway in her car, he pulled out in front of her vehicle. Armstrong followed behind Claimant, but within a few minutes, he stopped and urinated on the road in front of a nearby house in full view of Armstrong.

These two episodes of vulgar and offensive behavior preceded the November 21st

incident, which gave rise to Claimant's termination. With respect to that incident, Armstrong offered credible testimony as to how she observed Claimant emerge from his CSXT vehicle parked near her house and expose his penis with one hand while he waved at her with the other hand.

Armstrong's testimony was fully corroborated by Deputy Hickman, who responded to Armstrong's call to the sheriff. When Hickman arrived, he observed that Claimant was in his truck, still parked near Armstrong's house. Hickman testified believably that when he approached the truck, Claimant got out with his overalls open and his penis exposed. When Hickman questioned Claimant about his conduct, he offered no reasonable explanation.

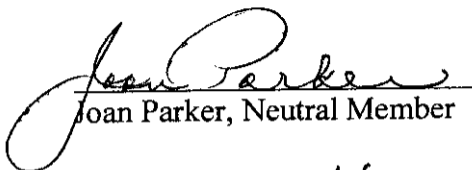
Claimant's testimony at the investigation made no more sense than his statement to Deputy Hickman. He denied the accusations, suggesting that perhaps he was a victim of mistaken identity. However, neither Armstrong nor Hickman mistakenly accused Claimant. Nor is there any evidence to suggest that they conspired to concoct a false story against Claimant or that they had any motive to place his job in jeopardy. Claimant did concede that when Hickman found him, his pants were unbuttoned, and while he insisted that his genitalia were not exposed, his testimony was not credible.

Based upon this Record, there is no doubt that Claimant engaged in lewd and harassing behavior, which had the potential to tarnish the Carrier's reputation. By exposing himself to Ms. Armstrong without provocation, Claimant engaged in conduct unbecoming a CSXT employee. The fact that Claimant was not arrested or prosecuted did not diminish the Carrier's right to determine that he had violated legitimate work rules.

In the past, arbitrators have recognized a carrier's right to dismiss an employee whose lewd and vulgar behavior can subject it to damages and adverse criticism. (See, for example, *Third Division Award No. 25621*.) Given the circumstances herein, this Board sees no reasons to depart from this sound principle.

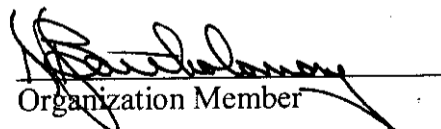
Award

The claim is denied.


Joan Parker, Neutral Member


Carrier Member

Dated: April 7, 2004


Organization Member

Dated: 4-7-04