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**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 14036
Docket No. 13917
10-2-NRAB-00002-090006**

The Second Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

PARTIES TO DISPUTE: (**Brotherhood Railway Carmen Division - TCIU**
(**Utah Railway Company**

STATEMENT OF CLAIM:

“Claim of the Employees’:

- 1. That the Utah Railway Company violated Rule 32 of the Denver and Rio Grande Western controlling agreement effective July 31, 1980, of which the Brotherhood Railway Carmen on the Utah Railway Company are covered.**

The Utah Railway Company did arbitrarily, unjustly and capriciously withhold Carman Kent Nelson, hereinafter referred to as the “Claimant,” from service on January 2, 2008, pending investigation. He was then cited for investigation on January 3, 2008, to be held on January 10, 2008, and subsequently held on January 30, 2008.

Carman Nelson was permanently dismissed from service by Notice of Discipline dated February 6, 2008.

- 2. That the Utah Railway Company be ordered to compensate Carman Daley as follows:**
 - A. Returned to service with seniority rights unimpaired.**
 - B. Made whole for all vacation rights.**
 - C. Made whole for all pension benefits, including railroad retirement and unemployment insurance.**

- D. Made whole for all health, welfare and insurance benefits.
- E. Pay for all time lost, including time lost for holiday pay and all other compensation for all overtime pay that he would have received from January 2, 2008, until returned to service.”

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers 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 Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This dispute, a companion to Second Division Award 14035 decided by the Board, centers on the dismissal of the second Carman (K. Nelson) involved in a confrontation with another employee (G. Daley) on January 2, 2008. Formal Investigations for both men were conducted on January 30, 2008, and both were dismissed by the Carrier on February 6, 2008, after review of the evidence adduced at that proceeding persuaded the Carrier that both were responsible for violations of its Harassment/Anti-Discrimination/Violence Policy and related General Rules.

On February 14, 2008, the Organization submitted a timely claim on Nelson's behalf taking exception to the Carrier's action. After progressing the matter on the property in the usual fashion and following denial at all appeal levels, the Organization advanced the claim to the Board for final disposition.

As set forth in Award 14035, shortly after noon on January 2, 2008, the Claimant's immediate Supervisor S. Cox went to the Rip Track Office to investigate a complaint from the Claimant that he was being harassed by fellow employee G. Daley. According to Cox, Nelson complained that he was "sick and tired of Gary Daley harassing me."

Upon further Investigation, Cox determined that the Claimant and Daley had exchanged hostile and vulgar insults plainly at odds with The Utah Railway Timetable Rules 5 and 15. Those Rules provide:

Rule 5: “The service demands a faithful, intelligent and courteous discharge of duty.”

Rule 15: “Boisterous, profane or vulgar language is forbidden. Employees are required to be considerate and courteous in their dealings with each other and must not enter into altercations with any person.”

Specifically the Carrier concluded from interviews with both employees and others that the Claimant’s aggressive attitude toward Daley on several occasions had provoked serious tensions between the two, including, in response, this threat from Daley on January 2: “If you ever get in my face again, I’m going to kill you.”

According to the Carrier, its determination that Nelson had provoked the confrontation on January 2 was influenced both by the unchallenged testimony of Carman Daley and by the Claimant’s seriously deficient past record of involvement in previous similar conduct. In support, it points to his record of warnings, reprimands and discipline in the four immediately preceding years, which included:

- **Written reprimand and Final Warning on January 23, 2004, following verbal altercation with co-worker D. Webster.**
- **Letter of Warning on October 15, 2004, confirming results of a meeting to address “the constant bickering and dissention” in the Car Department.**
- **Written reprimand on October 27, 2004, violation of Safety Rule.**
- **Three-month disciplinary suspension and referral to EAP anger management in lieu of dismissal on August 4, 2005. for “verbally harassing and making threatening and unwarranted gestures toward a fellow employee.”**

The Organization asserts several procedural arguments at the outset, including that the Claimant was “improperly and defectively charged” with multiple, non-specific Rule violations. With respect to the merits, the Organization contends that the Claimant properly complied with the Carrier’s Rules by reporting

the threats and harassment aimed at him by Daley and then, incredibly, was pulled out of service for complying to the letter with the Carrier's Rules.

The Board examined the procedural issues raised and must reject each as not supported by the record. The Carrier's handling of the discipline up to and including the formal Hearing comported with Rule 32. Its letter of charges was sufficiently precise so as to put the Claimant on notice of what he was being called to answer for. No compromise or prejudice to the Claimant's right to a fair and impartial Hearing can be seen by the manner in which the Carrier's Hearing Officer conducted the Investigation. Lastly, introduction of evidence of past incidents involving the Claimant's behavior was not, under the circumstances, inappropriate or unfair. While those had no bearing on guilt or innocence with respect to the events of January 2, they bore directly on the severity of the discipline that might be imposed in the event the Claimant was found responsible for misconduct.

With regard to the Organization's contention that the Carrier failed to bear its burden of establishing the Claimant's guilt, the record reflects that both employees engaged in inappropriate behavior, resulting in each feeling threatened by the other. The altercation, it appears, was merely the latest in a long history of confrontations between the two. Notwithstanding multiple prior warnings that this type of behavior would no longer be tolerated, and despite anger management counseling, the Claimant became involved in yet another altercation with Daley.

The Board concludes that the Claimant's conduct on January 2 was offensive to Rules 5 and 15 of Utah Railway Timetable No. 103 and in clear violation of the Carrier's Harassment/Anti-Discrimination/Violence Policy. The latter provides that "Boisterous, profane or vulgar language is forbidden. Employees are required to be considerate and courteous in their dealings with each other and must not enter into altercation with any person."

Under the circumstances presented, it is obvious that prior progressive discipline has had little success in stimulating a course correction on the Claimant's part. The Carrier had a right and obligation to insure that it maintained a safe and violence-free workplace by taking the action it took. The claim, accordingly, will be denied.

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AWARD

Claim denied.

ORDER

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

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 3rd day of November 2010.