

PUBLIC LAW BOARD NO. 6394

AWARD NO. 62

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissed from all service with Norfolk Southern Railway) of Mr. S. Snyder issued by letter dated June 25, 2012 in connection with his alleged conduct unbecoming an employee in that on Friday, April 20, 2012 he engaged in a verbal and physical altercation with a co-worker and directed unprofessional and offensive language at his co-worker during that altercation was unwarranted (Carrier's File MW-BLUE-12-06-LM-139).
2. As a consequence of the violation referred to in Part 1 above, Mr. S. Snyder shall receive the remedy prescribed under Rule 30(d) of the Agreement."

Upon the whole record and all the evidence, after hearing, the Board finds the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as precedent in any other case.

AWARD

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The Claimant entered service for the Carrier on July 17, 2007 as a Trackman, and was working as an Electric Welder on the date of the events which led to this case. On April 20, 2012 the claimant was working near Nitro, West Virginia to change a defective rail at Mile Post WV189.2. At the work site, Machine Operator J.E. Tucker was using an abrasive power saw to cut through a defective rail. Due to working conditions, Mr. Tucker was attempting to cut the rail from the base up. After about 40 minutes of unsuccessfully trying to cut through the rail Mr. Tucker was approached by the Claimant, who suggested he use a different procedure and try cutting the rail from the top to the bottom. At this time the Mr. Tucker used profanity ("dumb ass") against the Claimant. In

response, the Claimant used the same profanity against Mr. Tucker. Some sort of physical altercation occurred at that point – the Claimant states he was gesticulating towards Mr. Tucker and accidentally knocked off his hard hat and glasses. The Carrier characterizes this action as a physical blow. It appears as though the force of this physical altercation may have been enough to cause the Mr. Tucker to need dental work. Due to these events, both employees were removed from service pending a formal investigation by the Carrier. Mr. Tucker was later dismissed for his role in the altercation. The Carrier charged the Claimant with conduct unbecoming an employee for his role in the physical altercation. After an investigation, including a hearing held on June 7, 2012, the Carrier determined the Claimant was guilty of the charge and dismissed him from service via letter on June 25, 2012.

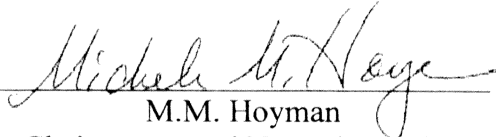
The Carrier argues the Claimant's action are a clear violation of Safety and General Conduct Rule GCR-1 ("Employees are to conduct themselves in a professional manner and not engage in any behavior...that would be considered offensive or inappropriate"). It is the Carrier's position that the Claimant was the aggressor in this incident. It characterizes the initial interaction as inappropriately criticizing Mr. Tucker (see Carrier Brief, page 5). The Carrier refutes the Claimant's assertion that he was simply trying to stop Mr. Tucker from improperly using a rail saw. The Carrier notes that the procedure used by Mr. Tucker was not in violation of Carrier rules or procedure, and within those limits Mr. Tucker was free to use any method that he felt is appropriate to complete the job – even if it is not the same method the Claimant would use (see Carrier Brief, pages 5-6).

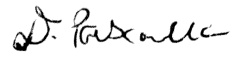
The Organization argues that the Carrier failed to meet its heightened burden of proof, which is higher in this case because the allegations involve acts of "moral turpitude." The Organization admits profanity was exchanged between the Claimant and Mr. Tucker, but it characterizes such language as normal shop talk. The Organization acknowledges that sometimes use of profanity can go beyond simply being shop talk, but such cases tend to involve things like racial slurs or other extreme language far beyond the "simple" profanity exchange which occurred here. The Organization also contends that the Claimant's procedure to cut the rail was "against procedure" (see Organization Brief, page 4), and as such the Claimant was trying to correct an unsafe work environment. Even in the event that the Claimant committed an offense, the Organization's position is that dismissal was disproportionate to the relatively minor misconduct.

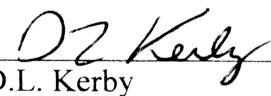
The Board finds there is sufficient evidence in the case record to suggest the Claimant acted as aggressor in the physical altercation. Although the Claimant certainly should not have been the target of profanity for suggesting an alternative way to cut the defective rail, it seems as though both his original interaction with Mr. Tucker and his response to the profanity directed at him only served to escalate events. Concurrently, our review of the case record suggests that although the Claimant is likely responsible for the physical altercation, it may have been inadvertently caused by him gesticulating toward Mr. Tucker. For these reasons, and given that the Claimant otherwise has a satisfactory

work record with no history of previous infractions, we consider dismissal to be inappropriate in this case. The Claimant is reinstated, but without back pay.

The claim is partially sustained.


M.M. Hoyman
Chairperson and Neutral Member


D. Pascarella
Employee Member


D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on June 20, 2013.