

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated February 14, 2011, D. W. Rust, Manager Bridges, notified B. P. Clark ("the Claimant") to attend a formal Investigation on February 24, 2011, at the Carrier's Great Lakes Division Office, Indianapolis, Indiana, "to determine the facts and place your responsibility, if any, in connection with information that I received on January 26, 2011 where it is alleged you used your cellular telephone to receive and transmit inappropriate text messages with other CSX employees." The letter stated that in connection with the foregoing the Claimant was "charged with conduct unbecoming an employee of CSX Transportation, failure to properly perform the responsibilities of your position, inappropriate use of a cell phone, harassment, and possible violations of, but not limited to, CSXT Operating Rules – General Rule A; General Regulations GR-2, GR-3 and GR-3A; as well as, CSX Safeway Rules GS-1, GS-28 and CSX Code of Ethics and the CSX Policy on Harassment." The letter confirmed that the Claimant was being withheld from service pending the results of the Investigation. The hearing was subsequently postponed and rescheduled to March 16, 2011.

FINDINGS:

Public Law Board No. 7120, 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.

The Board has jurisdiction over the dispute involved herein.

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

The Claimant, B. P. Clark, was employed by the Carrier as a Bridge Machine Operator in the Engineering department with a service date of June 27, 2005. D. W. Rust, the charging officer, as of the date of the hearing, had been in his position of Bridge Manager for nine months and had 29 years of service with the Carrier. He testified that in investigating allegations made by Claimant Clark concerning inappropriate text messages that he received from employees E. D. Dismuke and J. R. Sanders, who are both CSX employees, he determined that Mr. Clark's behavior was offensive and in violation of CSX rules and policies. Asked what facts led him to charge Mr. Clark with conduct unbecoming to his position, he stated, "Sending text messages that are inappropriate is certainly unbecoming of a CSX employee." He charged him with failure to perform the responsibilities of his position, he stated, because while sending text messages on company time while on duty, you are certainly not performing the responsibilities of your position.

He charged Mr. Clark with inappropriate use of a cell phone, Mr. Rust stated, because sending texts while on duty is prohibited by CSX policies; and sending inappropriate text messages is certainly inappropriate use of a cell phone. Inappropriate text messaging is a form of harassment, Mr. Rust testified, and since Mr. Clark sent text messages that were inappropriate, he deemed that to be a form of harassment. In investigating this matter, Mr. Rust stated, he interviewed Mr. Clark, Mr. Dismuke, and Mr. Sanders.

Mr. Rust testified that Mr. Sanders provided him with documentation of text messages sent to him by Mr. Clark on company time. The documentation, Mr. Rust stated, showed that Mr. Sanders was sending text messages as well. Mr. Rust also interviewed Mr. Dismuke who told him that he was sending text messages to Mr. Clark and that Mr. Clark was sending them to him as well. Mr. Sanders had no documentation of such calls since Mr. Dismuke had a prepaid cell phone.

Another employee interviewed by Mr. Rust was A. L. Weisheit, a bridge mechanic. Mr. Rust identified a text message received by Mr. Weisheit. He interviewed Mr. Weisheit by telephone with Roadmaster Chris Garrett present, and he asked Mr. Weisheit if he had had any inappropriate text message sent to him by Mr. Clark. Mr. Weisheit volunteered that he did. He allowed Mr. Garrett to photograph the text message.

Mr. Rust cited and read into the record a number of rules that he testified Mr. Clark violated by his conduct of sending text messages while on duty, or by sending offensive text messages: Rule A, requiring that an employee know and obey rules; Rule GR-2, by using profane or vulgar language, by engaging in horseplay on duty or while on company property; by willfully neglecting his duty; Rule GR-3, by not devoting himself exclusively to the company's service while on duty; Rule GR-3A, by using a cellular telephone for other than company business and by participating in an unauthorized activity while on duty or on company property that might interfere with the performance of the work of any employee; Rule GS-1, by behavior in the workplace that was not civil or courteous; and GS-28, which prohibits "using personal electronic and electrical devices for any function (such as text messaging, gaming and internet browsing) other than voice communication while on duty.

Mr. Just testified that Mr. Clark violated the Carrier's policy called Unlawful

Harassment, parts of which he read into the record as follows:

Unlawful Harassment

Policy Statement on Harassment

Effective January 1, 2010

It is CSX Corporation's policy to provide all employees with a working environment that is free of harassment by supervisors, other employees, customers, vendors, agents and other third parties. Harassment is personally offensive, lowers morale and interferes with the ability to work cooperatively. CSX Corporation has **zero tolerance** for sexual or any other form of harassment.

* * *

What Are Some Other Forms of Harassment?

CSX Corporation also prohibits any employee or supervisor from harassing another employee through racial or ethnic slurs or subjecting an employee to any verbal, visual, or physical abuse relating to a person's race, color, religion, sex, age, national origin, physical or mental disability, veteran's status, sexual orientation, gender identity, genetic information, or any other basis protected by applicable federal, state, or local law or engaging in any behavior that interferes with maintaining a work place free of discriminatory intimidation.

Mr. Rust testified, "The text messages were offensive in nature and would be considered a form of harassment."

Mr. Rust also quoted the paragraph from the CSX Corporation Code of Ethics headed "Non-Harassment":

Non-Harassment

We provide a work environment that is professional and free from intimidation, hostility, or other behaviors that might interfere with work performance. CSX does not tolerate any form of harassment – verbal, physical, or visual behavior – by employees, customers, suppliers, or others because of a person's race, color, religion, sex (including pregnancy, childbirth, or related medical conditions), age, national origin, physical or mental disability, veteran status, sexual orientation, gender identity, genetic information, or any other basis protected by applicable federal, state, or local law. Harassment is personally offensive, lowers morale, and interferes with an employee's ability to work cooperatively.

Reference: • *Policy Statements on Harassment*

Mr. Rust testified that Mr. Clark violated the policy by sending inappropriate text messages.

On cross-examination Mr. Rust testified that in his investigation he determined that Mr. Sanders and Mr. Dismuke sent Mr. Clark inappropriate text messages. He did not determine, Mr. Rust stated, that Mr. Weisheit sent Mr. Clark any inappropriate text messages. He had no record of anything being sent by Mr. Weisheit. January 25th, Mr. Rust testified, is when it was first brought to his attention that there was a problem between Mr. Dismuke and Mr. Sanders and Mr. Clark as far as sending and receiving inappropriate texts. Asked on cross-examination if he ever saw any employees grabbing Mr. Clark and pinching his buttocks, Mr. Rust testified, “No, I don’t recall any.”

Benjamin Dale Crossman testified that he is a Roadmaster for the Carrier, has been in his position for a little over a year, and with the Carrier a little over three years. On January 26th he assisted Mr. Rust in investigating charges that Mr. Clark had brought against fellow employees about inappropriate text messages that he had received. He helped interview Mr. Sanders, he testified, who provided him with a copy of his cell phone records. Mr. Sanders’s phone records, Mr. Crossman testified, showed that he received some text messages from Mr. Clark’s phone number. He was present during the questioning of Mr. Dismuke, Mr. Crossman stated, and Mr. Dismuke also said that he had received messages from Mr. Clark. Mr. Dismuke admitted sending text messages to Mr. Clark. Mr. Dismuke had a prepaid cell phone plan and did not have any records of his calls.

Christopher Lee Garrett is Roadmaster at Vincennes, Indiana. From 1998 to 2006 he was a contract employee. He was present in the room while Mr. Rust was

interviewing bridge employees by telephone. Mr. Weisheit received one text message from Mr. Clark, and Mr. Garrett took a photograph of it. Several guys on the gang had received text messages from Mr. Clark, Mr. Garrett testified, but Mr. Weisheit was the only one who still had the text on his phone. It was racially offensive and demeaning both with regard to the text of the message and an accompanying picture.

J. R. Sanders, Jr. is a bridge mechanic with the Carrier who has been in that position for approximately six years. He was interviewed by Mr. Rust, he stated, and said to him that he had been sending text messages while on duty and that some of them may have been inappropriate to those who were reading them. He sent text messages to Mr. Clark, he acknowledged, and Mr. Clark sent messages to him. Some of the messages he received from Mr. Clark, he testified, were of an inappropriate nature. He and Mr. Clark were sending messages back and forth, he stated. At no time, Mr. Sanders testified, did Mr. Clark tell him that he thought the material was inappropriate and for him to stop sending him messages.

On cross-examination the Claimant's representative asked Mr. Sanders, "Mr. Sanders, do you recall being at a safety overlapping on August 23, 2010, which was conducted by Mr. Rust and you were there along with Mr. Clark and do you remember that Mr. Clark was complaining because people were goosing and pinching his butt, do you remember that?" He answered, "No, I don't recall." On redirect examination Mr. Sanders testified that as a result of the investigation by Mr. Rust he was charged and required to attend a Company investigation over his actions. Mr. Clark was a witness for the Carrier in the investigation, Mr. Sanders stated.

Mr. Sanders was asked by the conducting officer whether the messages he received from Mr. Clark were similar in nature to the ones Mr. Clark was sending to him.

He answered, "I would say a majority of them; I wouldn't say all but yes, I would say majority." On cross-examination Mr. Sanders was asked if he had any copies of the inappropriate texts that Mr. Clark allegedly sent him. He said that he did not.

Mr. Buford Smith is a staff engineer in Nashville, Tennessee, for the Carrier's Nashville division. He has been in his position for approximately seven years and has been with the Carrier for 28 years. Mr. Smith testified that on Saturday, January 29, 2011, he received a two-page document from Mr. Clark's Organization representative. The document, which was introduced into evidence as an Organization exhibit before Mr. Smith was called to testify, stated at the top, "Outline order of events regarding harassment of Brian Clark; CSX bridge worker, Nashville Division."

The document alleged that from October, 2010, to January, 2011, Nashville Division bridge workers John Sanders and Eric Dismuke sent inappropriate text messages to Mr. Clark and engaged in bullying; that Mr. Clark asked both men to stop the harassment, but that the harassment increased with threats of violence. It further alleged that Mr. Clark had spoken to his supervisor about this several times in person and on the phone from October, 2010, to January, 2011, but that nothing was done by the supervisor until January 26, 2011. The document listed a number of events that allegedly occurred between October 13, 2010, and January 26, 2011.

Mr. Smith testified that he, another engineer, and a manager of the EEO with the Carrier's Ethics Compliance department were involved in the investigation. Several employees were questioned, he stated, and the conclusion of the investigation was that "there were no allegations in this two page document that were substantiated by any of the evidence, any of the testimony involved. . . ." The EEO manager, Mr. Smith testified, reported back to him that he had interviewed the people involved and that he did not find

any case that would cause the Carrier to go any further with an ethics complaint.

Eric D. Dismuke has been a bridge mechanic for three months. He has a little over seven years' service with the Carrier. He testified that he was interviewed by Mr. Rust about sending and receiving text messages. He admitted to Mr. Rust that he had sent text messages. Asked whether he admitted that some of those text messages may have been inappropriate, he stated, "No; they were inappropriate for I guess depending on who you were sending them to." He acknowledged sending some of them to Mr. Clark. Mr. Clark sent some text messages back to him, he stated. The text messages he received from Mr. Clark, he testified, were of a similar nature to those he sent to him. He had no documentation, he stated, of any of the phone messages or text messages. Asked why not, he testified, "I didn't see any need to save them; they were jokes."

On cross-examination Mr. Dismuke identified a group of text messages that he sent to Mr. Clark. He was aware, he stated, that Mr. Clark was appointed by Mr. Rust as the safety representative for the division. That included the crew that Mr. Dismuke worked on, he stated. On redirect examination Mr. Dismuke testified that Mr. Clark never told him personally or by text message that he was offended by any of Mr. Dismuke's text messages and wanted him to stop sending them.

Arlen Lee Weisheit has been a bridge mechanic since September, 1999, and has 31 years of service with the Carrier. He identified a text message with an offensive racial message and accompanying picture as a text message he received from Mr. Clark. He considered the text message to be inappropriate, Mr. Weisheit stated. He was interviewed by Roadmaster Garrett and identified the text message for him as a message he received from Mr. Clark. He has never sent a text message to Mr. Clark or anybody else, Mr. Weisheit testified.

Jeremy C. Wade is a truck driver on the bridge gang who has worked for the Carrier for 11 years. He identified a text message dated Jan 11, 2011 2:43 PM, with a single word "F_ksmack" written on it as a text he received from Mr. Clark. He showed the text message to Roadmaster Garrett, who took a picture of it. He stated that he believes that he also received the racially offensive text message previously identified by Mr. Weisheit. He considers such text messages inappropriate, he testified. He stated that he really didn't remember if he sent any text messages to Mr. Clark. Mr. Garrett was called as a witness and stated that he was shown the two text messages respectively by Mr. Weisheit and Mr. Wade and took photographs of them with his digital camera.

Mr. Rust was recalled by the conducting officer and testified that he asked Mr. Clark if he replied to any of the messages sent to him by Mr. Sanders and Mr. Dismuke. According to Mr. Rust, Mr. Clark said no, that he did not have a text messaging plan. In reply to questions by Mr. Clark's representative, Mr. Rust testified that Mr. Clark showed him messages that he received.

Mr. Crossman was also recalled by the conducting officer and testified that they asked Mr. Clark if he had sent messages, and he said that he had not. He showed them the messages that he received. Mr. Crossman photographed some of the messages that Mr. Clark showed them and made notations of the content of the remaining text messages.

The Claimant, called as a witness by the conducting officer, testified as follows. His position with the Carrier is Bridge Machine Operator. He has held that position about two months and has five and one-half years' service with the Carrier. On January 26, 2011, he was interviewed in his hotel by Mr. Rust. He sent some text messages to Mr. Sanders. The racially offensive email and the email with a form of the F-word on it were

floating around the railroad when he (Clark) was a foreman of another bridge gang around June 15th or so. About everybody on the bridge received a copy. Asked whether he considered the racial text message inappropriate, Mr. Clark stated, "It is to me, yes." He denied that he sent that text message to Mr. Weisheit and to Mr. Wade. "I didn't send that," he stated. "There were times when my phone was in the truck at different times and I had an old car at the time that didn't lock. And I was always getting practical jokes if you could say that but I was getting joked on a lot too so there were times when my phone would be prank dialed."

In reply to questions from his Organization representative, Mr. Clark testified that he told his supervisor, Dan Rust, about the text messages on January 5th. He offered to let Mr. Rust view the text messages at that time, Mr. Clark stated, but he declined to do so, saying that he didn't want to know anything about them.

Asked whether he had a text plan on his phone, Mr. Clark testified, "I didn't at the time, no." Asked to explain what that means, he stated, "Up until recently I did not have a text plan on my phone." It was actually his wife's phone, he testified. Mr. Clark was asked if he let Mr. Crossman and Mr. Rust review his "Sent" text messages. He stated, "Mr. Rust had seen I believe two 'Sent' messages, and then I believe I saw the one 'Sent' message where I had asked Mr. Sanders to quit the harassment and the story telling. When I mentioned that he should get a hobby, and he replaced [sic replied?] with the text." The conducting officer asked Mr. Clark if that was his way of telling someone to stop, by telling them to get a hobby. He stated, "I believe I asked them to stop and then mentioned about getting a hobby."

The conducting officer asked Mr. Clark if he ever told Mr. Rust directly that he was being harassed prior to January 25th and use those words. He answered, "I told him

several times I was being harassed and back in November 2010 I told him I was in a hostile work environment. And I asked could I be loaned out to another bridge gang to get away from the trouble. And he said he wanted to keep everything in house, and he didn't want Jacksonville to know anything about it."

Mr. Sanders was recalled as a witness by the conducting officer. He testified that his phone records showed an exchange of text messages between himself and Mr. Clark. The text messages he received from Mr. Clark, he stated, were work-related and non-work-related. The majority, he testified, were probably non-work-related. Asked whether he considered them of an inappropriate nature, he stated, "Yes, I believe so, inappropriate as far as mine and his back and forth, yes, I believe so."

Mr. Dismuke was next recalled to testify by the conducting officer and asked whether the text messages he received from Mr. Clark were of a business nature or other than a business nature. He stated, "Both." Asked whether there were more of the one or the other, he stated, "More of the jokes." Questioned by the conducting officer if he considered the jokes inappropriate, he stated, "As I stated before, it depends on who's reading them. Everybody has a different sense of humor."

The conducting officer recalled Mr. Rust to testify and asked him, "Prior to you starting your investigation, or interviews of the employees that work for you concerning text messages, when did you become aware that Mr. Clark felt that he was being harassed?" He stated, "On the 25th [of January] was the day that he called me after I was going up there to check to see if I was still coming. And he had asked me to come up there and I told him that I was on my way, I'd be there in about an hour and a half. And at that point is when he told me that the text messages were sexual in nature and he was being harassed by them."

Prior to January 25th, Mr. Rust testified, Mr. Clark called him two times. Mr. Clark said, according to Mr. Rust, that there was some stuff being done that he would like to talk to him (Mr. Rust) about. "I told him," Mr. Rust stated, "that the first step he should do is ask them to stop, and then kick back with, go to a foreman if it didn't stop, and if the foreman couldn't get it stopped then to come back to me." In the prior conversations, Mr. Rust testified, Mr. Clark did not say that he was being harassed.

On cross-examination the Organization representative asked Mr. Rust what he and Mr. Clark were talking about when he (Mr. Rust) said that if it didn't stop to take it up with his foreman. Mr. Rust stated, "Well he told me that . . . they were doing something, doing things, and that they were saying some things to him and I just told him to tell him to stop saying it. If you don't like it, tell them to stop saying it." Asked by the Organization representative, "He didn't tell you what they were saying?" Mr. Rust stated, "No sir." Questioned, "Did he say anything about text messages?" Mr. Rust testified, "No sir, not at that time."

Mr. Rust testified that January 25th is when Mr. Clark told him the nature of some text messages that he was receiving. Mr. Clark told him on the preceding Thursday, Mr. Rust stated, at quitting time, "that they were texting during the safety call and he couldn't hear because they were laughing at messages they were sending each other." He told Mr. Clark, Mr. Rust stated, to stay in his room . . . and then he wouldn't have any trouble hearing, and that I would come up there to talk to them on Tuesday." He asked Mr. Clark if that was okay, Mr. Rust testified, and Mr. Clark said yes.

Mr. Clark was recalled again to testify by the conducting officer and asked if he sent non-work-related text messages to employees during his work time. He stated, "It's possible, but I'd say most of them are work related." He did not remember sending any

text message to Eric Dismuke, Mr. Clark testified. With regard to Mr. Sanders, Mr. Clark was asked, “[Y]ou heard Mr. Sanders testify that more often than not the messages that he received from you were of a non-company business.” Mr. Clark stated, “If they were, I’d say they were responses to what he was sending me. My asking him to stop or do something else.”

Mr. Rust was recalled once again and asked if he told Mr. Clark that Jacksonville didn’t need to know those things. He stated, “No, I did not.” He then asked the conducting officer, “Wait a minute, what things?” The conducting officer stated, “Things related to the ethics hot line.” He then answered, “No. I never had a discussion with him about the ethics hot line.”

In a closing statement Mr. Clark asserted, “I enjoy working at CSX. I didn’t want to get anybody in trouble. I just wanted the excessive teasing and harassment to stop. I wanted to be able to work safely and provide for my family.”

In a closing statement for the Organization, the Organization representative stated that Mr. Clark came forward and made allegations that are real and not made up by him. The Carrier pooh-poohed his allegations, according to the Organization, rather than get to the bottom of the situation. The situation then mushroomed, the Organization asserts. Mr. Clark came forward and stated that there was sexual harassment and a lot of violations, the Organization argues, and the Carrier has policies against such things. The Carrier was informed, the Organization contends, and turned a blind eye to the situation prior to it blowing up.

The Union asserts that the Carrier failed to provide a fair and impartial hearing by prohibiting the Organization from questioning in areas it wanted to go into. It is the Organization’s position, it states, “that this is just not one little event here that happened

on January 26th and 25th, and it's been escalating all along, and it should have been taken care of, should have been addressed." The Organization requests that Mr. Clark be restored back to work and that a favorable decision be rendered.

After the conclusion of the hearing, by letter dated April 5, 2011, the Division Engineer MW Nashville Division notified Mr. Clark of the Carrier's determination, after a review of the transcript and the exhibits, that all contractual due process rights were afforded him and that all objections were properly addressed by the conducting officer during the course of the hearing. Regarding the merits of the charges the Division Engineer stated:

My review of all the material associated with this matter demonstrate that during the hearing sufficient testimony and evidence was submitted to validate that you engaged in conduct unbecoming an employee of CSX Transportation in violation of the cited rules and policies. Based on my finding of guilt, and the seriousness of the charges, as supported by the findings of the conducting officer, in addition to a review of your personnel record, it is my decision that the discipline to be assessed as a result of my finding of guilt is your immediate dismissal in all capacities from CSX Transportation.

In a post-hearing submission the Carrier takes the position that Claimant Clark was provided a fair and impartial investigation in accordance with Rule 25 of the Agreement and that the Carrier rightfully determined that he was guilty as charged. On the merits the Carrier argues that it "rightfully determined Claimant Clark was indeed guilty as charged." The hearing officer, the Carrier asserts, chose to credit the testimony of the Carrier witnesses over the self-serving testimony of the Claimant. Absent significant error, not here present, the Carrier argues, the hearing officer's credibility determinations

are accepted at an appellate level. Accordingly, the Carrier maintains, it produced substantial, credible evidence that Claimant Clark was guilty as charged, and the Board should uphold the discipline.

The discipline assessed, the Carrier contends, was fully justified given the severity of the case. The Carrier notes that on April 25, 2008, the Claimant accepted a 60-day suspension for a previous charge of harassment when he ordered numerous magazine subscriptions, music, and ceramic club memberships, recruiting packages, and other unsolicited telemarketing campaigns for his former supervisor. The Carrier notes that recently, in response to incidents of harassment within the Engineering department, the Vice President, Engineering issued a policy statement that included the statement, "Contract employees are also expected to abide by all company practices, rules and policies. Threats, intimidation or harassment as discussed above, will likewise not be tolerated under any circumstance."

Further, the Carrier cites Public Law Board No. 7255, Award No. 24, upholding the dismissal of an 18-year employee charged with making racial remarks directed against another employee. In the present case, the Carrier notes, there was an offending message sent by the Claimant with extremely demeaning racial remarks. As this was not the Claimant's first brush with harassment, the Carrier argues, and given the Claimant's spotty five-year record, dismissal was warranted and proper. The Carrier requests the Board to uphold the discipline assessed.

The Carrier argues that the Claimant was guilty of harassment and that his discharge should be upheld because of the seriousness of the violation and the fact that he was previously disciplined for harassment. The Board finds it significant that no employee made a complaint of harassment against Mr. Clark. By contrast Mr. Clark

made claims of harassment against his coworkers Mr. Dismuke and Mr. Sanders. Not only did he make claims against them but he produced copies of text messages received from both of them that were sexually demeaning to Mr. Clark. Not one such text message sent by Claimant Clark was produced by the Carrier involving Mr. Dismuke or Mr. Sanders. There was general testimony by Mr. Sanders and Mr. Dismuke that Mr. Clark sent similar messages to them that they sent to him. But not one message sent by Mr. Clark to Mr. Dismuke or Mr. Sanders was introduced into evidence. Nor was either Mr. Sanders or Mr. Dismuke a disinterested witness. The mere fact that Mr. Clark sent text messages to Mr. Sanders or Mr. Dismuke does not come close to proving that he harassed either individual. In the absence of any text message introduced into evidence from Mr. Clark to either Mr. Sanders or Mr. Dismuke or the text of any such message, the Board finds that there is no substantial evidence in the record that Mr. Clark in any way harassed Mr. Dismuke or Mr. Sanders.

The only text messages sent by Mr. Clark that were introduced into evidence were a text message that contained one word, "F_ksmack," and a second text message with a highly demeaning racial message and picture. The first message was sent to employee Mr. Wade and the second one to both Mr. Weisheit and Mr. Wade. Neither employee complained that Mr. Clark was harassing him. Both employees testified that they considered the text message inappropriate, but neither stated that he was offended by it.

The word "harass" is defined in The New Oxford American Dictionary (2001) as "subject to aggressive pressure or intimidation: *a warning to men harassing girls at work.*" No claim or complaint was made by Mr. Weisheit or Mr. Wade either prior to January 26, 2011, on that date, or during the hearing that Mr. Clark acted aggressively toward either individual, that he tried to intimidate either person, or that he otherwise

attempted to or harassed either one of them. The fact that he sent one text message to Mr. Weisheit and two to Mr. Wade that were in bad taste where there is no evidence that either felt pressured, intimidated, or offended by the text(s) (as opposed to merely deeming the texts to be inappropriate) is simply not evidence of harassment in the normal meaning of that term.

The Carrier cites Public Law Board No. 7255, Award No. 24 in support of its position that the racially offensive text message constituted harassment. In that case the white claimant directed racially offensive remarks directly to a black coemployee. In the present case there is no evidence that Mr. Weisheit or Mr. Wade is not a white employee. There is no evidence that a black employee ever saw the text message here in question or that a black employee was ever near the cell phone of Mr. Weisheit or Mr. Wade when the text message was sent to them or that the message was ever displayed or circulated by Mr. Clark with the intention that it be seen by or shown to a black employee. There is no evidence that a black employee ever saw the text message or that any employee ever complained about the text message.

Perhaps the Carrier considered Mr. Clark's conduct as harassment within the definition of the term found in its own Unlawful Harassment policy. That policy includes as "Examples of Harassment" "written . . . material that demeans or shows hostility or aversion toward an individual or group because of race . . . and is displayed . . . on . . . e-mails, Inter/Intranet or anywhere in/on CSX Corporation's premises, or is circulated in the workplace by any means." The racially demeaning text message could be considered to meet that definition. But where no aggression, pressure, or intimidation toward any employee occurred; nobody complained about the text message; and where there is no evidence that any black employee saw or was intended to see the text message,

it cannot reasonably be found that the text message in question sent to two individuals of the same race as the sender was grounds for dismissal of the Claimant, even taking into account his prior non-racially related offense of harassment of a supervisor almost three years earlier.

The Board finds that dismissal was an excessive penalty for the Claimant's conduct under all of the circumstances of this case. He is therefore entitled to prompt reinstatement to his former job with the Carrier. For two reasons, however, the Board will not award back pay to the Claimant. First he complained to management about the text messages he received from coemployees. But he himself, during his regular working hours, was sending coemployees text messages unrelated to his employment with the Carrier. Second he sent at least one employee a text message that contained profanity and, even worse, a text message to at least two employees that came within "Examples of Harassment" within the Carrier's policy called Unlawful Harassment. For these reasons he shall not be awarded any back pay.

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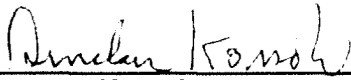
Award No. 94
Case No. 94

A W A R D

Claim sustained in accordance with the findings.

O R D E R

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



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
August 3, 2011