

PUBLIC LAW BOARD NO. 7120

(BROTHERHOOD OF MAINTENANCE OF WAY
PARTIES TO DISPUTE: (EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated September 28, 2007, T. C. Whitley, Manager SPT Teams, instructed B. L. Faulknier ("the Claimant") to attend a formal Investigation on October 10, 2007, in the Carrier's Division Office in Baltimore, Maryland, in connection with an incident that occurred at approximately 0800 hours on September 11, 2007, on the Baltimore terminal. "After I received information that you were not feeling well," the letter stated, "I proceeded to your location to investigate the report and when I arrived you threw your hard hat and started using profane language directed towards me." The letter stated that the Claimant was "charged with conduct unbecoming a CSX employee and Policy on Work Place Violence" and that his actions in connection with the incident "appear to be in violation of, but not necessarily limited to, CSXT Operating Rules General Rule A, General Regulation GR-2 and Safe Way GS-1." The Organization requested a postponement of the hearing due to the Claimant's sickness, and the hearing was rescheduled to December 5, 2007, in Somerset, Pennsylvania.

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant began his employment with the Carrier on June 19, 2000, and, at the times here relevant, was a Backhoe Operator in position 6XC8-67D, with a floating headquarters. After the job briefing on September 11, 2007, the Claimant and another employee asked their supervisor, Manager T. C. Whitley, whether they were being charged with missing work on Sunday, August 26, 2007. Mr. Whitley said that six employees would receive charge letters for taking off work that day without permission, including the Claimant and the other employee.

After the conversation, Manager Whitley went to perform his duties. Not long thereafter he overheard a radio conversation that the Claimant was having chest pains, and, a short time later, a second conversation to call 911 for an ambulance. Manager Whitley went to check out the situation, and, as he approached the Claimant, the latter kicked his helmet in the direction opposite from Mr. Whitley and said to him to get the

f__k away, that all he (Mr. Whitley) wanted to do was write letters and threaten their jobs.

Manager Whitley turned and walked away from the Claimant. He did so, he testified, to keep the situation from escalating until they got some medical help for the Claimant. About a month earlier, Mr. Whitley stated, there was an incident where the Claimant threw his hard hat during a job briefing. According to Mr. Whitley, he and the Claimant discussed the Claimant's conduct and the fact that it could not be tolerated. They agreed, Mr. Whitley stated, that it was an informal coaching for the Claimant to understand the rules and "for us to get an understanding of one another."

Manager Whitley reported the incident of September 11, 2007, to his supervisor, the Director Rail. The Director Rail instructed Mr. Whitley to charge the Claimant and pull him out of service when he got back from the hospital. At the hospital, where the Claimant had been taken by ambulance, he was examined, given an electrocardiogram, and sent home with instructions to see his own physician. He was not permitted to return to work without a medical release. Mr. Whitley testified that he waited to charge the Claimant for the incident because of the latter's medical disqualification.

On cross-examination Manager Whitley acknowledged that profanity was used by employees in the workplace, but stated that it was not acceptable for someone to use profanity directed at a supervisor or another employee. Asked whether every employee that used profane language directed toward another employee was automatically charged, Mr. Whitley stated, "Probably not but then as many people witnessed this as they did I

couldn't let it go and accelerate and so that it would be tolerated." Most of the team members were present for the incident, Mr. Whitley testified.

Foreman David Maxwell testified that an employee told him that the Claimant was not feeling well. Mr. Maxwell went to check on the Claimant and observed that "he was sweating profusely, he was flushed, . . . he just looked like that he wasn't his normal self." Mr. Maxwell instructed the employee-in-charge to call 911 and then phoned Manager Whitley and told him that they were calling an ambulance for Mr. Faulknier to go to the hospital and be checked out.

Mr. Maxwell testified that Mr. Whitley came to the back of the gang where they were. "As he approached," Mr. Maxwell stated, "Mr. Faulknier told him to get the f__k away from him. He didn't want anything to do with him." Mr. Whitley then left and went back toward the front of the gang, Mr. Maxwell testified. The hearing officer asked Mr. Maxwell if he recalled the Claimant throwing his hard hat. He answered, "Hmmm. Actually I do. Yeah. He did. Threw the hard hat. I forgot about that. Yeah, that did take place."

Joseph F. Dorto, the timekeeper for the team, and a 32-year employee, testified that he heard over the radio that the Claimant was sick and maybe having a heart attack. He walked to the back where the gang was and saw the Claimant sitting on the curb talking to another employee who was sitting next to him. Mr. Whitley was coming from the opposite direction, Mr. Dorto stated, and he heard Mr. Faulknier say, "Stay the f__k

away from me. This is all your damn fault.” He did not see Mr. Faulknier throw his hard hat, Mr. Dorto stated. He testified that he did not remember if he did.

Mr. Dorto testified that the EMS came, put the Claimant in the ambulance, and took him to the hospital. Mr. Dorto stayed with him the whole time. “He was very sick at that time that I could tell,” Mr. Dorto testified. He was sweating profusely. Mr. Dorto testified that people use profanity everywhere in the workplace. Asked if some employees direct profanity towards a supervisor, he stated, “I’ve never heard it no.”

Samuel Lee Jordan, a coworker, who witnessed the incident and testified in behalf of the Claimant, stated that he did not feel that Mr. Faulknier’s use of profanity intimidated or in any way threatened Mr. Whitley. Mr. Jordan expressed the opinion that the reason the Claimant spoke as he did was “more fear than anything and the state that he was in, sweating, you know, just not knowing what was going on or what was happening.” The Claimant’s speech, Mr. Jordan testified, “was not aggressive. It was not directed . . . in a harmful manner towards Mr. Whitley.” Mr. Jordan, who has worked daily with the Claimant for a period of seven years, stated that Mr. Faulknier was not acting like his normal person.

Mr. Jordan described the incident as follows:

Mr. Faulknier was sitting on the curb. Mr. Whitley was approaching him when Mr. Faulknier got up he made the comment and at that time kicked his hard hat, stumbled and then he went back up to the machine.

Mr. Jordan acknowledged that the Claimant directed the statement “stay the f__k away

from me” at Mr. Whitley as he approached the Claimant but stated that “it was not said in any aggressive manner whatsoever.”

Robert Chittum, a coworker who testified in behalf of the Claimant, stated that the Claimant’s hard hat was on the ground in front of the Claimant where he was sitting and that when the Claimant got up he stumbled over it and kicked it. He did not kick it at Mr. Whitley, Mr. Chittum stated, or as an act of aggression. The Claimant, Mr. Chittum testified, was sweating profusely and was beet red. Mr. Chittum, according to his testimony, thought the Claimant was having a heart attack. He put a little bottle of ice water to the Claimant’s neck and a wet towel on his head until the ambulance arrived. “I’m not a doctor,” Mr. Chittum testified, “but I know he wasn’t himself.”

Mr. Chittum testified that profanity is used frequently in the workplace but acknowledged that he has never observed Mr. Whitley direct any kind of profane language toward an individual. He expressed the opinion “the man was out of head” in reference to the Claimant and that therefore he did not think that the Claimant meant to direct profanity at Manager Whitley. He acknowledged, however, that the Claimant made the statement in issue to Mr. Whitley when Mr. Whitley walked up to the Claimant.

The Claimant prepared a written statement of the incident which began with a reference to the conversation he had with Manager Whitley about the charge letters to be issued to six employees for missing work on August 26, 2007. The statement continued:

Immediately after this conversation, I began feeling ill. My heart rate

became rapid. I had trouble breathing and sweating profusely. My mouth was dry and I felt extremely hot. Robert Chittum tried to keep me from being too frightened by cooling me down with cold wet towels on my neck.

From this point on, I have no recollection. Apparently my blood pressure had reached an extremely dangerous level. It is during this profoundly frightening time, that I am accused of throwing my hard hat and using profane language directed toward Mr. Whitley.

The remainder of the statement relates to what other witnesses would swear to regarding his hard hat and what he said to Mr. Whitley. The witnesses gave firsthand testimony at the hearing on these points, which has been set forth above.

The Claimant testified that his heart rate was very rapid and that he felt “an extreme pressure on my head.” This indicated to the Claimant that his blood pressure was very high. Asked whether he kicked or threw his hard hat, the Claimant testified, “I did not throw the hard hat and the only recollection that I have of that is that I don’t remember any of that part of it. I’m just strictly . . . going on what the folks that were present at the time told me that I did.” He does not deny the part of the charge regarding what he said, the Claimant stated, because everybody told him he said it, but it “was strictly out of character. . . .”

On Friday, September 14, 2007, when his Organization representative informed him that he was probably going to be charged for the incident with Mr. Whitley on September 11, the Claimant testified, was the first time he definitely knew that he had said anything to Mr. Whitley. At that time, the Claimant stated, he personally called Mr.

Whitley and told him that if he had said anything out of the way to him, or disrespectful, he was sorry, and Mr. Whitley had his apology.

He has a history of high blood pressure, the Claimant testified, but it was very well controlled. The Claimant offered into evidence a letter dated November 27, 2007, from his personal physician, Mark Niehaus, MD:

Patient Name: Brian Faulknier, DOB: 10/12/1971

To Whom It May Concern,

Brian has been under my care since 2003, and has been a patient in my office since 2001. He has had hypertension that had been well-controlled until this fall, when it became more difficult to control, with episodes of very high blood pressure (above 200/100). On September 11, 2007, he had an episode of acute chest pain while at work in Baltimore that was suspicious for possible angina. His blood pressure was noted to be very high by rescue squad. Fortunately, evaluation at St. Agnes hospital there, and follow-up evaluation under my direction demonstrated no heart abnormalities. Brian relates a marked increase in job-related stress leading up to this episode. Since he has been of [sic off?] work on medical leave, his blood pressure has normalized nicely. It is my opinion that there likely was some contribution of job-related stress to his episode of hypertensive emergency on 9/11/07.

Furthermore, his language and actions may have been out of character due to this extremely elevated blood pressure. It is not uncommon during hypertensive emergencies for an individual to say or do things that he does not recall later, once the blood pressure has normalized.

The Claimant testified that he “vaguely recollects seeing [Manager Whitley] coming” after he got ill on September 11, but that other than that he could not recall. He stated that he remembered certain things that happened in the ambulance on the way to the hospital, such as that he was given nitroglycerine twice, because he felt more secure

once he was under the care of medical professionals.

The Claimant acknowledged that there was a prior incident between him and Manager Whitley where he threw a hard hat in the opposite direction of Mr. Whitley. He stated that on that occasion he had raised a safety issue with Mr. Whitley, and Mr. Whitley responded in a sarcastic manner to his safety concern.

Regarding the Carrier's policy against workplace violence, the Claimant testified that he did not remember saying anything or doing anything to Mr. Whitley, but that he did not feel as though Mr. Whitley would in any way, shape, or form need to feel intimidated by him. The Claimant noted that Mr. Whitley was physically larger than the Claimant.

The Claimant testified that he began feeling ill immediately after his conversation with Mr. Whitley about the charge letter concerning his Sunday, August 26, 2007, absence. Also adding to his tension, the Claimant stated, was an accident that had occurred earlier that week where several team members were injured. The Claimant testified that his personal physician released him to return to work on November 3, 2007.

Following the close of the hearing, by letter dated December 21, 2007, L. E. Houser, Assistant Chief Engineer System Production Teams, notified the Claimant of his determination on behalf of the Carrier as follows:

Upon review of the transcript, the facts support and confirm your failure to properly and safely perform the responsibilities of your assignment, in addition to your failure to comply with CSX operating rules and policies. Moreover, you

admitted in your testimony that you failed to comply with CSX Operating Rules.

Account of the aforementioned violations, and your prior record, it is my decision that *you are to be assessed the discipline of a thirty-four (34) actual day suspension starting November 18, 2007, and continuing up to and including December 21, 2007.*

I ask that you take time to reflect on the incidents that led to your discipline and take appropriate actions to learn from this experience. You are an important member of the CSX Team and I look forward to your future contributions.

On January 20, 2008, the Vice Chairman of the Allied Federation of the Organization appealed the discipline given to the Claimant by the Assistant Chief Engineer System Production Teams. The appeal letter notes that the Claimant was very ill at the time of the incident, that he believed that he was having a heart attack, and that his blood pressure was extremely high, characterized by his physician as a hypertensive emergency. The appeal cites the Claimant's physician's opinion that job-related stress contributed to the Claimant's medical condition. It emphasizes that everybody who was present agreed that the Claimant "was not himself."

The Organization contends in its appeal "that the discipline assessed to Mr. Faulknier by the carrier is undue punishment because the testimony provided during the investigation do[es] not support the charges." The Claimant, the appeal argues, "was suffering from a stress related incident and or illness that caused him to act suspicious." The discipline meted out, the Organization asserts, failed to take into consideration "Mr. Faulknier's medical and or physical condition at the time of the so-called incident." The

Organization contends that the Claimant “was not acting normal at the time of the incident” and that his testimony shows that he did not act or speak with intent. The appeal requests that the Claimant be exonerated and that he be compensated for all lost wages and benefits.

On July 25, 2008, following the parties’ discussion of the case in conference on July 1-2, 2008, the Carrier’s Director, Labor Relations replied to the appeal. The Director’s reply states that the Claimant’s contractual due process rights were fully protected and that the hearing was conducted in a fair and impartial manner. The reply argues that the evidence presented at the Investigation established that the Claimant was guilty of the charges against him and violated the rules as charged. The fact that the Claimant was not well, the reply argues, “in no way excuses the Claimant for behaving in an aggressive manner toward his supervisor, spouting abusive language and throwing or kicking his hard hat.”

The reply to the appeal argues that the facts as brought out at the hearing “fall far short” of establishing that the Claimant was suffering job-related stress or a hypertensive emergency. In support of that position the reply asserts that the hospital released the Claimant without treatment and with instructions to see his personal doctor. This may signify the possibility of a medical issue, the reply states, but “it in no way denotes an emergency condition.”

The reply further argues that the fact that the Claimant selectively directed his

speech and actions towards his supervisor and nobody else present makes untenable the appeal's contention that the Claimant acted out of character as a result of his extremely elevated blood pressure. "A medical condition leading to out of character behavior and lapses in memory," the reply asserts, "would not be selective. One would be hard pressed," the reply continues, "to find any support for selective uncontrolled behavior."

The reply asserts that the Organization does not deny that the Claimant exhibited the behavior with which he was charged, but simply tries to excuse the behavior. It cites the Claimant's testimony that "I haven't denied the charge of what I said." The Carrier states that it took into consideration all of the circumstances in assessing discipline to the Claimant, including the Claimant's condition. His behavior, the Carrier contends, could have resulted in dismissal, but it chose to administer a lesser discipline of 34 days. The discipline assessed, the Carrier maintains, was supported by substantial evidence.

While the appeal was pending the parties, as confirmed in a letter between them dated July 28, 2009, agreed to move the case for expedited handling to this Public Law Board.

Although the Board is satisfied from the evidence that the Claimant had a hypertensive emergency at work on September 11, 2007, as stated in his doctor's written statement, we are not persuaded that he did not know what he was doing at the time. According to the testimony of Manager Whitley, in addition to telling Whitley to get the f__k way from him, the Claimant also said that all that Mr. Whitley wanted to do was

write letters and threaten their jobs. In the same vein, Foreman Maxwell testified that in addition the Claimant said that he (the Claimant) didn't want to have anything to do with him (Mr. Whitley). Mr. Dorto testified that in addition to telling Mr. Whitley to get the f__k away from him, he also said, "This is all your damn fault."

What the testimonies of the three witnesses have in common is that they show that the Claimant was very well aware of whom he was talking to. The Claimant had very negative feelings toward Manager Whitley, whether because he had confirmed that the Claimant would be receiving a charge letter for his Sunday, August 26th absence or because the Claimant blamed him for his sudden illness. It is for either reason (or a combination of both), the Board is persuaded, that the Claimant told Manager Whitley to get the f__k away from him. This was said by the Claimant in front of many team members and undermined Mr. Whitley's position of authority as supervisor of the team. It was a major offense, and this Board is not able to say that the 34-day suspension was excessive discipline for the violation.

The Board has considered the statement of the Claimant's physician introduced into evidence in the Investigation. The statement says that the Claimant's "language and actions may have been out of character due to this extremely elevated blood pressure." The judgment that conduct "may have been" out of character is not something that this Board can give determinative weight to. The Board notes that on a previous occasion, when he was not ill, the Claimant reacted aggressively and threw his hard hat when he did

not agree with something his supervisor said. This would indicate that it may be part of the Claimant's character to have diminished self-control when faced with a situation that angers or disturbs him. If so, he must work at maintaining self-control in the workplace even in trying circumstances. Order and respect for authority are very important in any business organization.

In defense of the Claimant, however, it should be said that there is no evidence in the record that he was guilty of violating the Carrier's Violence in the Workplace policy. The policy prohibits "threats or acts of violence against the Companies' [sic] employees or non-employees doing business with CSX or while on CSX property or in CSX-sponsored lodging. . . ." The Claimant voiced no threat to Manager Whitley. He kicked the hard hat away from, not toward, his supervisor. Mr. Whitley did not testify that he felt threatened. He walked away from the Claimant, not because he feared him, but because he did not want in any way to aggravate the Claimant's medical condition. In that respect the Board is impressed with the wisdom of Mr. Whitley's action. Another supervisor might have reprimanded the offending employee on the spot, and thereby perhaps endanger the employee's life. Nevertheless, even though the Claimant did not violate the Violence in the Workplace policy, the violation that he did commit was, as noted, a major offense. The claim will be denied.

One additional comment is in order. The discipline letter concluded with an appeal to the Claimant to "take time to reflect on the incidents that led to your discipline

and take appropriate actions to learn from this experience.” The letter then added, “You are an important member of the CSX Team and I look forward to your future contributions.” The Board notes for the benefit of the Claimant that the last sentence is not something that is added to discipline letters as a matter of course.

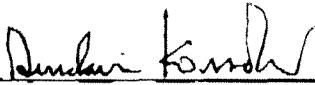
The Claimant should not take the discipline issued to him as a rejection but, as the letter states, a learning experience. The Board believes that the Carrier does, in fact, value the Claimant as an employee. The Board is favorably impressed by the fact that the Claimant called up Manager Whitley to apologize in the event he had said anything improper or disrespectful to him. That shows good character and lends support to the company’s expectations of future contributions from the Claimant. No employer, however, can overlook the kind of conduct that occurred in this case. It is hoped that the Claimant will put this matter behind him and resolve to prove himself to be a valuable employee

A W A R D

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.

A handwritten signature in black ink, appearing to read "Sinclair Kossoff", written over a horizontal line.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
October 19, 2009