

PUBLIC LAW BOARD NO. 6920

Brotherhood of Maintenance of Way )  
Employees Division - IBT Rail )  
Conference )  
 )  
and )  
 )  
 )  
The Kansas City Southern Railway Company )  
(Former Southrail Corporation) )

Case No. 24  
Award No. 24

Statement of Claim

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of Claimant R. Chamblee for the alleged violation of General Code of Operating (GCOR) Rule 1.6 - Conduct and The Kansas City Southern Railway Company's Anti-Harassment Policy was based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File C130301/K0413-2642 SRL).
2. As a consequence of Part 1 above, Claimant R. Chamblee's personal record shall be cleared of the charges immediately and he shall be made whole by returning him to service and paid for any and all time lost as a result of the investigation, along with all other relief contemplated by Rule 33(g)."

Background

On February 15, 2013 the Carrier issued to Claimant R. Chamblee a notice of formal investigation for the purpose of ascertaining "the facts and determining your responsibility, if any, in connection with your alleged inappropriate conduct on February 7, 2013 at the Holiday Inn in Garland, TX." In this regard, an anonymous informant contacted the Speak Up! Hotline and stated that Claimant directed racial slurs and derogatory terms towards an employee and engaged in physical contact by placing his arms around the employee's neck.

On February 22, 2013 the investigative hearing convened wherein Claimant and his representative cross-examined Carrier witnesses and presented testimony and evidence.

On March 1, 2013 the Assistant Vice President Engineering issued a discipline assessment letter to Claimant stating as follows:

After careful and thorough review of the transcript of this investigation, it has been determined that you have violated The Kansas City Southern Railway Company's General Code of Operating Rules 1.6 - Conduct and The Kansas City Southern Railway Company's Anti-Harassment Policy.

Accordingly, for your violation of the above-mentioned rule and policy you are hereby dismissed from the services of The Kansas City Southern Railway Company effective immediately, March 1, 2013.

Rule 1.6 - Conduct forbades discourteous conduct which is "[a]ny act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees" and such conduct "is cause for dismissal and must be reported."

Prohibited statements and conduct under the Anti-Harassment Policy includes, among other items, racial slurs and disparaging words showing hostility towards an individual or group as well as threatening and intimidating behavior.

On April 22, 2013 the Organization appealed the Carrier's decision. The Organization states that the Carrier did not provide a fair and impartial hearing, failed to meet its burden of proof and imposed unwarranted discipline.

#### Findings

Public Law Board No. 6920, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

The Board's review of the record shows that Claimant received a fair and impartial hearing. There are no procedural errors of Rule 33 - Disciplinary Procedure nor are there any statements or conduct by the hearing officer indicative of a predisposed outcome prejudicial to Claimant.

Additionally, the Carrier met its burden of proof with substantial evidence establishing the violations of Rule 1.6 and the Anti-Harassment Policy. In this regard, the Organization does not dispute the charges of racial slurs and hostile physical contact engaged in by Claimant directed at another employee in the bar at the Holiday Inn. Claimant acknowledged training on Rule 1.6 and the Anti-Harassment Policy. Thus, he was on notice that a violation of the Rule 1.6 "is cause for dismissal" and a violation of the Policy subjects him to discipline including dismissal. Notwithstanding training on and notice of the consequences for violating the Rule and Policy, Claimant referred to the employee, repeatedly, as a "fucking nigger" and "big fucking nigger" and "bitch" while engaging in physical contact when he placed his arms around the employee's neck.

Claimant's statements and conduct constitute discourteous conduct of a hostile nature directed at an employee based on that employee's race in violation of Rule 1.6 and the following provisions of the Anti-Harassment Policy:

Guidelines 12.02. Prohibited Conduct: Conduct prohibited by this Policy includes, but is not limited to:

1. epithets, slurs, negative stereotyping, threats, intimidation and hostile acts which are related to race, color, religion, sex, national origin, age disability or another protected category;

2. disparaging, abusive and/or sexual words, phrases, e-mails, or materials that denigrate or show hostility toward an individual or group because of race, color, religion, sex, national origin, age, or another category protected by law;

\* \* \* \*

5. unwelcome touching, pinching, cornering, or massaging or brushing the body;

6. inappropriate comments concerning an individual's appearance;

\* \* \* \*

9. threatening, intimidating, or hostile acts including jokes or pranks that might reasonably be perceived as hostile or demeaning;

\* \* \* \*

11. harassing conduct which occurs during non-working hours directed at any employee, such as harassing telephone calls made during off-duty hours.

Claimant's defense is that he cannot recall the slurs and hostile physical contact because he drank so much alcohol that he was in a stupor and, essentially, lost touch with reality. Over consumption of alcohol shows, the Organization states, that Claimant did not act intentionally. The record shows that Claimant recalls the name brand of liquor he consumed and he recalled that his bar tab was paid for by a vendor to the Carrier; this is cognitive recognition indicating he was not as detached from the reality of the incident as he asserts. Claimant apologized at the investigative hearing to witnesses testifying to his racial slurs and physical hostility; however, each apology was accompanied by a denial encased in his "loss of memory" defense.

At the Board's appellate hearing on June 23, 2016 the Claimant reaffirmed his "no memory" defense and added a new argument - - disparate treatment. Claimant argued others have engaged in the same misconduct and received a slight suspension or were instructed to apologize. As this new argument was not advanced or disclosed during on-property proceedings, it cannot be considered by the Board.

The Organization states that dismissal is unwarranted as Claimant, a Machine Operator, has nineteen (19) years of service, no prior discipline and is well-liked by employees as evidenced by the statement from a co-worker. Excessive discipline is punitive and not corrective. In support of the Organization's position, it relies on Second Division Award 6485, Third Division Awards 21760, 22237, 26584 and Fourth Division Award 3634 where dismissal was diminished to a lesser penalty. Those awards involved circumstances invoking procedural error, lack of evidence and rules violations for accidents. All of those situations are inapposite to the circumstances presented in this claim. There is no arbitral precedent in this record where a tribunal reinstated an employee after he or she engaged in racially-based misconduct.

This Board's authority and role are summarized in Third Division Award 26920:

Our function is not to substitute our judgment for that of the Carrier. We are confined only to determine whether substantial evidence exists to support the Carrier's conclusions. . . . Under our limited review capacity we cannot disturb the amount of discipline imposed unless it appears the amount of discipline was arbitrary or capricious as to constitute an abuse of the Carrier's discretion. Under our articulated review standard we are unable to say that when the violations are viewed in their totality Claimant was not deserving of the degree of discipline imposed.

Applying Third Division Award 26920 to the findings in this proceeding, the claim is denied.

Award

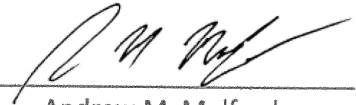
Claim denied.



Patrick Halter  
Neutral Member



Tammy Hardge-Stephenson  
Carrier Member



Andrew M. Mulford  
Organization Member

Dated on this 17th day of

August, 2016