NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1116

Parties to Dispute:	
BROTHERHOOD OF LOCOMOTIVE ENGINEERS	OPINION AND AWARD
vs.	Docket No. 23
CSX TRANSPORTATION, INC. (former Consolidated Rail Corporation)	Engineer T. A. Evans, III

STATEMENT OF CLAIM:

"Claim of Engineer T. A. Evans, III, ID 796572, for all wages lost due to his dismissal on April 23, 2003, and that any reference to his dismissal be expunged from his record."

FINDINGS:

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

Claimant Evans, first employed by Conrail on February 2, 1998, was working as an Engineer out of Buffalo, NY on the Lines West Extra List on the date of the incidents giving rise to this Claim. On July 19, 2002 he was reported to have sexually molested a minor on two separate occasions, once in April, 1999 and the second on some unspecified date in 2000 while sleeping over at the home of a friend following two sporting events. On September 15, 2002 he was charged with two counts of Sexual Abuse in the second degree. On March 25, 2003 he entered a plea of guilty to one charge of Sexual Abuse in the third degree, served 5 consecutive weekends in the Erie County Jail and was placed on probation for 1 year. Prior to these events, Claimant had a trouble-free work history.

On March 14, 2003, Field Director J. Lewandowski was alerted to these developments by an anonymous caller. After verifying the facts, by letter dated March 21, 2003 he directed Claimant to attend an investigation in connection with the following charges:

> "Your alleged conduct unbecoming a CSXT Employee when you pled guilty to sexual abuse in the third degree."

Hearing was ultimately conducted on April 14, 2003. There CSX Special Agent R. L. Hartman sponsored copies of various documents from Claimant's legal proceedings attesting to his plea and sentencing, including copy of a protective order barring further contact between Claimant and the victim; a statement from the victim's father, CSXT Engineer T. C. Seifert and a clipping dated March 20, 2003 from *The Sun*, a local newspaper circulated in the Hamburg and surrounding areas reporting Claimant's conviction and sentencing at Hamburg Town Court on March 5, 2003. Claimant's representatives entered a communication from Claimant's attorney to him dated January 24, 2003 explaining that Sexual Abuse in the third degree is a "B" misdemeanor under New York law; setting forth the possible range of criminal penalties associated with the offense; and advising that Claimant's negotiated plea agreement obviated both acceptance of responsibility for rape or assault and any need to register under the Sexual Offender Registry.

At the conclusion of Claimant's hearing and following review of the evidence adduced, Carrier determined that Claimant was guilty of conduct unbecoming a CSXT employee as charged and by letter dated April 23, 2003 terminated his employment, citing violation of NORAC General Rule "D". The Organization contested that action on a timely basis and appealed successive denials of the Claim in the usual fashion to Carrier's highest designated officer. When the matter remained unresolved it came before this Board for consideration.

The Organization here asserts both procedural and substantive challenges to Carrier's action in dismissing Claimant. First, it contends that Carrier's charges were issued untimely. Carrier represents, but has never established, that it received an anonymous tip on March 14, 2003. While evidence of record in the form of a Labor Relations' e-mail message to Claimant's supervisor indicates "1st Knowledge 3/14/03," that self-serving internal communication is hardly probative. Pursuant to Article G-m-11 (d) (1), in a case involving criminal offenses Claimant was entitled to be charged within 7 days of the date the Carrier became aware of the occurrence. He had a right know with certainty when

Carrier became aware of the acts leading to his termination. Further, he was entitled to have received a copy of the letter of complaint at the time the Notice of Investigation was sent in accordance with Article G-m-11 (d) (2). Since neither the maker of the complaint nor the date on which Carrier became aware of the offense can be determined from the record, Claimant's contractual rights to due process have been violated.

Underlying the Organization's procedural contentions is the premise that Carrier must have had prior knowledge of the offense and its delay in charging him violated the Agreement. No record evidence supports that assertion. Field Director Lewandowski testified without challenge that he first obtained word of what was already old news on March 14, 2003 and immediately asked Special Agent Hartman to investigate. With no evidence to suggest that the source of Carrier's information was *not* an anonymous call, there was neither a written complaint available to furnish Claimant nor any identity of a complainant to disclose. We conclude that all then available documentation and information was provided, that Claimant was afforded a fair hearing and that the case is procedurally regular in all respects.

On the merits, the Organization maintains that Carrier has failed to bear its burden of proof. We agree, and for the reasons stated below will sustain the Claim.

While the nature of the off-duty conduct for which Claimant was dismissed are abhorrent, as has been held consistently, including in the arbitral precedent on this property supplied by the Organization, an employee's conduct in his private life is generally not the employer's concern. Misconduct such as a misdemeanor sexual offense will not justify discharge so long as the employee misses no work or is unable to perform his duties; the arrest does not damage the employer's reputation, product or public image; or it does not affect the willingness of co-workers to deal with the employee.

Consideration of those factors precludes the Board from endorsing the severe measures taken against the Claimant. He missed no work as a result of his actions or ensuing criminal proceedings. He generated no publicity unfavorable to Carrier. Indeed, *The Sun* weekly newsletter article dated March 5, 2003 upon which Carrier relies appeared after Claimant was charged. It did not identify him as a CSXT employee. Claimant's guilty plea does not appear to have received any further media attention. It was never noted in the

more widely-circulated Buffalo *News*. Nor was it established that Claimant experienced any difficulty in working with fellow employees as a result of his guilty plea. The only factor arguably establishing a nexus between Claimant's off-duty misconduct and his workplace is the testimony of Special Agent Hartman indicating the father of the victim refused to work with Claimant. The two men, however, according to the testimony of Trainmaster T. Ferris, would not normally ever be required to work together since both are Engineers. Lastly on that point, the record reflects this exchange between Carrier's Hearing Officer and Claimant:

> HEARING OFFICER: "Mr. Evans, has any employee o f CSX approached you with regard to this incident?"
>
> CLAIMANT: "NO."
>
> HEARING OFFICER: "Have you had occasion to run into any CSX employees during that time frame?"
>
> CLAIMANT: "Yes."
>
> HEARING OFFICER: "And was any mention made of the—your conviction?"
>
> CLAIMANT: "No."

In sum, we find no reasonably discernible connection between Claimant's plea of guilty to these unsavory incidents and his job or his employer's business. For the foregoing reasons, we find that dismissal was improper and sustain the Claim.

AWARD

The Claim is sustained.

James E. Conway
Chairman and Neutral Member

Paul T. Sorrow
Employee Member

SR Friedman - Dissent attached
Steven R. Friedman
Company Member

Dated at Great Falls, VA
February 1, 2004

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CSXT DISSENT

The learned neutral party in this case has determined that CSXT employees may perpetrate the most heinous acts imaginable and face no employment consequences if there is no "reasonable connection" to our business. The Company's posture in such matters is that the well being of the community in which we serve is CSXT's business as well as everyone else's. Even if some mitigating factors were presented in this case, the Appellant's actions cry out for impact on his employment relationship with CSXT. The majority award cleans the employment slate and presents the Appellant with an undue windfall. The majority's willingness to ignore the facts account of the ostensible lack of impact in the workplace is, at best, discouraging. Plato said, "What is honored in a country will be cultivated there." The notion that criminal behavior can, in certain cases, be segregated from the workplace imperils the moral fabric of the corporation. Fine line distinctions which "honor" the privacy of the individual may be cultivated in the federal court system but such discreet parsing ill-serves the rail industry. The instant award is in error at worst or at best, overly generous and therefore I must vigorously dissent.

S R Friedman

S. R. Friedman