AWARD NO. 335 Case No. 335

Organization File No. D33903017 Carrier File No. 2017-223758

## PUBLIC LAW BOARD NO. 7163

PARTIES	) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION,
	) INTERNATIONAL BROTHERHOOD OF TEAMSTERS
ТО	
DISPUTE	) CSX TRANSPORTATION, INC.

## STATEMENT OF CLAIM:

- 1. The Carrier's discipline (dismissal) of Mr. K. Kelly, by letter dated June 23, 2017, for alleged violation of Rules 104.2(d), 104.3(a) and (b), 2000.1(2) and CSX Policy on Workplace Violence was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File D33903017/2017-223758 CSX).
- 2. As a consequence of the violation referred to in Part 1 above, Claimant K. Kelly shall now have the charges and discipline removed from his record, reinstated to service and paid for all time lost.

## FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated March 20, 2008, this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

Following a formal investigation at which he was charged with using vulgar language toward a manager and attempting to provoke him by "getting in his face," Claimant was dismissed from service. According to the Carrier, Claimant engaged in a verbal altercation with Roadmaster Wayne Kirkland regarding Claimant possibly receiving an assessment for a wide gauge derailment.

According to testimony by Kirkland and other employees in the vicinity, Claimant used vulgarity in addressing the Roadmaster. Claimant acknowledged there was an argument, but denied using vulgar language.

Before addressing the merits, we must consider a procedural argument advanced by the Organization. It avers that the hearing officer met with the witnesses before the hearing started, gave each one a copy of the statements they had prepared, and told them to enter the statements as evidence. The Organization insists this constituted coaching them on what to do and say. In support of its position, the Organization cites Award No. 31 of Public Law Board No. 7660 (BMWE-UP, Ref. Newman), finding that the claimant therein was denied his right to a fair and impartial hearing when the hearing officer met *ex parte* in secrecy and behind closed doors with witnesses prior to or during the investigation.

While we agree that it would be a fatal denial of due process for a hearing officer to tell witnesses how to testify, a mere accusation that such occurred is not sufficient to find a due process violation. The Organization must meet a burden of proof by at least establishing a *prima facie* case that the hearing officer influenced the testimony of a witness. In the case at bar, the record reflects that the hearing officer handed two of the witnesses copies of their own statements and simply told them to introduce them as evidence. No objection was made by the Organization during the investigation, even though they had the opportunity to question the witnesses to determine the extent of the contact they had with the hearing officer. In fact, no objection was made by the Organization in its initial letter appealing Claimant's dismissal. It was not until the Organization's letter confirming the conference that any mention of this was made. On the basis of the record we have before us,

we cannot conclude that there was a denial of due process or that Claimant was not afforded a fair

and impartial investigation.

Our review of the record of the investigation shows that the Carrier had substantial evidence

to support its charge against Claimant. There is no dispute there was an argument between him and

Roadmaster Kirkland. There was conflicting testimony as to whether Claimant used vulgar

language, but it is not the role of this Board to resolve factual conflicts. That is the role of the

hearing officer, and we would reverse her decision only if we could find that it was unreasonably

made. We make no such finding in this case, particularly in light of corroborating statements from

other employees. We further reject any suggestion that such language is acceptable in the workplace

as "shop talk." Those days are over, and most employers, including Carrier, have made that clear

to their employees.

It is the Board's conclusion, however, that permanent dismissal was excessive in this case.

It is apparent that Claimant was upset about the prospect of being blamed for a wide gauge derail-

ment that he did not believe was his fault. While this does not excuse his conduct, the Board can

understand his mind-set at the time. We also note that Claimant had nearly ten years of service with

the Carrier at the time of this incident. Without minimizing the seriousness of Claimant's offense,

we will direct that he be reinstated to service with seniority rights unimpaired, but without compen-

sation for time lost. Prior to his return to work, though, the Carrier may require him to attend and

successfully complete, on his own time, an anger management class of the Carrier's choosing.

Claimant is on notice that any future conduct of this nature may result in his permanent dismissal.

AWARD: Claim sustained in accordance with the above Findings.

Barry E. Simon

Chairman and Neutral Member

Andrew Mulford Employee Member

Katrina Donovan Carrier Member

Dated: 02/04/19

Arlington Heights, Illinois