

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42770
Docket No. MW-43060
17-3-NRAB-00003-150295**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Indiana Harbor Belt Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Trackman P. Woznicki for his alleged violation of Rule D-Employee Conduct on June 12, 2014 for allegedly disobeying instructions and threatening Foreman J. Perkins was without just and sufficient cause, on the basis of unproven charges, arbitrary, capricious, excessive and in violation of the Agreement (System File 14-087 IHB).

(2) As a consequence of the violation referred to in Part (1) above, Trackman P. Woznicki shall now be reinstated to service and the Carrier shall ‘...make Claimant Woznicki whole, compensating him for all lost time and wages restoring all rights and benefits and expunge his personnel record removing assessed discipline and any and all reference of this issue from the record.’”

FINDINGS:

The Third 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.

Claimant, a nine year Trackman, was assigned to work with Foreman Perkins on a Gibson gang that was spiking and changing ties in the Blue Island Yard on June 12, 2014. A Notice of Investigation dated June 13, 2014 was issued to Claimant on charges of disobeying instructions and threatening his Foreman with physical harm. The Claimant was withheld from service pending the Investigation. The Investigation was conducted on June 18, 2014. The June 25, 2014 Notice of Discipline finds the Claimant guilty of the charges in violation of Rule D - Employee Conduct, and dismisses him from employment. The instant appeal resulted.

The designated Hearing Officer made clear at the commencement of the Investigation that he would not rule on any objections nor render the decision in this case, but would only serve the role of developing a factual record upon which other the Carrier officers would rely in making their decision. Testimony was taken from Foreman Perkins, Assistant Supervisor Ritter, the Claimant, three other members of the Gibson gang who rode over to the Blue Island Yard after the morning briefing with Claimant and Foreman Perkins (Reno, Lacefield and VanderMeer), two other Trackmen working with the gang during parts of the day (Donnahue and Bish) and two Carrier Managers involved in the preliminary Investigation (Greeve and Reyes). The initial charge was drafted based upon the written statements of Perkins and Ritter regarding a verbal threat allegedly made by the Claimant around 10:30 A.M. The Claimant was initially briefly questioned, an interview that was not completed, and was not asked to write a statement. None of the other employees working with the gang were interviewed about Claimant's conduct that day.

Foreman Perkins' evidence was that, during the truck ride over to the site, the Claimant asserted that he was not going to work, and knew how to get out of working. The Claimant denied saying this, and the other three employees in the truck testified that they did not hear him say this. Equipment Operator Lacefield recalled something being said about the fact that they did not have their equipment that day so there wasn't going to be much work done. Perkins' evidence indicates that, although he did not push the Claimant to work too hard, he was barely doing anything, and that the Claimant got mad when he told him to keep busy, and said

that he knows where I live and he would kick my ass. Perkins expressed that he was not afraid of the Claimant. Ritter testified that he saw them arguing, and as he got closer approaching from behind Claimant, he heard the Claimant say "You might think your big and bad out here, but I know where you live and I'll come to your house and kick your ass." Ritter testified that he thought the Claimant had seen him and that he believed that Donahue and Reno were around at the time.

Ritter stated that he pulled Perkins aside and asked if he wanted him to pull the Claimant upstairs and deal with it, and Perkins responded that he was the Foreman and could handle his men, a sentiment Ritter chose to respect. Ritter testified that he does not micromanage his Foremen, and allows them to gain the respect of their men. He told Perkins to let him know if he couldn't handle it. There was no report made to higher management or the police. Ritter stated that he moved the Claimant to the other end of the track and kept his eye on him, and there did not seem to be any further incidents between them. None of the other gang members recall the Claimant being separated from Perkins by Ritter. Perkins and Ritter admitted that the Claimant did perform some work after the incident. Perkins also agreed that he liked to joke around with his gang, and Reno explained an incident that day when he had his shoe on a board trying to tie the laces, and Perkins kicked out the board, causing him to fall.

The Claimant denied making the threatening statement, or failing to work that day. His only recollection of an interaction with Ritter is when he showed him pictures of his new ski boat. None of the other employees present at the time recalled hearing any argument between the Claimant and Perkins and denied hearing the Claimant make the alleged threat to Perkins. They only recall Ritter coming to the gang later after lunch when he pulled Bish, and then the Claimant, off the track to go to the office. According to Perkins, after lunch he had an incident with Bish where he continued to refuse a direct order to work, and he called Ritter over to report the insubordination and ask for help. It was when he was in the office concerning this incident, that he mentioned the prior comment made by the Claimant that morning, which ultimately led to the Claimant being called into the office. Bish and the Claimant each testified that during the entire discussion with management, the Claimant was not specifically mentioned nor was any reference made to an alleged threat he had made. The Claimant was asked what happened that morning, he began talking about their arrival at the track and the improper track protection, and was stopped and, after a recess, was informed that he was being removed from service and the matter was being referred for an Investigation.

The Claimant testified he had no idea why he was removed, he and his Organization representative were not told the reason, and he did not learn of any alleged threat until later that evening. The Claimant denied all of the allegations of the charge, calling them lies.

The Carrier argues that the Claimant received a fair and impartial Investigation, and there is no requirement under the Agreement that the Hearing Officer be the decision-maker. It contends that the facts developed at the Investigation clearly show that the Claimant failed to comply with the clear instructions of his Foreman and threatened him, and that the validity of Foreman Perkins' evidence cannot be questioned, since he showed no desire to get his Union brother in trouble when he was first threatened, and was consistent in his account, which was corroborated by Ritter. The Carrier asserts that it met its burden of proving the charges by substantial evidence, and that it properly considered the Claimant's lengthy past disciplinary record - which shows that he had been counselled for difficulty in complying with instructions and behaving professionally - in assessing the penalty. It notes that there is a zero tolerance policy against threats, which must be taken seriously and support dismissal, citing SBA 1116, Award 34; PLB 3139, Case 176.

The Organization contends that the Claimant was denied a fair and impartial Investigation under Rule 25, since the Carrier failed to interview any of the five witnesses supporting the Claimant's word at the time of the Investigation, the Hearing Officer refused to answer the Organization's questions to pre-qualify himself and failed to rule on any objection, as well as failed to play any role in the discipline decision-making despite being the only one who could assess witness credibility from their testimony at the Investigation, citing Third Division Award 13240. It argues that the Carrier failed to meet the heightened burden of proof that applies in dismissal cases, especially where a charge of conduct involving moral turpitude is involved, relying on Third Division Award 32890. The Organization asserts that there is no probative evidence of the Claimant's guilt of the charges, noting that management could not clarify what instruction he failed to follow, admitted he was working, and took no action in response to the alleged "threat" made by the Claimant until hours later, when it came to light in the course of another investigation. It requests that the claim be sustained, and that the Claimant be returned to work and made whole.

A careful review of the record convinces the Board that the Carrier has failed to sustain its burden of proving the charges against the Claimant by substantial evidence. While there may be nothing in the Agreement requiring the Hearing Officer to be the decision-maker, or to even make recommendations concerning the charges, he is the only one in this case who saw each witness and heard the evidence of each of the four gang members, who worked along with the Claimant and Perkins that morning, and fully supported the Claimant's denials. They were not interviewed in the preliminary Investigation, nor were statements solicited from them or the Claimant. In assessing the discipline in this case, the Carrier officer who reviewed the transcript of the Investigation apparently chose to credit the accounts of Perkins and Ritter over the other 5 witnesses. There is no explanation why this is so. For the same reasons that the Board does not resolve credibility on the basis of a written record, deferring to the assessment of the Hearing Officer or Carrier official who is in the best position to weigh credibility factors in the face of directly contradictory evidence, the Carrier's reliance solely upon a conflicting record to uphold one version over another must be viewed with caution. In this case, Perkins' corroborating witness Ritter named two employees who he believed were in the vicinity of the conversation when the threat was made, yet both deny overhearing such a threat.

Most compelling for the Board is the manner in which the charges in this case arose. The threat relied upon by the Carrier to support the Claimant's dismissal was allegedly uttered by Claimant at 10:30 A.M., yet the Assistant Supervisor chose not to report it to anyone when his Foreman told him that he could handle the situation, and stated that he was not afraid. Apparently, there was no real concern for safety at that time. The record shows that Perkins and Claimant had no further inappropriate interaction for the balance of the day until Perkins sought the help of Ritter concerning the insubordination of another employee. Thus, had the alleged insubordinate conduct of Bish leading to Perkins' quest for supervisory intervention not occurred, the Claimant's comment would never have come to light or been acted upon. Additionally, even if the instructions that Claimant was charged with not following involved working, a fact that was not clear from the record, both Perkins and Ritter admitted that Claimant did some work after this incident that day, and did not refuse a direct order to do so.

For all of these reasons, the Board concludes that the Carrier failed to meet its burden of proving that the Claimant was guilty of the charges, or that his

conduct merited dismissal. See, e.g. Third Division Award 32890. The claim is sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of September 2017.