

PARTIES
TO THE DISPUTE:

Brotherhood of Maintenance of Way Employes
Division of the International Brotherhood of Teamsters

VS.

CSX Transportation, Inc.
Carrier File: 2016-204572

Arbitrator: Sherwood Malamud

FINDINGS

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute.

Under date of March 26, 2016, Claimant G.G. Desgres signed an attachment A expedited discipline handling form. Through this document, Claimant Desgres elected to forgo the traditional on – property discipline process and instead submit the matter directly to arbitration.

FACTS

The Carrier hired G.G. Desgres on March 28, 2011. By letter dated February 8, 2016, the Carrier notified Claimant of an investigatory hearing scheduled and held on March 3, 2016. The focus of the hearing was an incident that occurred at approximately Noon on February 2, 2016 in the yard in Pittsfield Massachusetts.

The crew consisted of the foreman, Joe Massey, Brock Kalinowsky, Ryan Cosby, Claimant and Toro. Claimant called Quintin Toro, who is of Hispanic heritage, a derogatory term. He told Toro that Toro had six children by six different women. Toro became very upset. Roadmaster Daningburg after he was called and he arrived at the Pittsfield yard office, he obtained written statements from both Toro and Desgres, as well as others in the crew. Then, he removed Claimant from service.

Daningburg obtained a statement from Kalinowsky. He heard Claimant say that Toro had six children from six different women. Later, when they were working on the track, Desgres called Toro a sp-c. Toro asked Claimant not to call him by that derogatory name.

Daningburg obtained a statement from the crew Foreman Massey. His statement reads, as follows:

We were working in the West yard lead, 17 track. I was speaking to Quintin about putting tools out, and being the vehicle operator job, but a pause before saying vehicle operator, because I was thinking of the position name, and heard Gary saying the word sp-c.

It got very quiet then Quintin said, don't call me that. Then, Quintin was pretty upset avoiding being around him.

In his testimony at the investigatory hearing, Claimant interjected because when Massey paused, Desgres believed Massey was about to use the word, sp-c.

The Carrier concluded that Claimant's conduct violated,

Operating Rule 104.2 "Employee behavior must be respectful and courteous."

CSX ethical practices provides under Discrimination and Harassment:

Further commitment to ensuring the atmosphere of race and sexual equality. No CSX company employee shall use any racial or ethnic slurs, or engage in any sexual harassment.

At another point in the policy, it states:

We are committed to foster culture where people, regardless of their differences, feel respected, safe and valued. You can help us reach our goals by making your own commitment to diversity and inclusion. In your actions, treat everyone with respect and follow these guidelines[:]

Maintain fairness in all of your relationships;

Never discriminate against anyone –neither fellow employees, customers, suppliers nor any other stakeholders;

Report any actions of discrimination that you see, and do not retaliate against anyone who reports a concern.

Anti-- Harassment, Anti-- Discrimination

We do not tolerate any form of harassment – verbal, physical or visual, by employee, customer, suppliers or others, because of a person's race, color, religion, sex including pregnancy, birth or related medical condition, 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.

Claimant completed training on the above rule and policies on 9/4/2014.

In a statement provided by Cosby, who the Organization wanted to testify at the hearing, but whose attendance at the hearing was denied by Roadmaster Danningburg, indicated that Claimant had used the word, as charged. However, Cosby noted the following:

Those words had been thrown around all morning. These guys were picking on each other's heritage. Gary[Desgres] did not use it in a malicious fashion, and did not say it again.

Toro testified at the hearing that he did not understand that Claimant "meant any harm. ." During the hearing, Toro turned to Claimant and asked why he did not apologize at that time.

Claimant testified at the hearing that Kalinowsky and Foreman Massey were both hostile to Claimant after Claimant bumped into the crew, that morning. Claimant testified he would have apologized, but Toro was sent on a different job. Claimant testified that he went into therapy over this incident.

At the time of the imposition of discipline, Claimant had a clean disciplinary record. Record of a time out was removed on March 18, 2016, 5-days prior to the decision of Division Engineer Posey to dismiss Claimant.

THE CARRIER ARGUMENT

The Carrier first addresses the Organizations' procedural objection, the failure to make available the witnesses requested by the Organization. The Carrier maintains that the testimony of the witnesses requested was not necessary. The Carrier is under no obligation to provide Organization witnesses, particularly when they did not directly witness the events. The testimony concerning the bad blood between the protagonists was developed through other witnesses. Special Board of Adjustment 1116 Award No. 37, (Kenis). There was no issue as to what Claimant said. Roadmaster Daningburg obtained and entered into the record the February 2 written statements of crew member participants. The Carrier argues Claimant received a fair and impartial hearing.

The Organization objects that the Carrier failed to specify the rules violated by Claimant's alleged conduct.

The Carrier met its burden of proof. Claimant admits to stating the ethnic slur. Claimant did not apologize to Toro. The Carrier maintains a zero tolerance policy with regard to ethnic slurs and harassment. Carrier may be sued if it fails to protect its workforce from ethnic slurs. The Carrier submitted cases on point in which the termination of employees for one offense under its Harassment policy was upheld by the Board, Kenis award, supra; PLB 7529 Award No. 20 (William R. Miller) sustaining the dismissal of an employee engaged in a verbal altercation in which he used profanity and sexual innuendo. PLB 7529 Award 112 (Roger K. MacDougall) sustaining the dismissal of an employee who made sexually harassing statements to motel staff personnel and racial comments about the motel's owner.

THE ORGANIZATION ARGUMENT

In addition to the procedural arguments, the Organization argues that the Carrier failed to meet its burden of proof. The Organization emphasizes that the level of discipline the Carrier imposed was arbitrary and unwarranted. There are mitigating circumstances. The complaining employee was not the employee who was the object of the ethnic slur, but the crew Foreman who was upset that Claimant bumped into the gang that very morning. Claimant was honest and forthright. He made no threats. Dismissal is unwarranted, in this case.

BOARD FINDINGS

The Board first addresses the Organization's procedural contentions. Here, one of the witnesses the Organization requested attend was a member of the crew. Roadmaster Daningburg denied the request of the organization to make crew member Crosby available to testify because when the Roadmaster asked him to write a statement on the date of the incident February 2, Crosby stated that he did not hear the remark made by Claimant. The written statement that the Organization submitted into the record authored by Crosby indicates that his testimony went to his overhearing the discussion among Massey and other members of the crew excluding Toro, the subject of the slur, as to whether to contact Roadmaster Daningburg. The Carrier's deliberate act to make Crosby unavailable to testify, it implemented at its own risk. The Board fully credits Crosby's written statement. With regard to the other witnesses that the Organization requested attend the hearing, the Organization failed to demonstrate how it was prejudiced by the Carrier's refusal to release these witnesses.

The Organization maintains that the notification letter was inadequate. It failed to alert Claimant of the rules he allegedly violated. The Organization objects to the February 8, 2016 notification letter. The letter failed to specify the rules allegedly violated by Claimant's conduct. This Board determined in Awards 106 (MacDougall) and 114 (Malamud); NRAB Third Division Award No. 35022, BMW v. BNSF (Kenis) that it was not necessary to specify the Rules allegedly violated. Under Rule 25, the Carrier had to provide sufficient information to alert Claimant of the conduct that is the subject of the investigation. The Carrier did so in the February 8, 2016 letter.

The Board now turns to address the substantive issues. The Carrier met its burden of proof. Claimant admits he made the ethnic slurs. His assertion that his use of the ethnically charged word, sp-c, only anticipated its use by Foreman Massey fails to explain or mitigate this conduct. Furthermore, when the crew was working outside on track, he made the remark, that Toro had six children from six different women. Claimant acknowledged making this demeaning remark.


At the on property investigatory hearing, Claimant credibly explained why he failed to apologize on February 2. Toro was assigned to another area. Claimant testified that this was the only occasion that he engaged in and he made these insensitive ethnic remarks to Toro over a long period of time that they had worked together. In his testimony, Toro noted his surprise at Claimant's insensitive statements.

The real issue in this case is whether Claimant's comments warrant dismissal. The Carrier argues that it maintains a zero tolerance policy. It presented awards in which the dismissal of employees for a first offense of making a racial or sexual remark was upheld by the Board. For its part, the Organization did not cite Awards concerning the enforcement of the Carrier's Harassment policy, in which discipline other than dismissal was either imposed by the Carrier or reduced by the Board to a lesser penalty than dismissal.

The Board functions in the context of the practices and work environment created by the parties. A zero tolerance policy means that all violations of the policy are addressed. It does not mean that all violations of the policy must be met with only one disciplinary response. Such a policy would not be one of zero tolerance, but one of zero thinking. However, in this case, Claimant not only used an ethnic slur name, but he made a derogatory and demeaning remark. The Board does not find that this is the case that warrants imposing a penalty other than dismissal.

AWARD

Claim denied.



Sherwood Malamud
Neutral Member
Date: November 3, 2017