BEFORE PUBLIC LAW BOARD NO. 7566
CASE NO. 230/AWARD No. 230

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
DIVISION – IBT RAIL CONFERENCE

and

WISCONSIN CENTRAL LTD.

Carrier's File WC-BMWED-2020-00030
Claimant: Joseph Engelhardt

Statement of Claim

"Claim of the System committee of the Brotherhood that:

1. The dismissal imposed upon Mr. J. Engelhardt for alleged violation of USOR - General Rule H - Furnishing Information and Conduct, Prohibited Harassment, Discrimination and Anti-Retaliation Policy and CN Code of Business Conduct was arbitrary, capricious and in violation of the Agreement (Carrier's File WC-BMWED-2020-00030 WCR).

2. As a consequence of the violation referred to in Part 1 above, Claimant J. Engelhardt's personal record shall be cleared of the charges immediately and he shall be provided the remedy prescribed in Rule 31 of the Agreement. Additionally, the Claimant shall have his seniority restored, his accredited months of service and all benefits that were not received during his time out of service including, medical, dental and vision premiums, co-pays, deductibles and all other out of pocket expenses as well as 401(k) and CN Stock Purchase incentives."

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7566 has jurisdiction over the parties and the dispute involved herein.

Facts

The Claimant was hired on April 17, 1989 and has established and holds seniority in the Carrier's Maintenance of Way Department. He was working as a Lead Mechanic at the time of the incident that resulted in his dismissal and had no discipline listed on his Personal Work Record. On February 28, 2020, possibly during a briefing at the Carrier's Fond du Lac, WI shop, the

Claimant, in talking about a piece of equipment that was to be worked on, allegedly expressed his hope that the equipment had not been "nigger-rigged." The alleged comment was not reported to Carrier management until March 10, 2020 when it was mentioned in a telephone conversation with Equipment Manager Southern Region Mickey T. Ernst, who was in South Carolina at the time. The call came late in the afternoon, so Mr. Ernst considered the situation overnight and informed Labor Relations on March 11, 2020. Chief Engineer Marvin Burton was also informed on March 11, 2020. Statements from witnesses were elicited and received and by letter dated March 31, 2020 the Claimant was instructed to attend an investigation, ultimately held on June 23, 2020 after several postponements. By letter dated July 12, 2020, the Carrier informed the Claimant of its conclusion that he was guilty of violating the rules and policies set forth in the above-noted claim of the Organization and that he was, therefore, dismissed. On July 17, 2020 the Organization filed a timely claim on the Claimant's behalf. The claim was properly progressed on the property without resolution and advanced to this Board for final and binding adjudication.

Carrier Position

There is conclusive proof that the Claimant is guilty as charged. The notice of investigation was issued twenty (20) days after the Carrier became aware of the incident. Mr. Engelhardt's accuser was not required to testify, but in evidence is testimony from two witnesses and their written statements. While the testimony varied as to the time of the briefing and thus the statement, clearly the Claimant uttered an offensive and inflammatory racial slur. The investigation was fair and impartial without prejudgment, with the Claimant afforded representation, with a Hearing Officer who acted professionally and who did not commit procedural violations. The dismissal was just and with sufficient cause, as the Claimant had violated rules and policies, committing a Level 4 violation that calls for dismissal. There are no mitigating circumstances. This is an appellate process in which the Board should not substitute its judgment for that of the Carrier.

Organization Position

The investigation was not fair and impartial because the notice was issued thirty-two (32) days after the alleged incident, in violation of Rule 31.B. Also, the Carrier did not provide all relevant witnesses. The Carrier has not met its required burden of proof as there is inconsistent testimony about the time of the incident and testimony that the allegedly offensive phrase "may have" been used. The dismissal was arbitrary and unwarranted, punitive, not rehabilitative. The Claimant's thirty-one (31) years with the Carrier was not considered.

Findings

The CN Code of Business Conduct defines harassment as "behavior or communications, whether written or verbal, which a reasonable person would consider to cause offense or humiliation or affect the dignity of a person and, in the context of employment, results in an intimidating, hostile or offensive atmosphere." The Prohibited Harassment, Discrimination and

Anti-Retaliation Policy – U.S. includes "Prohibited harassment on the basis of gender race, color, national origin, ancestry, religion, creed, physical or mental disability, veteran status, age sexual orientation, gender identity, or other protect basis, includes behavior similar to sexual harassment such as . . .visual conduct such as derogatory posters, photography, cartoons, drawings or gestures. USOR H requires familiarity with the CN Code of Business Conduct. A Level 4 violation of the CN Discipline Policy, which can result in immediate termination, includes "Intentional acts that cause harm to other persons . . .and Purposeful disregard for rules or policies."

The Organization's contention that the Carrier violated Rule 31.B. fails for two reasons. First, there is no evidence that any member of Carrier management was made aware of the Claimant's alleged use of racially inappropriate language prior to March 10, 2020 when Mr. Calderon and Equipment Manager Ernst spoke on the phone. Therefore, the twenty (20) day clock began to tick at the earliest on March 10. Second, the phone conversation took place at 6:49 pm Eastern Standard Time, as Manager Ernst was temporarily in that time zone. It would have been 5:49 pm Central Standard Time. In the absence of evidence to the contrary, the Board assumes that administrative offices such as Labor Relations had closed for the day. The Board finds Manager Ernst's decision to ponder the situation overnight and call the next day rational and appropriate under the circumstances. We find that the twenty (20) day clock began on March 11, 2020 so that the notice of investigation (NOI) dated March 31, 2020 met the requirement of Rule 31.B.

The absence of Mr. Calderon as a witness is troublesome for reasons discussed below, but, standing alone, does not stamp the investigation as less than fair and impartial. The neutral referee has read each of the prior awards submitted by the Organization and observes that almost every case where the Carrier's failure to call one or more witnesses involved current employees within the control of the Carrier. Those cases are distinguished from Claimant Engelhardt's case because Mr. Calderon, at the time of the hearing, was no longer a Wisconsin Central employee and apparently had not left a working phone number. The prior award that comes closest to the current fact situation is a case where a Conrail customer wrote a letter complaining of the Claimant's behavior. The complainant was in Seattle, the hearing was in Chicago in 1980, well before the pandemic-forced Zoom era, and the complainant refused to testify. That case is easily distinguished from the instant case because the complainant's letter was unsupported by any additional evidence. See PLB No. 2409, Award No. 9.

Having weighed the evidence, the Board finds substantial support for the Carrier's allegation; therefore, the Claimant is found to have violated the Rules and Policies as alleged. Weighing against the Claimant are Manager Ernst's hearsay testimony of his conversation with Mr. Calderon and the written statements of Lead Mechanic Westrich and Mobile Mechanic McCarthy. Both statements explicitly confirm the hearsay report of Manager Ernst. Both statements were written twenty (20) days after the incident, before the NOI was issued and while the Claimant was in service. The Board has considered the investigation testimony of both

Mechanics—testimony that clearly departed and detracted from the detail of the written statements. We have considered that the testimony was given almost four (4) months after the incident and at a time when it would have been obvious that the Claimant's long career with the Carrier hung in the balance. We find the written statements to be more compelling. Moreover, we find that the Claimant's recollection of the February 28, 2020 incident and his denials that he used the racially offensive language do not cancel our conclusion. Nor does the lack of consistency regarding the timing of the incident.

The Carrier's sensitivity to the times in which we live is commendable, but that sensitivity does not override the obligation to carefully consider each disciplinary decision so as not to overlook or ignore mitigating factors. The Claimant has given thirty-one (31) years of apparently excellent service. His personal record dating from October 23, 2017 is spotless. Manager Ernst testified that since 2012 he has never heard the Claimant use racially objectionable language. Mr. McCarthy testified that he never heard the Claimant use such language. While not faulting the Carrier for Mr. Calderon's absence from the investigation, it would have helped to have his reaction to the incident. Under the circumstances, the Board makes no finding that Mr. Calderon, had he testified, would have weakened the Claimant's case. Furthermore, nothing in the record provides the Board with insight into the Carrier's consideration, if any, of mitigating factors, including the Claimant's long tenure.

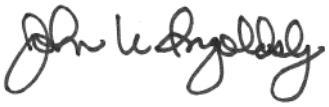
We find that, on balance, the dismissal was an abuse of discretion requiring a partially sustaining award. While the Claimant has been found to have used an insensitive, inappropriate, racist expression, there is no evidence that he had ever used such language before or that his use of the language on this one occasion renders him incapable of an appropriate, productive relationship with fellow employees. We find that the Claimant is an employee who will benefit from "considerate discipline" (see Third Division Award No. 5372), more generally known as corrective or progressive discipline, rather than punitive discipline that appears to ignore thirty-one (31) years of seemingly excellent service. The Claimant is to be reinstated with his seniority intact but without back pay and benefits. His work record is to show this as a Level 2 suspension.

Award

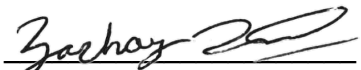
Claim sustained in part.

Order

The Carrier is ordered to make an Award partially favorable to the Claimant in accordance with the above-noted Findings.



John K. Ingoldsby
Carrier Member



Zachary Wood
Organization Member

I.B. Helburn
Neutral Member

Dated: December 9, 2021