

PUBLIC LAW BOARD NO. 7120

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PARTIES TO DISPUTE: (EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated September 10, 2009, Division Engineer S. K. Piccirillo directed A. J. Banks ("the Claimant") to attend a formal Investigation at the Carrier's office conference room in Fort Wright, Kentucky, on September 24, 2009, as principal, "to determine the facts and place your responsibility, if any, in connection with information that I received on Friday, September 4, 2009, from Ms. J. M. Svela, Manager Human Resources, regarding an internal investigation into allegations that you made threatening remarks involving physical violence toward CSX Transportation Officers to Roadmaster W. L. Stamper at approximately 1800 hours on August 6, 2009, while you were with him in the vicinity of mile post BB-7.2 near Cincinnati, Ohio." The letter stated that the Claimant was "charged with conduct unbecoming an employee of CSX Transportation, threatening physical violence against fellow employees and possible violations of, but not limited to CSX Transportation Operating Rules – General Rule A, General Regulation GR-2; CSX Safe Way General Safety Rule GS-1; CSX Policy on Workplace Violence; as well as, the CSX Corporation Code of Ethics." The letter confirmed that the Claimant was being withheld from service pending the results of the Investigation.

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 service with the Carrier on September 26, 2005. As a contract employee he held positions of track inspector, foreman, operator, and trackman. Approximately three years after his hire he was promoted to Assistant Roadmaster, a management position. He was discharged from that position on or about September 4, 2009, for allegedly violating the CSX workplace violence policy by uttering the alleged threats which are the subject of the present Investigation. Upon termination from his management position the Claimant was charged in his seniority position as set forth above.

The evening of August 5, 2009, the Claimant was agitated. His son had been charged with rule violations in an incident of which the Claimant had personal knowledge, but his superiors would not permit him to attend the hearing and testify. J. C. (Doc) Windell, Engineer of Track and the Claimant's immediate supervisor, testified that earlier in the week the Claimant had come to see him and "was pretty upset because his son had been scheduled to be in a hearing." "I think," Engineer Windell stated, "he felt threatened . . . because it was a family member." Mr. Windell told the Claimant that it was "not necessarily Mr. Banks's fault and that his best course of action was to stay the heck out of it, let things happen the way they happen, talk to his son and try to get him to change his work habits and what he was doing."

Roadmaster Willie Stamper was required to be at the hearing the next day

involving the Claimant's son and had asked the Claimant to meet with him the evening of August 5th so that they could conduct a job briefing about the work for the next day when the Claimant, as Assistant Roadmaster, would be taking over the duties of Roadmaster Stamper. Roadmaster Stamper testified that he wrote down the conversation he had with the Claimant that evening "so it would be fresh in my memory." Mr. Stamper read his summary of the conversation into the record at the Investigation:

To Whom It May Concern:

On Wednesday, August 6 [corrected at hearing to August 5], 2009, at 18:00, Assistant Roadmaster AJ Banks climbed into my work truck while I was sitting along the tracks at BB 7.2 in Cincinnati, OH. AJ asked that I roll the window up and he locked the doors of my truck. AJ seemed agitated and I asked him what was wrong. AJ stated that the following:

AJ Banks: This hearing tomorrow is getting f___g personal!

Willie Stamper: What do you mean?

AJ Banks: This f___g hearing tomorrow concerning my son is getting personal!

Willie Stamper: What do you mean?

AJ Banks: This hearing tomorrow is a personal attack against me and my family. If this hearing goes bad tomorrow, Kelly, Doc and Mike better stay the f__k clear of me!

Willie Stamper: What do you mean by that?

AJ Banks: I have been known to "cut" a man and it wouldn't be the f___g first time. They just better stay the hell clear of me. Why don't they want me at this hearing tomorrow?

Willie Stamper: It probably is a conflict of interest due to Matt being your son.

AJ Banks: I think I should be involved because he [the son] called me when he called in that day! Why are Kelly and Doc not speaking to me and attacking me? I opened up the mail yesterday and Kelly gave me a charge letter because I did not have my hard hat on at Taylor Bros.

Willie Stamper: Are you serious? You were far enough away from the track.

AJ Banks: Yes! They are picking on me. Kelly and Doc are “blocking” me from getting the Roadmaster jobs that I have been interviewing for.

Willie Stamper: They can’t do that. You have to at least get an interview.

After that conversation we went over the work plan for the next day and AJ stated that he was heading home. After this conversation, I felt “un-easy” and I thought I should bring it up in case something really did happen.

At 18:45, AJ sent me a text message via Blackberry Messenger the following message: Keep everything under your hat for me about what we talked about thanks ol buddy.

Thank you,

Willie Stamper
Roadmaster

Asked by the hearing officer if his summary covered the entire conversation that he and the Claimant had that evening, Roadmaster Stamper stated that they also talked about a hobby they had begun recently of flying remote controlled planes together. In addition, Mr. Stamper stated, the Claimant confided in him about financial problems he was having; and they talked about buying an airplane.

Roadmaster Stamper did not immediately report the conversation he had with the Claimant to anyone. The next morning Mr. Stamper reported the conversation to Mike Little, Staff Engineer, Louisville Division. He told Staff Engineer Little that the Claimant had threatened to cut some people. (Tr. 46). Mr. Little asked Roadmaster Stamper whom he was talking about. Mr. Stamper said that the Claimant mentioned Division Engineer Kelly Piccirillo, Engineer of Track Doc Windell, and Mr. Little. Staff Engineer Little was the conducting officer of the hearing for the Claimant’s son.

Engineer of Track Windell testified that Mike Little called him and told him of the visit he had from Roadmaster Stamper, who reported the conversation that he (Mr. Stamper) had had with the Claimant the day before. Mr. Little, he stated, told him the

following:

Well basically AJ's [the Claimant's] son was scheduled to be in a hearing and told me that AJ had got in the truck with Willie [the Roadmaster] and rolled the windows up and made a statement that the events around the hearing were getting really personal and that he was pretty upset about it and that if the hearing didn't go the right way then Doc and Mike and Kelly better watch out. He'd cut people before and something to the extent of that.

His reaction to what he was told, Mr. Windell testified, was, "I couldn't believe that he said something like that for the first thing. And for the second thing . . . it's a pretty threatening remark to say that you're gonna cut somebody."

The Claimant, when asked by the hearing officer to state what he knows about the incident and his involvement with it, testified, "We talked about a lot of different things that day, but I never one time allegedly threaten anyone that I have worked with. I have nothing but the utmost respect for the men that I work for and the Company that I work for."

Asked by the hearing officer to give his version of the conversation between him and Mr. Stamper, the Claimant stated that they talked about a hard hat incident because he had been told earlier that day that he was going to be charged for a hard hat incident although he was 40 feet away from the track. This agitated him, he stated. He acknowledged that as it turned out he was never charged with any kind of hat incident. He was also agitated, he testified, because his son had an investigation coming up the next day. He felt that the investigation was bogus, he stated, because his son was pulled out of service for being late and not calling in when, in fact, he (Claimant Banks) was the manager who took the phone call from his son.

Staff Engineer Little told him, the Claimant testified, that he (the Claimant) had no managerial authority at Cincinnati Queens Gate Terminal (where the Claimant's son

worked), but yet the Claimant was a manager for CSX Transportation. It aggravated him, the Claimant asserted, and he felt that his son was not going to be treated fairly in that the truth was not going to be brought out. "But," the Claimant continued, "my hands were tied and as I had discussed with Mr. Windell, he told me to stay clear of it. And I told Matthew [the Claimant's son] that night when he called me that, Dude my hands are tied, I can't do nothing else for you."

The Claimant acknowledged that when he got into the truck he asked Roadmaster Stamper to roll the windows up and that he might have locked the doors. He did this, he stated, because they were discussing his (the Claimant's) private life. Asked by the hearing officer if the Roadmaster's written account of the conversation was an accurate representation of the conversation between them, the Claimant testified, "It could have been part of it, but I never threatened to go after anyone, I am not made that way. He may have misunderstood me, may have misconstrued. I don't know, but I never one time singled anyone out for physical violence."

In reply to questioning by his Organization representative, the Claimant stated, "I figured I could talk to Willie, I had known him for three years. I have worked with him shoulder to shoulder for three years."

The Organization representative asked the Claimant, "Did you ever in any of your conversations with Mr. Stamper, threaten to cut anyone or do any physical violence to anyone from CSX?" He answered, "No." The representative continued, "But you did make statements that 'to cut them where it hurts.' Can you explain once again what you meant by that?" He stated, "Take legal action, cut a man where it hurts, cut him in the wallet."

At the close of the hearing, given the opportunity to make a statement in his own

behalf, the Claimant stated as follows:

On my own behalf. I feel that this would be – this is being taken way out of context. This is not who I am and they know it. This couldn't be further from my character if somebody drew me out to be a mad man. Stress does a lot of things to a lot of good people in different ways. Do I feel like I did something wrong, no. Could I have worded it better, possibly; but as far as all of this, I feel I have done nothing wrong and will stand by it.

I tried to be as honest and front forward as I possibly can and that is what I have done my tenure at CSX is I have shot people straight and they know I shoot them straight. I don't beat around the bush, it is what it is. A very smart man told me that. If I am wrong for believing that, I'm sorry, but I will live that till the day I die.

Do I feel that I should be going through this, no I do not. I have lost my managership due to agitation. Should it have went this far, no.

In my honest opinion, I should be allowed to go back to work and do what I do, keep the trains safe. That is what I have done for four years and I can knock on wood and say I am proud to do it.

Following the close of the hearing, the Chief Engineer, by letter dated October 13, 2009, notified the Claimant of the Carrier's determination that the evidence presented at the Investigation supported the charges, that the hearing was conducted in accordance with his contractual due process rights, and that due to the seriousness of the charges proven in the case "the discipline assessed is immediate dismissal from the service of CSX Transportation and forfeiture of all rights and seniority."

A procedural issue raised by the record is whether the Claimant received a fair hearing considering that the charge letter stated that the alleged threatening remarks were made by the Claimant on August 6, 2009, instead of August 5, 2009. The Board believes that stating the wrong date in the charge letter is not a sufficient basis for overturning or reducing the Claimant's discipline. First, the prior investigation conducted while the Claimant was still a management employee should have made him aware of the basis for the charge against him. Second, the Carrier offered the Organization and the Claimant

the opportunity to adjourn the hearing to give him additional time to prepare his defense. The Organization and the Claimant declined to postpone the hearing and continue it at a later date. For these reasons the Board finds that alleging the wrong date in the charge letter is not a reason for reversing or modifying the discipline assessed against the Claimant.

The Board will now consider the merits. In Third Division Award 29817 (Barry E. Simon) the Board noted that the term “threat” covers “a broad spectrum [of] conduct.” While the Board found a threat present in that case, it deemed it not serious enough to warrant dismissal of the claimant.

In the present case the Board accepts the Roadmaster’s written account of the conversation, made while his memory was still fresh, as an accurate report of what the Claimant said. A careful reading of the Roadmaster’s account shows that the Claimant’s testimony that in the conversation “I never threatened to go after anyone” is accurate. He did not state that he was going to, or wanted to, cut or otherwise harm any company manager or anybody else. His statement rather was that the named managers “better stay the f__k clear of me” or “better stay the hell clear of me.” He did not say that he would seek them out or that he wanted to harm them.

Moreover, from the Roadmaster’s account, it appears that the “cut” remark never would have been made except that the Roadmaster repeatedly asked the Claimant, “What do you mean?” Had the Roadmaster just let the Claimant talk out his feelings, or tried to calm him, there is no reason to believe that he would have gone any farther than to say that the management officials should stay clear of him. The “cut” remark was made in response to the third time that the Roadmaster asked him, “What do you mean?” while the Claimant was giving vent to his anger and frustration about not being allowed to attend

the disciplinary hearing for his son. The statement about staying clear of him in itself could reasonably be interpreted as expressing a desire to avoid any contact with the managers, the implication being that contact could result in a confrontation.

Of course a manager should not have to be concerned about being in the presence of a subordinate. Nor can orderly operations be carried out by the company if supervisors or managers must be in fear of confrontations with employees. To that extent the Claimant's remarks were threatening and deserving of discipline. However, the "stay clear" remark by the Claimant did not necessarily refer to a physical confrontation between him and the managers. It is just as reasonable to interpret his remarks as warning of a possible verbal confrontation. That would be a much less threatening remark than warning of a possible physical confrontation.

It is true that the Claimant said, "I have been known to cut a man and it wouldn't be the f___g first time." However, if he intended to threaten the managers physically, all he had to say when the Roadmaster asked him, "What do you mean by that?" was that he was going to cut them or attack them if they didn't stay clear of him. The Claimant said no such thing. The Roadmaster was the Claimant's personal friend. They had worked together closely for three years and shared a hobby together. The Claimant confided in the Roadmaster about his financial and legal problems and the slights he believed he was receiving from management. When asked outright by the Roadmaster what he meant by saying the managers should stay clear of him, one would have expected the Claimant also to tell the Roadmaster of any plan or intention to physically harm the managers if that was his state of mind. But, as noted, the Claimant did not say that. Instead he made some vague remarks about what he has been known to do. That indicates that the Claimant was intentionally avoiding uttering any direct physical threat against any company officer or

employee.

The CSX Violence in the Workplace Policy is very clear. “If any employee becomes aware of an emergency situation involving immediate violence or a threat of immediate violence by a CSX employee or non-CSX personnel, he/she must immediately call 911. . . .” The Policy further states, “If any employee becomes aware of or suspects threats or acts of violence by employees or non-CSX personnel, in a non-emergency situation, he/she must immediately report such conduct to our Public Safety Coordination Center at 1-800-232-0144.” (emphasis added). The Roadmaster did not immediately report his conversation with the Claimant either to the Public Safety Coordination Center or to his supervisor. He did not report it to anybody until some 13 hours after the event when he told Staff Engineer Little about it. This leaves a real doubt in the mind of this Board that the Roadmaster considered what the Claimant said to him to constitute a genuine threat of physical violence against any CSX officer or other employee.

If the Claimant had a history of violence or making threats at work, then one might be justified in giving a sinister interpretation to his remarks. But there is no evidence of such a history on the Claimant’s part. Nobody (except with regard to the present incident) challenged the Claimant’s testimony that he has never threatened anybody that he has worked with (Tr. 69). That testimony was supported by the testimony of his immediate supervisor, Engineer of Track Windell, who, when asked how he felt when told what the Claimant allegedly said to Roadmaster Stamper, stated, “I couldn’t believe that he said something like that. . . .” (Tr. 42).

In addition the Claimant has a good overall work record. The only blemish on his record is a single time out session for an incident that occurred three and a half years prior to the present incident. We therefore appear to be dealing here with a good employee

with no prior record of threats, violence, or indecorous behavior.

The most reasonable way to view the Claimant's conduct in this Board's opinion is that of a father speaking in anger and frustration in response to what he perceived as an injustice being done to his son, but not intended as a threat of bodily harm to any manager or anybody else. The dominant theme of his conversation with the Roadmaster is to avoid having anything to do with the named managers and not a desire to harm them. He wants them to stay clear of him, out of his way. He does not express an intent to seek them out. At no time does he say that he wants to or plans to inflict any harm on them. The Claimant's choice of words was very poor and contained elements of threat or hostility that provided management with cause to remove the Claimant from his management position. But, in this Board's opinion, reasonably construed, the words did not amount to a threat by the Claimant to physically harm the named managers or anybody else so as to justify depriving him of his seniority. Nor did the Claimant's work history indicate that he was a violent person or had ever previously threatened anyone. On the contrary, he has a good work record. Under all of the circumstances the Board concludes that dismissal from the service and forfeiture of seniority was an excessive penalty.

The Claimant shall be reinstated to seniority and service. In view of the length of time that he has been out of the bargaining unit and out of service, he shall be given the necessary refresher training before being permitted to resume work on his own. In view of his serious misconduct, however, he will not receive any back wages or benefits for the time that he was off work.

An additional comment is in order. In his closing statement the Claimant expressed pride in being a straight shooter who does not beat around the bush and says things as they are. Shakespeare wrote, "This above all: to thine own self be true. . . ." The

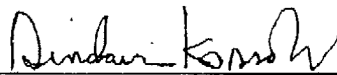
Claimant should not try to fool himself as he did in his closing statement when he said, "Do I feel like I did something wrong, no." (Tr. 82). He should admit to himself that it was very wrong to say that his managers better stay clear of him or to display bravado by saying that he has been known to cut a man. Such statements have no place at work or elsewhere. The Claimant should make it a resolution to take care about what comes out of his mouth because, once spoken, words cannot be taken back. The Board has returned the Claimant's seniority to him because he has a good work record with no history of violence or threats and because it believes that, while he came close, he did not actually cross the line of uttering a threat of physical harm. The Claimant cannot expect, however, that he will be given the benefit of the doubt should he engage in similar conduct in the future.

A W A R D

Claim sustained in accordance with the findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the date the signed Award is transmitted to the parties.



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
February 9, 2010