

PUBLIC LAW BOARD – NO. 6461

Case No. 21

Award No. 21

PARTIES

Brotherhood of Maintenance of Way Employees

to

-and-

DISPUTE:

Grand Trunk Western Railway

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline (withheld from service beginning October 23, 2009 and subsequent dismissal on November 10, 2009) imposed upon Messrs. J. Tuzas and D. Dean for alleged violation of USOR – General Rule A – Safety; USOR – General Rule H – Furnishing Information and Conduct; USOR General Rule P – Employee Conduct; USOR Rule 100 – Rules, Regulations and Instructions; LIFE for Engineering – Section II: Core Safety Rules, Rights and Responsibilities #1 f & h; CN Prohibited Harassment, Discrimination and Anti-Retaliation Policy; and CN Code of Business Conduct; in connection with allegations of racial slurs allegedly directed to a fellow employee during which it is alleged that a rope was placed around the neck of a fellow employee, which allegedly occurred at approximately 1330 hours on October 20, 2009 on the South Bend Division Mile Post 156.3 Indian Lake Road, was on the basis of unproven charges, unwarranted, excessive and in violation of the Agreement (Carrier's File GTW-BMWE-2009-00006).

As a consequence of the violation referred to in Part (1) above, Claimants' J. Tuzas and D. Dean shall now receive the remedy prescribed by the parties in Rule 25.”

FINDINGS: This dispute arose as a result of the Carrier charging the claimants' with the following offense:

“your responsibility, if any, and, if you violated any company rules, instructions or policies in connection with information received by the company on October 21, 2009 indicating that you and/or other employees were involved in an incident during which racial slurs were allegedly directed to a fellow employee and during which it is alleged that a rope was placed around the neck of a fellow employee. This incident is alleged to have occurred at approximately 1330 hours on October 20, 2009 on the South Bend Subdivision M.P. 156.3, Indian Lake Road.”

Following a joint formal investigation, the Carrier found the claimants' guilty of violating the following rules, and assessed them discipline in the form of being dismissed from service effective November 10, 2009:

1. USOR – General Rule A – Safety
2. USOR – General Rule H – Furnishing Information and Conduct

3. USOR – General Rule P – Employee Conduct
4. USOR – Rule 100 – Rules, Regulations and Instructions
5. LIFE for Engineering – Section II: Core Safety Rules, Rights and responsibilities #1 f & h
6. CN Prohibited Harassment, Discrimination and Anti-Retaliation Policy
7. CN Code of Business Conduct.

The Carrier asserts that their investigation of the incident disclosed that on October 20, 2009, the claimants' were working at Indian Lake Road making field welds. They state the claimants' confronted a fellow employee, Mr. Kevin Dyer and began making racial slurs and exhibited inappropriate behavior towards him. They contend that the claimants' actions are strictly prohibited by their rules and policy, and that based on the seriousness of the offense, the imposed discipline of dismissal was clearly warranted.

According to Mr. Dyer's written statement (Exhibit #7), he asserts the claimants' confronted him and asked if he knew what happened to their missing mascot (a stuffed doll named "Barney"). Mr. Dyer said that he told them that he knew nothing regarding the whereabouts of their mascot. At that point he states that claimant Tuzas began making racial slurs by stating "Maybe a Mexican had stolen it" and "Maybe it was an El Paso River crosser". Mr. Dyer stated that when he was reaching for a pitchfork to pick-up ballast, claimant Tuzas stepped on it so he could not pick it up, and again asked him "who had Barney". Mr. Dyer said that he told him that he couldn't help him, whereupon Mr. Tuzas told his co-worker, claimant Dean to "Get a noose". Mr. Dyer states that several minutes later, claimant Dean approached him from behind and placed a rope around his neck. He described the rope (Exhibit's 8 and 9) as being approximately 12 feet long with a noose on the end. At the formal investigation, Mr. Dyer emphatically stated that he did not take the claimants' behavior as being a joke. He said he felt threatened by their verbal and physical actions.

Conversely, the claimants' disagree with Mr. Dyer's version of what transpired. Albeit, they admit there was some discussion with Mr. Dyer regarding their mascot Barney, they steadfastly disagree with his assertions that there was any racial or physical actions directed towards him. They deny that the events as described by Mr. Dyer ever occurred.

After a thorough review of the testimony and evidence adduced at the hearing, including the arguments presented by the parties in support of their respective positions, the Board finds that it cannot sustain the Organization's position in this case. The record supports the conclusion that the claimants' engaged in inappropriate behavior with strong racial overtones. We found the claimants' self-serving testimony as being specious. While the record contains some conflicting evidence, the Carrier resolved the evidentiary conflict in favor of Mr. Dyer. Accordingly, we found no basis upon which to disturb the Carrier's credibility determination. One cannot minimize the gravity of the claimants' offense. The behavior in which they engaged was totally inappropriate and constituted a clear violation of Carrier's rules and procedures.

Based on the evidence and testimony brought forth in the record, the Board finds the Carrier properly concluded that the claimants' were guilty of the offense for which they were charged and that they were on solid grounds when they assessed discipline. However, while the Board does not in any way minimize the seriousness of the offense, because it may warrant dismissal, we find that in consideration of all factors involved in this case, including the claimants' tenure

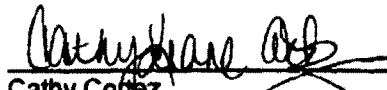
and relatively good work record, we deem the assessed discipline in its present form is excessive.

Therefore, the claimants' are to be restored to service, but without any back pay for time lost. The claimants' are to understand that the purpose of this Award is to give them one "last chance" to be a safe and reliable employee, and the lengthy suspension without pay will emphasize the gravity of this situation. In addition, they should also understand that any future infractions of the rules on their part could possibly result in the permanent termination of their service.

The Carrier is directed to implement the Award within 30 days of receipt.

AWARD: As specified in the Findings.


Francis J. Domzalski
Neutral Member


Cathy Cofez
Carrier Member


Bradley A. Winter
Organization Member

Dated: 6-12-2010