

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 136

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of R. L. McVay for reinstatement to service with seniority, vacation and all other rights unimpaired and pay for time lost as a result of his 35 day actual suspension following a formal investigation held on October 31, 2003, in connection with his conduct unbecoming an employee for being abusive and confrontational with contractor employees and coercing the contractor to purchase lunch for him in exchange for receiving track time, while assigned to provide roadway worker protection for a bridge painting contractor in Marion, Ohio.

(Carrier File No. MW-FTW-03-68-LM-325)

Upon the whole record and all the evidence, after hearing, the Board finds that 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 a precedent in any other case.

AWARD

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

Claimant R. L. McVay entered service with the Carrier as a Maintenance of Way employee on October 11, 1976. On October 9, 2003, Claimant was assigned as an Assistant Foreman to work with a contractor for the Ohio Department of Transportation (ODOT), an assignment he held for several weeks. The contractor was painting a bridge over the Carrier's tracks near Marion, Ohio, and Claimant was responsible for the safety of the contractor's employees (and the Carrier's employees) as the Roadway Worker In Charge. In the vernacular of the railroad, Claimant's assignment was "flagging" for the contractor.

Basically, Claimant was responsible for protecting the contractor's employees by making sure they were not fouling the tracks under the bridge when train traffic was approaching, and by warning train crews that the contractor was working in the area. A majority of that work consisted of maintaining radio contact with the Carrier's train dispatchers, who would advise him when it was safe to work on the tracks. This function of flagging is commonly referred to as "getting track time," although that is a misleading phrase because a flagman does not actually provide track time; he merely conveys the information from the dispatcher to the contractor.

On October 9, 2003, Track Supervisor D. R. Krupp and Assistant Track Supervisor R. Strode were inspecting track when they received a call from the ODOT Project Supervisor, who was not satisfied with the amount of track time being provided the contractor for painting the bridge, therefore he wanted assistance improving that situation. During their conversation, the Project Supervisor also told the Track Supervisors he had a few problems with Claimant's job performance. The Project Supervisor accused Claimant of attempting to persuade the contractor to buy him lunch in return for getting track time, of using inappropriate and abusive language, and of being involved in "some pushing and shoving and so forth. . . ." At the request of Carrier's Track Supervisors, the ODOT Project Supervisor put the accusations in a letter, and they met at the work site to discuss the accusations with Claimant. Also present were the contractor's employees and an ODOT Inspector who was also on site during the painting project. At that time, although Claimant denied the allegations contained in the letter, the contractor employees and ODOT Inspector signed the letter presented by the ODOT Project Supervisor.

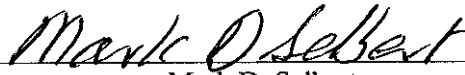
By letter dated October 14, 2003, Claimant was notified to report for a formal investigation on October 31, 2003, and charged with "conduct unbecoming an employee in that you were being abusive and confrontational with contractor employees and coercing the contractor to buy lunch in return for getting track time while you were assigned to provide Roadway Worker Protection for a bridge painting contractor at the bridge at M.P. S49.76 at U. S. Route 23 east of Marion, Ohio." The investigation was held as scheduled, at which time the testimony of the ODOT Supervisor, the ODOT Inspector, and Claimant himself, proved that he had indeed used abusive language and was inappropriately confrontational with the contractor's employees, in the presence of the ODOT Inspector, while acting as a representative of the Carrier. The ODOT Supervisor personally witnessed Claimant call one of the painters, "f*cking stupid," which Claimant admitted he had done.

Although, in response to questioning by Claimant's representative during the investigation, Claimant and a couple of Carrier witnesses testified that the language used by Claimant was not uncommon in the workplace, the fact is that Claimant was not interacting with co-workers, he was interacting with outside parties; i.e., ODOT and the painting contractor. Frankly, the language he admitted using is inappropriate under any circumstance, and certainly constituted conduct unbecoming an employee under these particular circumstances.

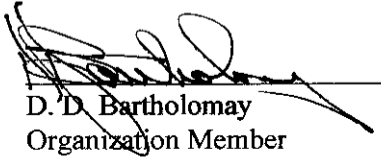
Further, while he may not have actually been attempting to bribe the contractor's employees to buy him lunches in exchange for procuring additional track time (something he was unable to do anyway), the fact that the painters complained about his comments indicates their unease with his behavior. Such solicitations are not appropriate, even in jest. Again, these were not co-workers with whom he may have had a relationship, who might ignore such comments; they were outside contractors working for the State. Claimant's behavior reflected poorly on himself and the Carrier he represented. In fact, Claimant's solicitations raised the suspicion in the Project Supervisor that maybe the contractors were not receiving sufficient track time to work because they weren't buying the Claimant lunch.

There are boundaries of decorum in all settings, including industrial settings such as this, and Claimant failed to observe those boundaries. While Claimant may be sincere in his statement that he never intended to bring discredit on the Carrier through his actions, intent and consequence are often quite distinct and apart. The Carrier had a reasonable expectation that Claimant would conduct himself as a courteous representative of the Carrier during his daily contact with the State and the painters, and when he failed to do so, the Carrier had the right to administer substantial disciplinary action.

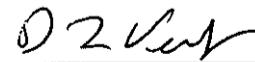
Regarding the measure of discipline assessed, while certainly substantial, this Board does not find the imposition of a thirty-five day suspension harsh or excessive under the particular facts of this case. Therefore, this claim is denied in its entirety.



Mark D. Selbert
Chairman and Neutral Member



D. D. Bartholomay
Organization Member



D. L. Kerby
Carrier Member

Issued at St. Augustine, Florida on October 18, 2004