

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13921
Docket No. 13809
07-2-06-2-18

The Second Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

PARTIES TO DISPUTE: (**(International Brotherhood of Electrical Workers**
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

- “1. That the Union Pacific Railroad Company violated the Controlling Agreement, particularly, but not limited to, Rule 39, when Electrician A. G. Parker was assessed a Level V dismissal as a result of an unfair, biased and unwarranted investigation.
2. That, accordingly, the Union Pacific Railroad Company make whole Electrician Parker as follows: (a) reinstate him to service with seniority rights unimpaired; (b) compensate him for all wages lost at the prevailing electrician's rate of pay and all applicable overtime; (c) compensate him for, and restore all vacation rights lost; (d) compensate him for, and reinstate, all health and welfare and insurance benefits lost; (e) compensate him for, and restore, any and all other benefits lost, including Railroad Retirement and Unemployment Insurance; (f) compensate him for, and any and all other benefits that he would have earned during the time withheld from service, and (g) any record of this arbitrary and unjust disciplinary action be expunged from his personal record.”

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.

On July 21, 2005, Carrier notified Claimant to appear for a formal Investigation on July 25, 2005. The Investigation was postponed and subsequently held on August 10, 2005, to develop all the facts as to whether or not Claimant made threatening remarks towards a fellow employee at approximately 6:10 P.M. on July 19, 2005, at the Denver Locomotive Facility.

On August 18, 2005, Claimant was notified that he had been found guilty as charged and was dismissed.

It is the position of the Organization that Claimant was deprived of a fair and impartial Investigation because the Hearing Officer did not recognize that the Lead Technician Director (Carrier witness) who was responsible for gathering facts and evidence to be presented at the Hearing had prejudged the Claimant which was apparent by her testimony that was fraught with personal opinion and/or biases. It further argues that Claimant was not guilty of making alleged threatening remarks to his co-workers, but had simply engaged in crass language, sometimes referred to as "shop talk" within the industry.

Carrier argues there is no substance to the Organization's argument that Claimant was denied a fair and impartial Investigation. It also submits that the record indicates that the Claimant threatened his co-worker and invited violence. This was a serious act of misconduct which required the termination of the Claimant.

The Board has thoroughly reviewed the transcript and record of evidence and finds no merit to the Organization's argument that Claimant was deprived of a fair and impartial Investigation. The dispute will be resolved on its merits.

The facts are Claimant was employed as an Electrician at the Carrier's Locomotive Facility in Denver, Colorado. On July 19, 2005, Claimant confronted two co-workers R. Mascarenas and D. Little who were waiting outside a tool-room in the locomotive shop for its attendant's help. While standing there, Claimant rode up on an electric car and parked a few feet behind them. Addressing Mascarenas, Claimant stated "Any time, any place you fat motherfucker!" He then came closer and forcefully threw locomotive parts into a trash can next to where Little stood.

Mascarenas obtained the parts and tools he needed and left the area without responding to Claimant, but almost immediately reported Claimant's threat to his Supervisor. Mascarenas and Little gave written statements attesting to Claimant's threat, after which a Special Agent was called to remove Claimant from service and escort him off the property. At that time Claimant admitted using foul language in the presence of Mascarenas and Little which he confirmed in a written statement. His explanation was that he was addressing a different employee, Mr. D. Lasick by stating "Fuck you, you fat cocksucker," which Claimant termed a "friendly gesture".

Claimant's defense that he was making a friendly gesture to a fellow employee was not helped any by Lasick, who in a written statement said he did not hear the alleged greeting, but instead wrote that he did hear Claimant talking to someone. That statement does not conflict with the testimony of the employee who stated he had been threatened and the other employee who heard the Claimant's threat, but instead confirms that the Claimant addressed Mascarenas.

The Organization vigorously argued in behalf of the Claimant that he merely engaged in "shoptalk". However, that argument does not meet the test of what is "shoptalk". Shoptalk within the railroad industry has often been characterized as being language that is coarse, rough and sometimes vulgar. Claimant's statement went beyond the use of foul language as it was a direct threat of intimidation.

A review of the testimony of Mascarenas and Little shows it to be in conflict with that provided by the Claimant. However, that testimony was far more credible than Claimant's self-serving statements. Additionally, there is no indication that either employee had anything to gain by fabricating testimony. The Carrier in this instance met its burden of proof that Claimant was guilty as charged of threatening a co-worker.

The only issue remaining is whether dismissal was appropriate. Violence in the workplace should and cannot be tolerated and the Carrier has a legal obligation to provide a safe work environment for its employees free of potentially violent employees. The Claimant has a less than stellar work history which includes violating the absenteeism policy, displaying demeaning tattoos in violation of instructions to keep them covered while at work and making threats against a janitorial contractor. In addition it came to light while the case was being handled on the property that Claimant pleaded guilty to assaulting Mr. Mascarenas in public and threatening to kill him. Claimant's conviction coupled with a permanent restraining order to stay away from Mr. Mascarenas and the Carrier's Locomotive Facility proves that Claimant has a violent nature. The Board finds and holds that the dismissal was appropriate as it was not arbitrary, excessive or capricious. The discipline will not be set aside.

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.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 6th day of August 2007.