

PUBLIC LAW BOARD NO. 6394

AWARD NO. 51

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 twenty-five (25) day suspension imposed upon Trackman T. Noel for conduct unbecoming in connection with using threatening and unprofessional language while in a disagreement with Foreman D. Flower on April 5, 2010 is unjust, unwarranted, excessive, based on unproven charges and in violation of the Agreement (Carrier's File MW-PITT-10-29A-LM-152).
2. As a consequence of the violation referenced in Part 1 above, Mr. Noel 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 entered service for the Carrier on May 10, 2004 as a trackman and was working in that capacity on the date of the incident in this case. On April 5, 2010 the Claimant was working on track maintenance with the Cresson Section Gang at the No. 2 Main Line Track in Gallitzin, Pennsylvania. Part of the Claimant's work that day was the placement of hydraulic track jacks at track joints so that other employees could use machines to ensure the track was level. The first track jack the Claimant placed that day was inside the gauge of L.G. Trexler, a Boom Truck Vehicle Operator. Mr. Trexler, who is also a member of the local Safety Committee, at that time advised the Claimant that placing the jack inside the gauge of the track was against the Carrier's safety rules (specifically, Rule 1207). Before proceeding to place the second track joint, the Claimant

asked Foreman R.T. Hollen where he should place the track jack. Foreman Hollen confirmed Mr. Trexler's comment, telling the Claimant to place the jack on the outside of the track gauge in accordance with the safety rules.

Later that day, the Claimant was going to place another track jack – this time, on the outside of the track as instructed previously. At that time Foreman D.J. Flower, who was also working at the site, saw the claimant place the track jack outside of the track and instructed him instead to place it on the inside of the gauge. The Claimant explained to Foreman Flower that this was contrary to the instructions he had been given previously. Foreman Flower responded "you can do what you want" to the Claimant and then walked away. At this point an argument began between the Claimant and Foreman Flower, the specifics of which are disputed in the case record. At some point Foreman Flower stumbled and fell backward. The reason for the fall is not clear. Either he stumbled as he was trying to back away or he was bumped by the Claimant. The argument supposedly involved physical threats and profanity by the Claimant. The argument was intense enough that Foreman Hollen observed the exchange and attempted to defuse the argument by having the Claimant step away from Foreman Flower. The incident was reported to Track Supervisor Little, who arrived at the scene about one hour later. At that time he found a local Police Officer on the scene who had been called there by Foreman Flower. The police did not issue any citations.

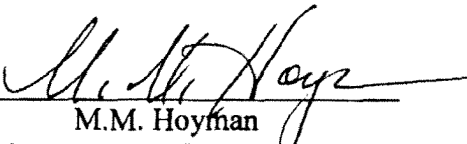
Assistant Division Engineer Taggart, along with Track Supervisors Little and Webb, conducted a preliminary investigation at the scene of the altercation. After concluding the investigation, the Claimant was informed he was suspended from service pending a formal investigation. The Carrier conducted a formal investigation including a hearing on April 23, 2010 for a charge that the Claimant had exhibited conduct unbecoming an employee. On May 5, 2010 the investigation was concluded and the Carrier informed the Claimant by letter that he was found guilty of the charge and was being assessed a 25 day suspension from service beginning April 5, 2010 (the date of the incident).

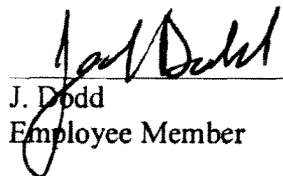
The Carrier argues that its investigation produced sufficient evidence to prove the Claimant was guilty of conduct unbecoming an employee. In support of this claim it cites the testimony of not only Foreman Flower but Foreman Hollen and others that affirmed the Claimants use of profanity. The Carrier also notes that the altercation was of a severe enough level that it caused Foreman Flower to fall in what could have been the path of an oncoming train. There were no injuries, but Foreman Flowers did call the local police.

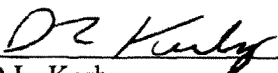
The Organization contends that there is no independent evidence that supports the Carrier's version of events. The basis of the charges were on the word of Foreman Flower, and due to the high volume of machinery being operated in the work area no other witness can reliably corroborate Foreman Flower's accusations. The Organization also argues that the Carrier's findings lacked proper foundation because it is based on the preliminary investigation and not the findings of a hearing officer. Some of the conversation may have been "heated" as the Carrier claims, but that was due to the immediate safety concern.

The Board finds sufficient evidence in the record to support that there was some kind of altercation between the Claimant and Foreman Flower. The nature of the altercation is unclear, as the record has conflicting evidence on whether there was bodily contact, and whether Foreman Flower's stumble was due to his own misstep or due to pushing from the Claimant (Transcript page 16). Given the conflicting nature of much of record for much of this case, the Board only finds enough evidence to support that an altercation of some kind occurred, and during the altercation the Claimant used profanity. The Board understands why the Carrier generally frowns upon the use of profanity, but the use of profane language does not warrant the level of disciplinary action utilized in this case. In coming to this conclusion, the Board notes that the Claimant's role in the altercation is mitigated by the fact that he does not appear to be the aggressor and that the other party appears to have aggressively pursued him, which in essence provoked the Claimant. The Claimant shall be made whole for wage loss suffered the duration of his suspension. The suspension should be expunged from the Claimant's work record.

The claim is sustained.


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.