

PUBLIC LAW BOARD NO. 7545

AWARD NO. 1

CASE NO. 1

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
DIVISION - IBT RAIL CONFERENCE

PARTIES

TO DISPUTE:

and

INDIANA HARBOR BELT RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. D. Bennett issued by letter dated February 15, 2012 in connection with alleged violation of NORAC Rule “D” was arbitrary, unjust and clearly in violation of the effective working agreement.

2. As a consequence of the violation referenced in Part I above, Mr. Bennett shall be immediately reinstated with all rights and benefits intact, further compensated for any and all monetary loss he has suffered commencing February 15, 2012 and continuing until such time as he is reinstated and have this entire matter expunged from his record.”

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant was assigned as Lead Mechanic on December 7, 2011 when fellow Mechanic Lamont Williams, an African American, noticed a knotted rope made to look like a noose hanging in the Mechanics’ office, which he saw as an intentional racially

charged action to which he took offense. The matter was investigated by the Chief Engineer and, ultimately, Claimant admitted to knotting the rope with no ill intent and for an innocuous work-related purpose, and he apologized to Williams for any unintentional offense given. Carrier removed Claimant from service on December 13, 2011 and charged him with a possible violation of NORAC Rule D, the applicable portion of which states:

“Employee Conduct: To remain in service, employees must refrain from conduct that adversely affects the performance of their duties, other employees, or the public. Acts of insubordination, hostility or willful disregard of the Company’s interest are prohibited.”

An investigation was held on February 2, 2012, and on February 15, 2012, Carrier found Claimant guilty of the charge and permanently dismissed him from service. The instant claim protests that discipline as unwarranted and excessive.

In the investigation, Williams admitted that he had worked with Claimant for years and he never showed any prejudice, that Claimant apologized to him and told him that he makes that type of slip knot all the time for use at work or recreation, and did not mean anything by it, and that, it was in the context of a prior incident involving another employee that he took offense and felt intimidated. Claimant stated that when he spoke with Williams after admitting making the knot, Williams told him that he did not believe that it was Claimant who put the knot up, and that there was no hostility between them. Claimant was told that their discussion would be the end of it, but after his Manager spoke with Labor Relations, he was removed from service pending investigation. The evidence reveals that employees and supervisors were not given training about these type of issues in the past, and that Carrier was being investigated by the EEOC as a result of a complaint of hostile work environment previously filed. Carrier stipulated that Claimant did not intend to harass or hurt anyone when he made and put up the knot in issue.

Carrier contends that since Claimant admitted that he made a noose knot and hung it in the Mechanics' office, and a reasonable person would understand that the making and displaying of a noose is a symbol against African Americans, citing Third Division Award 37537; Public Law Board 6242, Award 125; Public Law Board 7229, Award 30; Special Board of Adjustment 1132, Award 29; such conduct is offensive behavior (even if not intended to harm or harass Williams) in violation of NORAC Rule D. Carrier asserts that Claimant received a fair and impartial hearing and that the discipline assessed was not arbitrary based upon the severity of the conduct and Carrier's responsibility to maintain a safe workplace. It requests that the Referee not consider new arguments posited by the Organization for the first time in its Submission to the Board, including the results of the EEOC investigation and its disparate treatment contention.

The Organization first argues that the allegation against Claimant involves moral turpitude (a hate crime) which requires Carrier to meet an appreciably heightened burden of proof including that Claimant intended to harass, intimidate or threaten Williams, relying on Third Division Awards 16154, 32707, 33396, especially where Carrier dismisses the employee, citing Third Division Award 32890. The Organization maintains that Claimant knotted a rope for innocuous work-related purposes, which Williams interpreted as intentionally racially motivated and threatening, noting that Carrier admits that Claimant had no intent to harass or hurt anyone and Williams did not believe Claimant was responsible as a result of their prior positive relationship.

The Organization contends that Claimant's conduct falls far short of outrageous behavior found to have occurred in the cited cases upholding lesser discipline, and that William's and Carrier's excessive reaction must be considered in the context of a workplace that the EEOC found to constitute a hostile work environment. It asserts that dismissal was excessive and arbitrary under the circumstances of this case, which include

a lack of anti-discrimination training resulting in cultural ignorance and insensitivity, Claimant's lengthy good work record, his immediate expression of remorse and apology to Williams, and the fact that a Trackman was given a 30 day suspension some months previous for hanging a noose from the rear view mirror of William's car, a more egregious action than what occurred in this case. For all of these reasons, the Organization requests that Claimant's dismissal be set aside, he be returned to work, and compensated for all lost wages and benefits as a result of this dismissal.

A careful review of the record convinces the Board that, while reliance upon a subsequent EEOC finding regarding a hostile workplace complaint being investigated during the relevant time period and raised during the on-property handling, can be considered by the Board when reviewing the context of the incident giving rise to the discipline herein, the Union waived its right to make a disparate treatment argument in this case. The facts underlying the Trackman incident and resulting discipline were known to the Organization months prior to the December 7 incident and Claimant's February dismissal, yet no mention was made of this argument during the claims processing and Carrier had no opportunity to address the specifics of that case or how it compared with the situation herein. Thus, it is not appropriately before the Board for review.

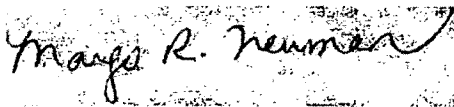
Consideration of the context within which the December 7 incident occurred explains why Williams was especially sensitive to finding a knotted rope looking like a noose in the Mechanics' office, and took immediate offense to it. However, the fact that the EEOC was in the process of investigating a hostile work environment complaint also explains why Carrier chose to dismiss Claimant, despite knowing that he had no mal-intent, did not realize that his slip knot would be construed as a noose with negative connotations, was sincerely remorseful, and immediately apologized to Claimant. While

Claimant's action was, at the very least, insensitive and inappropriate, he had no history of any racially prejudicial conduct and worked well with Williams for many years, which distinguishes this case from PLB 6242, Award 125 relied upon by Carrier. It was admitted that he had no intent to harass or hurt Williams or anyone, another important mitigating factor. See, Third Division Awards 37537; Public Law Board 7229, Award 30. While it is understandable why Carrier would want to make clear to all of its employees that racially motivated conduct is impermissible, it failed to prove that Claimant violated NORAC Rule D as alleged, and its reaction to the situation in this case was both excessive and arbitrary. See, e.g. Public Law Board 6302, Award 61.

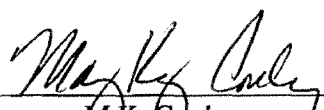
Accordingly, the dismissal is overturned and is to be expunged from Claimant's file. Carrier may substitute a Letter of Reprimand in its place. Claimant is to be returned to work without delay, and is to be made whole for all loss of wages and benefits resulting from his dismissal.

AWARD:

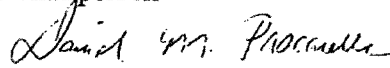
The claim is sustained in accordance with the Findings.



Margo R. Newman
Neutral Chairperson



M.K. Conley
Carrier Member



David M. Pascarella
Employee Member

Dated: July 9, 2012

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