

PUBLIC LAW BOARD NO. 7163

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES
DIVISION - IBT RAIL CONFERENCE**

vs.

**Case No. 443
Award No. 443
Organization No. D51905918
Carrier No. 18-54799**

CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. C. Gainey, by letter dated November 19, 2018, in connection with allegations that he violated CSX Transportation Rule 104.3(a) and the CSX Code of Ethics was arbitrary, capricious, unnecessary and excessive (System File D51905918/18-54799 CSX).
2. As a consequence of the violation referred to in Part 1 above, the Carrier ‘*** must clear all mention of the matter from Claimant’s personal record, immediately return Claimant to service with rights and benefits unimpaired and compensate him for all loss suffered. This loss includes, but is not limited to, any straight time, overtime, double-time or other Carrier provided compensation lost as a consequence of the discipline. It also includes healthcare, credit rating, investment, banking, mortgage/rent or other financial loss suffered because of the discipline.’ (Employee’s Exhibit ‘A-2’).”

JURISDICTION

The Board upon consideration of the entire 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 this dispute; that the parties were given due notice of hearing.

FINDINGS

The Carrier hired C. Gainey (“Claimant”) on October 9, 1995. On September 20, 2018, Claimant was working as an Assistant Foreman Flagman with Employee Jones (“Jones”), Employee Gilbert (“Gilbert”), Employee Green (“Green”), and Employee Harbuck (“Harbuck”). The next day Gilbert contacted Foreman and Charging Officer Henry White relating an incident where Claimant said the n-word. While Claimant and two other employees were performing work, Claimant made

reference to needing a pair of “n----r-nose pliers.” A call was placed to the Carrier’s ethics hotline complaining of the incident. The investigative hearing for this incident was held on October 30, 2018. On November 19, 2018, the Carrier determined Claimant was culpable of violating Rule 104.3, and the CSX Code of Ethics and dismissed him. The Organization appealed Claimant’s dismissal on November 27, 2018. Thereafter, the dispute was handled according to the ordinary and customary on-property handling process, including the parties discussing the matter on January 10, 2019. The parties were ultimately unable to resolve the dispute and the matter is now before this Board for final adjudication. The applicable rules are as follows:

Rule 104.3 states in pertinent part:

The following behaviors are prohibited while on duty, on CSX property, or when occupying facilities provided by CSX: a. Boisterous, profane, or vulgar language[.]

The Code of Ethics states in pertinent part:

A Harassment-Free Workplace: Teamwork is the foundation of our business. No team can be successful when harassment and discrimination are present. Everyone deserves the freedom to do their job in a professional and respectful environment free from behavior that creates intimidating, hostile, or offensive working conditions. We do not tolerate any form of harassment. Harassment affects everyone. It is personally offensive, lowers morale, and interferes with our ability to work together.

In reaching its decision the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence *de novo*. As such, our function is not to substitute our judgment for that of the Carrier, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion.

The Board finds substantial evidence in the record to uphold the Carrier's position regarding the charges against Claimant. However, we believe the penalty imposed was excessive given the circumstances presented here. While the Carrier is attempting to deliver the message that such conduct will not be tolerated, it is critical that employees be put on specific notice that use of racial slurs will lead to not just discipline, but termination. It is true that employees are on general notice of ethical conduct requirements. However, if termination will be the consequence for a first

offense, it is incumbent upon the employer to put employees on clear and specific notice of the consequence associated with such an offense. No such notice has been provided to employees. Thus, while Claimant's conduct violated the rules, imposition of a discharge was punitive, in this case.

While Claimant noted that the use of the n-word violates CSX ethics policy "in today's world" it is still problematic that Claimant, did not find use of the n-word offensive referencing the fact that such talk has been common over his 23-year career in the railroad industry and 28-years of service in the military. Such is a sad reality and signals that significant work must be done regarding awareness of the insidiousness of such a word.

Under a just cause standard, the question is whether Claimant is unsalvageable as an employee. The Board finds that Claimant made the slur intentionally and disrespectfully, but without malice. The witnesses believed that, while offended by the use of the n-word, it was not directed at anyone in particular. Claimant returned days later to the workers who were present, apologized and asked for forgiveness. The apology was accepted. In sum, the Claimant demonstrated extremely poor judgment, which is intolerable, but it should not end his lengthy career given his otherwise unblemished record. Accordingly, the relief sought by the Organization is sustained, in part. The discharge shall be removed from Claimant's personal record, and he shall be reinstated with time served. No back pay is awarded.

AWARD

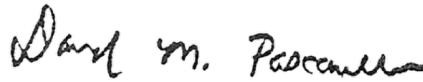
Claim sustained, in part. The Carrier is directed to comply with this Award on or before thirty (30) days following the Award date below.



Jeanne Charles
Chairman and Neutral Member



John Nilon
Carrier Member



David M. Pascarella
Employee Member

Dated: 9/20/2021