Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32452
Docket No. MW-32917
98-3-96-3-284

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (removal from service and subsequent dismissal) of Mr. C.E. Pea in connection with the charge of '. . . conduct unbecoming an employee concerning alleged racial slurs being made on May 10, 1995 at the corporate lodging facility at the Holiday Inn in LaPorte, Indiana . . .' was harsh and unjust [System File SPG-TC-9640/12 (95-728) CSX].

(2) As a consequence of the aforesaid violation, the Claimant shall be '***reinstated with all seniority unimpaired and be made whole for all monetary loss incurred while held out of service. In addition, we request that Mr. Pea be entitled to all days he was held out of service to count toward his 1995 vacation qualifying time, plus all other benefits.'"

FINDINGS:

The Third Division of the Adjustment Board, 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.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

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

On May 9, 1995 the Claimant, who had established 18 years of service and who held the position of Equipment Operator, was staying in corporate lodging with other members of a SPG gang. On the day in question the Claimant was advised by the motel clerk that he would be required to share a room with one of his co-workers, but he objected and instead chose to spend the night in his automobile. The following morning the Claimant spoke to one of those co-workers, who asked him about his decision. In response the Claimant told his co-worker that he preferred to sleep in his automobile rather than spending the night with a "nigger." The co-worker objected to the Claimant's comment, but before there was any additional interaction between them another co-worker intervened and the incident ended. The two co-workers reported the matter to supervision who, after an Investigation, dismissed the Claimant from service on June 21, 1995 for making racial slurs that constituted ". . . conduct unbecoming an employee. . . ."

The Organization first attacks the removal on the basis that the Carrier did not provide to it the statements of witnesses called at the Hearing on the property. We reject this argument, agreeing with the Carrier's observation that there is no contractual requirement or any other obligation to provide the statements in question in the Rules applicable to this matter.

On the merits, the Organization contends that the Carrier did not meet its burden of proof because the record established at the Hearing on the property shows that the Claimant, who was not wearing his false teeth at the time of the incident, slurred his words and in fact said that he preferred not to sleep with a "drinker." Thus, the co-workers mistakenly heard a racial slur when no such comment was made; there is therefore no basis for the removal. To accept the Organization's contention however the Board must reject the factual assessment made by the trier of fact. We may not substitute our judgment for that of the trier of fact unless the testimony of the Carrier's witnesses are so devoid of probity that to accept their testimony would be per se arbitrary and unreasonable. Upon review of this record we find no basis for such a conclusion. Accordingly, we decline to do so and find that the Claimant did in fact make the racial slur in question.

The Organization's final argument is that removal from service is a harsh penalty in light of two facts. The first is the Claimant's numerous years of service. The second is the record evidence that on November 9, 1995 the Carrier's Labor Relations Department agreed to consider reinstating the Claimant without pay for time off so long as he agreed, in writing, that he would not repeat the impermissible conduct in the future. Subsequently, the Claimant agreed noting in his own handwriting that he wanted to ". . . assure the Company this type of language will not be used again." However, the Carrier's Engineering Department did not accept the agreement and the removal was carried out.

In light of the foregoing the Organization argues that the Claimant's long years of service and the fact that the Carrier failed to follow through on its leniency agreement require that the removal be overturned and that the Claimant be reinstated with full backpay, benefits, and seniority. The Carrier on the other hand asserts that making a racial slur of the type uttered by the Claimant is a serious and significant infraction.

To assess these competing assertions we begin our consideration noting again that we agree with the finding that the Claimant is guilty of the misconduct with which he was charged. Further, we agree that this type of racial slur is reprehensible and cannot be condoned. However, the record indicates that, for whatever reason, the Carrier at one time chose to disregard these considerations and offered reinstatement without backpay to the Claimant once he assured the Carrier that the reprehensible conduct would not be repeated. More importantly, the record is devoid of any evidence as to why this decision was not carried out. In the absence of any such evidence it would be harsh and unjust to the Claimant if we were to ignore his agreement to the terms imposed by the Carrier before he could be reinstated. However, because the Claimant agreed to reinstatement without backpay it would be inappropriate to award, as the Organization asks, that the Claimant receive full backpay and benefits. Rather, we believe that the appropriate action under the circumstances is to put the parties back to the position they would have been in had the Carrier stuck to the terms of the bargain agreed to by the Claimant and the Organization. Thus, we find that the Claimant should be reinstated, without backpay, and that the discharge be converted to a suspension for the time served until reinstatement.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of January 1998.