

**PUBLIC LAW BOARD NO. 7104**

<b>BROTHERHOOD OF</b>	)	
<b>MAINTENANCE OF WAY EMPLOYEES</b>	)	
<b>DIVISION – IBT RAIL CONFERENCE</b>	)	
	)	<b>CASE NO. 11</b>
<b>vs.</b>	)	<b>AWARD NO. 11</b>
	)	
<b>CSX TRANSPORTATION, INC.</b>	)	

**STATEMENT OF CLAIM:**

**Claim of the System Committee of the Brotherhood that:**

- 1. The dismissal of Machine Operator Paul Acree for his alleged violation of Operating Rules General Rule A, General Regulations GR-2, GR-2A, GR-3A and CSX Safe Way General Safety GS-1, CSXT's Policy on Workplace Violence and CSXT's Policy on Harassment was without just and sufficient cause, based on unproven charges and in violation of the Agreement [System File D21402507/12(07-0920) CSX].**
- 2. As a consequence of the violations referred to in part (1) above, Machine Operator Paul Acree shall be reinstated to the service of the Carrier and be made whole for losses suffered as a result of the Carrier's actions."**

**FINDINGS:**

Public Law Board No. 7104, 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.

The Claimant, P. Acree, had been employed by the Carrier since 1978. On May 18, 2007, Claimant was charged to attend a formal hearing "to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 0700 hours in the morning job briefing, in May 16, 2007, at Radnor Yard, on the Nashville Terminal, near Nashville, TN, in which you exhibited a threatening demeanor and aggressiveness to another CSX employee." Claimant was charged with violating several Carrier Rules, as well as the Carrier's Policy on Workplace Violence and Policy on Harassment. Following the investigation, by letter dated June 22, 2007, the

Carrier found Claimant guilty of the charges, stating that the investigation had confirmed that he had exhibited a threatening demeanor and aggressiveness to another Carrier employee, conduct that could not be tolerated. Therefore, the Carrier dismissed him from employment.

At the opening of the investigation on June 5, 2007, Claimant's representative acknowledged that he had received a copy of the charge letter dated May 18, 2007. He stated that he objected to the location of the hearing, as it was a great distance from Claimant's home, and requested a postponement and a change of venue. The Hearing Officer denied the request on the basis that it had not been requested in advance of the hearing, that no specific reason other than distance was proffered for Claimant's absence, and that the Carrier had its witnesses assembled and was ready to proceed. Following the testimony of Carrier's first witness, the Organization representative exited the hearing.

James Crutchfield, Carrier Manager of Tie Teams, testified at the investigation that on May 17, 2007, he conducted a job briefing for a crew, including Claimant, in a hotel parking lot in Nashville, Tennessee. He stated that at the conclusion of the discussion, Claimant raised his hand and proceeded to explain what had happened to a piece of his equipment the preceding day. Mr. Crutchfield further stated that employee Ken Garrett replied that the problem was that Claimant had left the equipment running. Mr. Crutchfield testified that Claimant's demeanor then completely changed, with his body language and tone becoming very defensive. He stated that Claimant took a stance of self-defense or attack, moved towards Mr. Garrett like he was ready to fight or inflict bodily harm, and appeared violent. He stated that Mr. Garrett made no threatening remarks, nor did he exhibit any threatening behavior, toward the Claimant.

Mr. Crutchfield testified that he later questioned Claimant about the incident, and Claimant replied that Mr. Garrett was trying to blame him for something that was not his fault. He stated that he tried to explain to Claimant that that was not the case, but Claimant replied that he was mad, and that if Mr. Garrett had taken one more step he would have thrown him to the ground in front of everyone. Mr. Crutchfield further testified that Claimant seemed terribly upset, so after consulting with higher management it was decided, for the safety of all concerned, to remove Claimant from service.

Dennis Thompson, Carrier Manager System Teams Work Equipment, testified at the investigation that he also witnessed the incident. He also stated that Claimant told the group that he left his machine and returned to find the controls changed, and that Mr. Garrett replied that it was a violation of Carrier policy and safety rules to leave a running machine unattended. Mr. Thompson testified that Claimant then stated that if Mr. Garrett said one more word, Claimant would "kick (his) ass." He also recounted that Track Worker Michael Forlenzo stepped between Claimant and Mr. Garrett and prevented the assault he thought might occur. He stated that Mr. Garrett made no threatening remarks or gestures. He further stated that somewhat later, Mr. Crutchfield informed him that Claimant was still exhibiting aggressive behavior and they decided to take him out of service.

Track Worker Forlenzo also testified at the investigation. He stated that he was present during the job briefing on the day in question, and that at the end of the meeting, when the floor was opened to discussion, Claimant stated that someone had changed the controls on a piece of machinery when he left to go the restroom. Mr. Forlenzo stated that Mr. Garrett replied that it was against Carrier policy to leave a running machine unattended.

Mr. Forlenzo stated that Claimant then became very aggressive towards Mr. Garrett, told him that he had "better shut his mouth or he was gonna shut it for him" and started to approach Mr. Garrett, who began to back up. Mr. Forlenzo testified that he got between the two employees to prevent anything bad from happening, as he believed Claimant "would have kicked the living hell out of Mr. Garrett." He stated that he told Claimant that his attitude was very aggressive, that it was a hazard, and that it was not tolerated. He stated that he and Mr. Crutchfield then escorted Claimant away to defuse the situation.

Mr. Forlenzo further testified that Claimant then "squared off," poking his chest out, and told him that if Mr. Garrett had come into that circle he would have "mopped the pavement up with him and his blood would have been all over the place." Mr. Forlenzo states that he repeated to Claimant that his behavior was unacceptable and would not be tolerated.

On or about June 28, 2007, Claimant submitted a statement to the Carrier, essentially contradicting the version of events described above by Carrier's witnesses.

The Carrier first contends that all of Claimant's due process rights were fully protected and the hearing was conducted in a fair and impartial manner. The Carrier notes that Claimant received proper notice of the hearing and had ample time to request a postponement in advance, and the Carrier violated no rules by denying the postponement request made for the first time at the opening of the hearing. The Carrier also asserts that there is no merit to the Organization's contention that Claimant was prejudiced when the Carrier failed to call Vehicle Operator Garrett as a witness. The Carrier states that it did present witnesses who viewed the altercation, and it is not clear what additional information Mr. Garrett could have provided. Moreover, the Carrier notes, it is well established in the industry that the Carrier is not obligated to call witnesses on behalf of the Organization.

On the merits, the Carrier contends that it demonstrated with substantial evidence that Claimant was guilty of displaying aggressive behavior and making threatening remarks to a fellow employee. The Carrier points to the testimony of Carrier witnesses Crutchfield and Forlenzo, who stated that Claimant displayed an aggressive stance towards Mr. Garrett, began to approach him using threatening language, and that a dangerous incident was avoided only on their intervention. This evidence, the Carrier concludes, clearly established that Claimant exhibited violent behavior and made threats to another employee, creating an unsafe working environment which could not be tolerated. The self-serving written statement of Claimant, produced nearly a month after

he failed to appear at the investigation, has, the Carrier urges, no probative value and should be disregarded by this Board. In addition, the Carrier points out, it is well established that evidence not produced at the initial investigation cannot be considered thereafter. For all of these reasons, the Carrier concludes, it has met its burden of establishing Claimant's guilt by substantial evidence.

The Carrier also asserts that the penalty of dismissal is fully justified. Simply put, the Carrier states, the record demonstrates that Claimant created a severe and threatening environment, and the Carrier will not tolerate such violence in the workplace. It is uniformly accepted in the railroad industry, the Carrier notes, that this is a serious offense that merits dismissal. Therefore, it urges, the Board should uphold that penalty.

The Organization raises numerous procedural and substantive objections to the discipline assessed against Claimant. In particular, the Organization points out, neither Claimant nor the other employee involved in the incident testified at the investigation. The Carrier's failure to allow a postponement, the Organization asserts, clearly deprived Claimant of his right to testify and cross-examine witnesses, and thus precluded a full and fair investigation.

On the merits, the Organization asserts that the evidence presented at the investigation, even when considered in the light most favorable to the Carrier, does not support its decision to dismiss a 28-year employee. Thus, the Organization urges, the claim must be sustained.

The Board has carefully reviewed the record in its entirety. We find, upon consideration of the particular circumstances of this case, that although there were certain procedural irregularities in the conduct of the hearing, they were not sufficient to deprive Claimant of his right to a full and fair investigation. On the merits, although we take note of the Organization's argument that the Carrier failed to call the witnesses with the most direct knowledge of the incident, we conclude that the consistent testimony of the three individuals who witnessed the incident, including one rank-and-file employee, is sufficient to minimally satisfy the Carrier's burden of proof. Thus, we conclude, the charges have been proven.

However, without minimizing the serious nature of Claimant's conduct, and recognizing the Carrier's need to maintain a workplace free from threats of violence, we find that the penalty assessed herein is too harsh and is therefore an unfair, arbitrary and discriminatory exercise of the Carrier's discretion. We therefore order the Claimant reinstated, without backpay and on a last chance basis with respect to the sort of conduct which occurred herein. In addition, his reinstatement is conditional upon his participation in Carrier's Employee Assistance Program to address this conduct and prevent any future reoccurrences.

**AWARD**

Claim sustained in accordance with findings. The Carrier is directed to comply with this Award within 45 days.

  
JACALYN J. ZIMMERMAN  
Neutral Member

  
MATTHEW BORZILLERI  
Carrier Member

  
TIMOTHY KREKE  
Organization Member

Dated this 5<sup>th</sup> day of June, 2008.