

PUBLIC LAW BOARD NO. 6394

AWARD NO. 50

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The dismissal of Foreman D. Flower for conduct unbecoming in connection with using threatening and unprofessional language while in a disagreement with Trackman T. Noel on April 5, 2010 is unjust, unwarranted, excessive, and in violation of the Agreement (Carrier's File MW-PITT-10-29B-LM-152).
2. As a consequence of the violation referenced in Part 1 above, Mr. Flower shall be granted the remedy in accordance with Rule 30(d) of the Agreement."

Upon the whole record and all the evidence, after hearing, the Board finds the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as precedent in any other case.

AWARD

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The Claimant has over 35 years of seniority and was working as a foreman on the date of the incident in this case. On April 5, 2010 the Claimant was working at the No. 2 Main Line Track in Gallitzin, Pennsylvania. The Claimant noticed Trackman T. Noel placing a jack outside of the track, while the Claimant's experience was that the jack should be placed inside the track, to perform the task at hand. The Claimant was the foreman of a gang working there but he was not Trackman Noel's foreman. There were two gangs who had been assigned simultaneously in the same location. The Claimant told Trackman Noel to place the jack differently, but his comments were ignored. The Claimant again tried to explain where the jack should go to Trackman Noel, and this time the Claimant states Trackman Noel got into a confrontation with him that included

calling him names and profanity. At one point, supervisor Hollen stepped in between the men to try to mediate the conflict. The Claimant then states Trackman Noel bumped him, which caused the Claimant to trip over a rail behind him. This fact is in dispute, because other witnesses saw the Claimant trying to get away from Trackman Noel and saw the Claimant falling backwards, having tripped on the rail. In response, the Claimant called the police and his Track Supervisor. The police left shortly afterward, with no citations to either of the employees.

Assistant Division Engineer Taggart, along with Track Supervisors Little and Webb, conducted a preliminary investigation at the scene of the altercation. The Carrier conducted a formal investigation including a hearing on April 16, 2010 and charged the Claimant with conduct unbecoming an employee. On May 3, 2010 the Carrier informed the Claimant by letter that he was considered in violation of the charge and was dismissed from service.

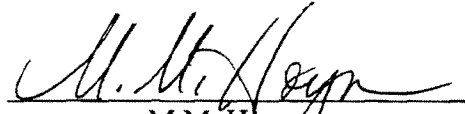
The Carrier argues that the testimony of Trackman Noel was credible and was corroborated by Foreman Hollen, who testified that he witnessed the exchange between the Claimant and Trackman Noel (Transcript page 24). In addition, the Claimant in his written statement admitted he told Trackman Noel to place the jack on the inside, which the Carrier claims is a safety rules violation. The Carrier dismisses the Claimant's argument of self-defense because it says there is no corroborating evidence for it. The dismissal of the Claimant was in accordance with progressive disciplinary action since the Claimant has been suspended three times before (including a dismissal action that was reduced).

The Organization claims that the Carrier's dismissal of the Claimant was unjust and unwarranted because it was based on uncorroborated testimony of one accuser which fails to meet the heightened standard of evidence required for dismissal. The Organization finds the action of dismissal to be disproportionate because the other party to the altercation was given a lesser punishment of suspension. The Organization makes the point that the reason their voices were raised was simply because a tamper gun was being operated at the time, which made it very noisy. Therefore, this does not support the fact that the argument was so heated, as much as it does that the two men had to raise their voices to be heard. The Organization also notes that it is improper to raise the subject of prior disciplinary record only at the late point of the arbitration hearing.

The Board finds that there is no dispute that the incident occurred. There is factual ambiguity regarding whether Trackman Noel pushed the Claimant or he tripped and fell backwards (Transcript, pgs. 45-49). Upon review of the case record, the Board finds that it was the Claimant's actions which initiated the altercation. Given the Claimant's position at the time of this case, there was no reason for him to direct Mr. Noel on any work matter. If the Claimant had concerns over Mr. Noel's work, he should have brought them to the attention of a supervisor. Instead, the Claimant chose to give orders to an employee that was not even on his gang. The Board notes that while neither party – the Claimant or Mr. Noel – acted in an exemplary manner, the case record suggests that Mr. Noel's responses were more aimed at deflecting conflict while the

Claimant sought to continue the altercation. The evidence is clear that the Claimant instigated the argument by directing Noel to do his work differently, even though Claimant was not Noel's supervisor. The Board has carefully considered the severity of the Claimant's actions in this case and weighted them against his seniority and previous work record. The Claimant has extensive seniority, but concurrently has a work record that includes multiple disciplinary actions for violations of the Carrier's rules of conduct. On balance, we find that dismissal of the Claimant was warranted and appropriate given the circumstances of the case and the Claimant's work history.

The claim is denied.


M.M. Hoyman
Chairperson and Neutral Member


J. Dodd
Employee Member


D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on January 31, 2012.