

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 14035
Docket No. 13916
10-2-NRAB-00002-090005**

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 Gary Daley, 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 Daley 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.

According to the record before the Board, including the transcript compiled at the Claimant's formal Investigation conducted on January 30, 2008, the Claimant, a nine-year employee, was dismissed on February 6, 2008 after the Carrier concluded from evidence adduced at the Hearing that he was responsible for violations of its Harassment/Anti-Discrimination/Violence Policy and related General Rules. By timely submission of a claim on February 14, 2008, the Organization challenged that action as unwarranted, ultimately advancing the dispute to the Board for final and binding resolution when it remained unresolved in claim handling on the property.

The facts upon which the Carrier relied are disputed. S. Cox, Manager, Mechanical & MOW Operations and a 29-year employee, testified without

challenge that at around 12:30 P.M. on January 2, 2008, he had taken a call on his cell phone in his office from write-up Carman K. Nelson. Upon arriving at the Rip Track Office where Nelson was located, he found him "visibly upset." According to Cox, Nelson told him, "I'm a little upset. I am sick and tired of Gary Daley harassing me. Look at this calendar."

Upon pulling the calendar from the garbage, Cox observed that it bore the words "Kent goes nuts" or "Nelson goes nuts." Nelson explained that while he was in the office doing car bills, Daley had waited until the other Carman on duty had left and then walked up to him and stated, "If you ever get in my face again, I'm going to kill you."

Nelson advised Cox that he asked Daley, "You're threatening my life because I told you not to park the truck in my way?" To that, he says Daley responded, "Just meet me off the property and I'll kick your ass." He states that he then told Daley he did not plan to meet him anywhere and that it was not worth losing his job over. Cox then quotes Nelson as saying, "I'm tired of this. You need to do something." At that point, Cox states that he advised Daley he was being removed from service pending Investigation.

Nelson's testimony confirmed that of Cox. Nelson states that after the Claimant said he would kill him if he "ever got in his face again," he asked if he was being threatened. "No," the Claimant replied, "that's a promise. You cannot come to me like a man and tell me to not park on the rip track." Nelson explained that the reason he had reported the Claimant's parking to Cox was because "you don't listen. You know you are not supposed to park there. So I go to Mr. Cox." In reply, the Claimant said, "Well, let's settle this like men off the property." "I'm not going anywhere with you," Nelson replied, "because you're not worth it." According to Nelson, during this conversation he had left his chair and opened the door in hopes that someone would hear the exchange. He states that after twice telling the Claimant not to threaten him he left the office and called Cox.

The Claimant tells a markedly different story, testifying that prior to January 2, Nelson had "got into his face" over his parking, and that he had felt threatened at the time and reported the incident to Cox, who took no action. On January 2, "I asked Kent [Nelson] not to ever get in my face like that again because I felt

threatened and I have the right to protect myself if you do that again.” He states that Nelson then got up from his chair and kept asking if he was being threatened. “No, I said, I just want to come to work, do my job and go home.” Nelson, according to the Claimant, then walked out the door, came back in “and started screaming, F. . . you. You’re not worth it.” According to the Claimant, “we was just talking. Nobody touched nobody, nothing.”

The Organization’s several procedural objections to the Carrier’s case handling have been carefully reviewed and are rejected as not sufficiently serious so as to have deprived the Claimant of his right to a fair Hearing. With respect to the merits, the Board concludes that the Carrier has borne its burden of proof. The credibility assessments made by the Hearing Officer regarding the accuracy of competing testimony offered by the witnesses was resolved in favor of Messrs. Cox and Nelson, and those judgments are beyond the scope of our review. With regard to the severity of the discipline imposed, Item 15 of the Utah Railway Company and Salt Lake City Southern Time-Table No. 103, with which the Claimant admits he was familiar, clearly states:

“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.”

As noted in the Claimant’s termination letter, he had been counseled on a previous occasion about his behavior. The Carrier’s expectations that its employees will refrain from threats and harassment are reasonable and well publicized. Had it failed to take strong action against an employee’s threat to kill a co-worker, it would have subjected itself to legitimate criticism and potential liability. The record here offers ample reliable evidence in support of its charges. Under the circumstances presented, and in recognition of the Claimant’s past record and the very real concerns over violence in the workplace, the Board concludes that the Carrier’s action was neither arbitrary nor capricious. On that basis, the claim will be denied.

AWARD

Claim denied.

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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.