

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 207

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 services with Norfolk Southern Railway) of Mr. J. Tucker 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-129).
2. As a consequence of the violation referred to in Part 1 above, Mr. Tucker 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 18, 2005 as a Trackman, and was working as a Machine Operator 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. In order to remove the defective section of the track, the Claimant was using an abrasive power saw to cut through it. Due to the high temperature that day, the rail had expanded which made the task more difficult than usual. In order to

compensate for these circumstances, the Claimant was attempting to cut the rail from the base up. After about 40 minutes of unsuccessfully cutting through the rail the Claimant was approached by Mr. Snyder, who suggested he use a different procedure and try cutting the rail from the top to the bottom. At this time the Claimant used profanity ("dumb ass") against Mr. Snyder. In response, in the process of gesticulating to the Claimant, Mr. Snyder knocked off the Claimant's hard hat and glasses. It appears as though the force of this physical altercation was enough to cause the Claimant to need dental work, although the Carrier questions this in its version of events. Due to these events, both employees were removed from service pending a formal investigation by the Carrier. Mr. Snyder was later dismissed for his role in the physical altercation. The Carrier charged the Claimant with conduct unbecoming an employee for directing unprofessional language at a co-worker and being involved in a 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.

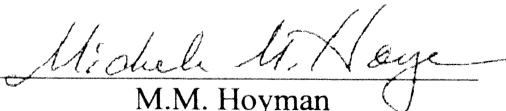
The Carrier contends that dismissal in this case is appropriate and proportionate to the level of misconduct. In particular it cites PLB 2120 Award 132 (see Employer Brief, page 14) wherein an employee was dismissed for his role in a verbal altercation which involved the use of profanity. As such, the Carrier argues Claimant clearly responded in a hostile and unprofessional manner to Mr. Snyder. It characterizes Mr. Snyder's initial communication with the Claimant as a simple attempt to inform the Claimant on the proper way to cut through a defective rail. Furthermore, the Carrier argues that the Union's position has no merit. The Carrier notes the Union argues the use of profanity in this case was "shop talk," and as such was not intended to be offensive. However, the profanity was directed specifically at Mr. Snyder in a way that the Carrier contends was meant to be insulting. The Carrier also believes any physical injury the Claimant suffered may not have been from the events in this case because the dentist statement admitted as evidence was from a non-witness. Finally, the Carrier argues that the Organization's procedural argument has no merit because it fails to cite any part of Rule 40 which was violated in the investigation.

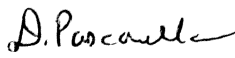
The Organization notes that because the misconduct in this case involves allegations of "moral turpitude", the burden of proof ("clear and convincing" and not "preponderance of the evidence") is higher than normal. It is the Organization's position that the Carrier failed to meet this heightened burden of proof. The Organization characterizes the Claimant's use of profanity as "shop talk" that is normal and part of the workplace culture. There was testimony from Track Supervisor and Charging Officer Daniels that the use of this particular profanity ("dumb ass") was commonplace (see Transcript, page 7). The Organization further contends that, given the Claimant's 7 year work history, dismissal for this case - even if the alleged misconduct is true - is disproportionate to the offense.

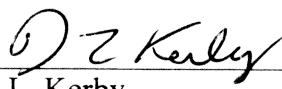
Although the generalized use of profanity may be commonplace and thus considered as "shop talk," in this case the Board finds the case record supports the idea that the profanity was abusive and insulting to Mr. Snyder. Concurrently, the Board

acknowledges that Mr. Snyder's reaction to the profanity was unacceptable. Regardless of the Claimant's use of profanity, he should not have had his hat and glasses knocked off, even if it was unintentional. The Board is sympathetic to the idea that altercations of this nature almost always involve aggression from both sides. However, the Claimant was on the receiving end of the physical altercation. Concurrently, the record also supports that provocative words were exchanged both ways. The Board finds that dismissal in this case was excessive. The Claimant shall be reinstated. For his role in the verbal altercation, the Claimant shall be assessed a 30 day suspension beginning from the day he was initially removed from service. The Claimant shall receive back pay for all time he would have worked from the end of the 30 day suspension to the date he is reinstated by the carrier.

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.