

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES DIVISION—IBT)
)
v.)
)
BNSF RAILWAY COMPANY)

Carrier File No. 10-13-0402
Organization File No. C-13-D040-18

Claimant — Ronald Burman

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on May 17, 2013, when it issued Claimant, Ronald Burman, a Level S 30-day Record Suspension with a one-year review period for violation of MOWOR 1.6 — Conduct, for inappropriate conduct with regards to a conversation that took place with a fellow employee on February 25, 2013 at MP 82.1 on the Mendota Subdivision.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately remove the discipline from Claimant's record, and make him whole for losses incurred.

BACKGROUND:

The Claimant, a Machine Operator, entered service with the Carrier on May 27, 2003. At the time of the incident giving rise to discipline, he was a B&B Foreman on a Mobile Gang based in Iowa. On February 25, 2013, Claimant was working as a Grapple Truck Driver in Mendota, Minnesota, as part of a crew that was replacing walkways at the First Avenue crossing. In the presence of at least one other employee (Michael Eckert), the Claimant addressed an African-American employee, Bernard Blackman, as "boy," when he said, "Could you hand me that [strap], boy?" When Blackman objected and said his name was not "boy," the Claimant said, "Did I call you 'boy'? I meant 'guy.'" Blackman objected again: "You know my name." The incident came to

management's attention when another employee, Michael Stevens, who heard about it from others, reported it on February 27, 2013.

A Notice of Investigation dated March 4, 2013, informed the Claimant of the date and time of the investigatory hearing, which was scheduled "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged inappropriate conduct with regards to a conversation that took place with a fellow employee on February 25, 2013 approximately 1500 hours at First Ave (MP 82.1) on Mendota Subdivision, while assigned as grapple truck driver. The date BNSF received first knowledge of this alleged violation is February 27, 2013 approximately 1000 hours." The investigation, which was originally scheduled for March 11, 2013, was postponed by mutual agreement and ultimately held April 26, 2013.

At the hearing, Keith Evans, HR Director for the Chicago Division, testified that he had conducted an investigation. He collected written statements from five employees, including Claimant, Blackman and Eckert. Another employee, Ray Rogers, who did not actually hear the exchange, attested to its impact on Mr. Blackman, who talked to him and Eckert at the end of the shift about how upset he was by Claimant's conduct. The fifth employee, Michael Stevens, was busy with paperwork and did not hear the exchange. However, his statement indicated that he noticed a change in Blackman's demeanor and after hearing about the incident from others, "took it up my chain of command." The Claimant's statement was taken on March 4, 2013. He indicated that:

This event is not fresh in my mind so recall of any specifics of any details is not available at this time. All I am able to recall is the sickness and nausea I had all afternoon and evening. I remember talking with Bernard Blackman about several things, none of which I can express right in detail. In brief I can say that I knocked on his door in the hotel the same evening with a need to apologize, ask his forgiveness and talk in general. My emotions took over in our conversation. I believe there were a few times including when I left and I think we hugged, that Bernard accepted my apology. He forgave me and said we were good. Refer to each other as brothers. Nothing more took place meaning we were working together business as usual, and now we have this. I am nauseous again and will be sick again as well.

Evans also interviewed both Eckert and Blackman; he stated that he was unable to interview Claimant because he was on medical leave and unavailable. Based on the information he obtained during the preliminary investigation, Evans decided to proceed with a formal investigatory hearing. Truck Driver Michael Eckert also testified. According to Eckert, he was lowering a block on a boom down to Claimant and Blackman so they could hook up. Blackman grabbed both ends of the strap that was on the block and Ron said, "Hey why don't you give me one end of that, boy." Blackman said, "Better watch that 'boy' shit." Claimant responded, "Oh. Sorry about that, guy." Blackman objected again, "You better watch that 'guy' shit too. I got a name." After Blackman and Claimant finished hooking up, and Blackman walked to the truck, Claimant said to Eckert, "Did I really say 'boy'?" Eckert said, "Yes." Claimant: "I did?" Eckert: "Yes, you did, Ron." Eckert

testified that Claimant asked, "Well, how come you didn't correct me on that?" to which Eckert had no response. Blackman's testimony corroborated Eckert's, in somewhat more colorful terms ("What's my mother-fucking name?") He stated that he did not feel harassed or degraded by Claimant's use of "boy" "because I have been called worse than that since I've been here on the railroad." Blackman also corroborated the fact that the Claimant came to him that evening to apologize and stated that he did not believe Claimant was trying to harass him. Blackman added that he was more upset with Claimant because he was responsible for Blackman's being shorted twenty hours on his paycheck. The Claimant also testified. He stated that he did not recall making the statements or "how they came about." He apologized, saying "I am very bothered by them now sitting here." It was never his intention to call Blackman "boy." He stated that in the past they had used terms like "big guy" and "big man." Other employees complained about their paychecks being short but he did not know how that was his fault.

By letter dated May 17, 2013, the Carrier informed Claimant that he had been found in violation of MOWOR 1.6 and that he was being assessed a Level S 30-Day Record Suspension, with a one-year review period.

The Carrier contends that the charges were proven and that the level of discipline was commensurate with the offense. The Carrier has a zero tolerance policy toward harassment in the workplace. The Workplace Harassment Policy is well-known and widely disseminated. Racial derogatory slurs violate EEO prohibitions against discrimination on the basis of race. EEO Policy Violations are set forth as Serious Violations in the PEPA policy, and a 30-day suspension was consistent with a first Level II offense. The Organization argues that Claimant spoke inadvertently and never had any intent to harass Mr. Blackman. He rectified the situation by apologizing as soon as he realized what he had done, and Blackman accepted his apology. Blackman himself stated that he did not feel harassed or degraded by Claimant's comment and that the matter should not have gone as far as it has. This incident was a perfect time for the Carrier and the Organization to work together to identify any and all problems that led to the incident and come up with a positive approach to preventing this in the future. Instead such harsh punishment as here encourages everyone to keep their mouths shut and is not truly productive.

FINDINGS AND OPINION:

Public Law Board 7602, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Board has jurisdiction over the dispute involved herein.

The Claimant was found guilty of violating Maintenance of Way Operating Rule (MOWOR) 1.6, which states:

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome
- or
7. Discourteous

While Claimant stated at the investigatory hearing that he did not specifically recall the exact words he used to address Mr. Blackman, the evidence in the record establishes that he called Blackman “boy.” Blackman and Michael Eckert testified credibly to Claimant’s use of “boy.” In addition, while the Claimant may not remember his specific words, he sought out Mr. Blackman later that same day to apologize to him, which indicates that Claimant knew that his language and conduct toward Blackman had been inappropriate.

The Carrier has a Workplace Harassment Policy, Policy 90.2, that is designed to provide employees with “a work environment that fosters mutual respect and working relationships free of harassment.” The Purpose paragraph of the Policy continues:

BNSF does not tolerate verbal or physical conduct by any employee, which harasses, disrupts or interferes with another’s work performance or which creates an intimidating, offensive or hostile environment.

The Policy goes on to be more specific:

III. Policy Requirements

1. All BNSF employees will treat others with dignity and respect. BNSF will take the necessary actions to prevent workplace harassment and will take prompt remedial action should nay violation of this policy occur.
2. Any form of harassment by or toward employees ... is prohibited. ... No form of harassment will be tolerated. ...
4. Creating a hostile work environment is prohibited. Any harassing or offensive conduct in the work place ... is prohibited. This includes conduct that is derogatory or hostile toward an individual because of his or her race, color, ..., and includes but is not limited to:
.....
(d) sexually or racially degrading words;
.....
(h) ethnic or racial slurs;
.....

That the Carrier has zero tolerance for harassment in the workplace is made very clear in the Policy. Employees receive training on the Policy when they are hired and it is reviewed annually. As someone with nearly ten years seniority when the incident occurred, the Claimant has to have known what the policy was, or should have.

The evidence in the record establishes that Claimant violated the policy. The use of “boy,” intentional or not, harkens back to the era of enslavement and is a reminder of the darkest chapter in our nation’s history. Moreover, using terms such as “boy” and even “guy” in response to an individual’s request to be called by name denies that person the dignity of his individual identity.

The fact that Mr. Blackman testified that he did not feel harassed is irrelevant. Anti-harassment policies are designed not only to protect individuals from being subjected to harassment based on their race, sex, and other protected statuses, but also to provide an environment *for all employees* that is not hostile to any individual or group of individuals simply because of their status. Conduct that creates a hostile work environment is as much a violation of the anti-harassment policy as harassing conduct that targets one individual; there would be little point in an anti-harassment policy that prohibited individual harassment but permitted the widespread perpetuation of racial, sexual and other noxious stereotypes throughout the workplace in general. The textbook example is where male employees are prohibited from making sexually suggestive comments to female co-workers but permitted to post “girlie” calendars at their work stations or openly access pornography on workplace computers: no individual woman may be the object of harassing remarks or actions, but the overall atmosphere of the workplace nonetheless remains hostile to women.

Moreover, the Carrier’s Policy requires other employees to report workplace harassment when they hear of it, and that is what happened in this case. The incident was reported to management by an employee who was not present to hear the exchange, but was apparently bothered enough by it to “take it up [the] chain of command.” Even if the Claimant did not intend to demean Mr. Blackman and Mr. Blackman did not feel harassed, Claimant’s conduct in calling Blackman “boy” and then pushing back when Blackman objected created a hostile work environment for all employees. The Carrier was justified in concluding that Claimant had violated the Workplace Harassment Policy 90.2 and MOWOR 1.6, Discourteous Conduct. Moreover, the Workplace Harassment Policy is very clear that serious discipline will follow any acts of harassment or that contribute to a hostile work environment. EEO Policy Infractions are considered Serious Violations under the Carrier’s PEPA policy. Accordingly, the 30-day Level S Record Suspension with a one-year review period was an appropriate level of discipline for the offense, and the Board will not overturn the Carrier’s decision.

AWARD

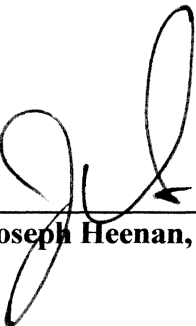
Claim denied.

ORDER

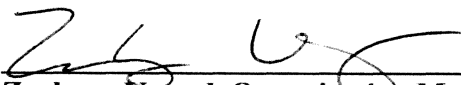
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.



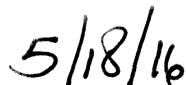
Andria S. Knapp, Neutral Member



Joseph Heenan, Carrier Member



Zachary Voegel, Organization Member



Date