

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY
(Former ATSF Railway Co.)

Case No. 399 – Award No. 399 – Brereton
Carrier File No. 14-10-0209
Organization File No. 140-13A2-104.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing August 5, 2010, when Claimant, Jimmy R. Brereton (1672047), was dismissed for the incident of conduct unbecoming when he entered into a verbal altercation with a co-worker at the Las Vegas Depot on August 5, 2010. The Carrier alleged violation of MOWOR 1.6 Conduct.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated with seniority, vacation, all rights unimpaired and wage loss commencing when Claimant withhold from service and continuing forward and/or otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Jimmy R. Brereton, had been employed by the Carrier since 2005. On August 5, 2010, the Carrier charged Claimant to attend an investigation "for the purpose of ascertaining the facts and determining (his) responsibility, if any, in connection with

the alleged incident of conduct unbecoming when (he) entered into a verbal altercation with a co-worker at the Las Vegas Depot at approximately 0800 hours on August 5, 2010 on the Glorieta Subdivision. . . .” Following the investigation, on September 20, 2010, the Carrier issued Claimant a letter finding him guilty of the charges, in violation of Maintenance of Way Operating Rule 1.6, and dismissed him from employment.

Rule 1.6, Conduct, provides, in relevant part:

Employees must not be:

* * *

3. Insubordinate.

* * *

6. Quarrelsome

or

7. Discourteous

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.

The facts of this case are largely undisputed. On August 5, 2010, Claimant, an Assistant B & B Foreman, was involved in an argument with his supervisor, Lawrence Lucero, at the Carrier’s Las Vegas Depot. Mr. Lucero called his supervisor, Joseph A. Walters, Structure Supervisor at La Junta, Colorado, and Mr. Walters came to the scene, where he took statements from the two principals as well as from two other employees who had been present, Joshua Gilmore and Brian Sydnor. All four employees read their statements into the investigation record and also testified concerning the incident.

The record indicates that on the morning at issue, Mr. Walters conducted a conference call with Claimant’s gang, including Mr. Lucero. During the call, Mr. Walters apparently mentioned that employees were not allowed to nap in their vehicles. Claimant acknowledged at the investigation that he had “taken a little nap” during a trip a short time earlier.

A short time later, Mr. Lucero instructed the employees to check the equipment in preparation for the day’s work. Approximately two weeks before, there had been a problem with low tires on some of the vehicles. On the morning at issue, Claimant came into the office and told Mr. Lucero that the “f . . . ing backhoe” was low again. Mr. Gilmore came into the office and told them that the trailer also had a flat. Mr. Lucero told the employees to put air in the tires, and Claimant, by his own admission, replied that Mr. Lucero had had a “f . . . ing credit card” for two weeks and should have used “that

piece of s . . . t.” Claimant told Mr. Lucero that the situation presented a safety issue which needed to be addressed, and that somebody could get killed. It appears that Mr. Lucero instructed Claimant to put air in the tires and it would be OK, and they would get them fixed, and Claimant replied that he would not do it. Mr. Lucero testified that he had informed Mr. Walters of the problem and they were not using the vehicles so there was no risk.

During this conversation, Claimant also confronted Mr. Lucero about Mr. Walters’ earlier instructions about napping. According to Mr. Lucero, Claimant told him that he was a “f . . . ing rat” for reporting Claimant. Mr. Lucero replied that he would enforce all rules, and Claimant replied that any time Mr. Lucero did anything wrong he would call Mr. Walters.

Mr. Lucero characterized Claimant’s conduct as a blow-up and asserted that Claimant had gone “on and on.” He acknowledged that there was no physical contact during the incident. Mr. Lucero also acknowledged that he had heard words such as “f . . . k,” “bulls . . . t” often on the railroad and they were not offensive to him. However, he explained, he had never had such words directed to him with such demeanor, and he found it offensive and disrespectful.

Mr. Lucero stated that Claimant had been engaging in such conduct for some time, and, as a result of this incident, he did not feel comfortable with Claimant, felt threatened by his actions and no longer wanted to work with him. He stated that if he came to it he would seek another job and would never work with Claimant again.

Mr. Gilmore, who was working as a B & B Mechanic on the day of the incident, stated at the investigation that he had not overheard all of the conversation. He did state that Claimant and Mr. Lucero had argued about the car on the trailer, and Claimant told Mr. Lucero that it needed to be fixed, that it could kill someone if it blew out, and Mr. Lucero replied that it would be fixed.

Mr. Sydnor, who was working as a B & B helper that day, confirmed at the investigation that Claimant confronted Mr. Lucero about having informed Mr. Walters that Claimant had been napping. He also confirmed that Claimant told Mr. Lucero that any time Mr. Lucero broke a rule he would call Mr. Walters, and he (Claimant) he could “be a f . . . ing a . . . hole too.” He also confirmed that Claimant continued yelling at Mr. Lucero about the flat tires and used the “f-word” a few times.

Mr. Sydnor testified that he felt there was no danger of a physical confrontation, and, although Claimant spoke a “little loudly” he did not view the incident as an altercation, and he heard cursing on the railroad every day. He also stated that a leak on the trailer could present a safety problem, because the vehicle was driven on the highway and there was no way to predict what might occur. He stated that the backhoe did not present such a problem. He added that putting air in the tires would not present a safety issue. He stated that Claimant was “adamant” about the safety issue.

Claimant testified at the investigation that after the conference call that morning Mr. Lucero asked the gang to perform several tasks to prepare for the day's work. He stated he went outside and noticed that the backhoe and trailer tires were again low, so he went back inside and brought the matter to Mr. Lucero's attention. He stated that Mr. Lucero replied that he was the "f---ing foreman" and made the decisions. Claimant acknowledged that he replied that Mr. Lucero had a "f---ing card (and should) use that piece of s---t," as he had known there was a problem with the backhoe two weeks earlier and had done nothing about it. Claimant also acknowledged that he asked Mr. Lucero if he had brought his "little nap" to Mr. Walters' attention, and Mr. Lucero told him that he had he had.

Claimant maintained that what had occurred was a disagreement concerning a safety issue regarding the tires on the two vehicles. He added that there was no physical contact or other threat involved. He stated that he believed Mr. Lucero was failing to address the situation, and it would not be safe to use the vehicles because there was reason to fear a possible blowout of the tires. He acknowledged that after he raised his voice Mr. Lucero did address his concern, but stated that he believed handling the matter as he had was the only way to achieve the desired result, and the matter had been resolved.

Claimant acknowledged that he had an argument with Mr. Lucero but maintained that cursing was involved "on both ends." Claimant testified that "cussing" occurred every day and he did not feel like either man had been out of line. He stated that the matter involved a normal conversation such as was had all the time.

The Carrier's Policy for Employee Performance Accountability (PEPA), provides that an employee involved in a serious incident, as enumerated in the policy's Appendix B, will receive a 30-day record suspension and may be offered training to correct the underlying behavior. The PEPA provides that a second serious incident within a 36-month review period will subject the employee to dismissal.

Claimant's discipline record shows a 10-day record suspension issued on January 11, 2010, for a verbal altercation on October 26, 2009. It also shows a Level S 30-day record suspension, with a three-year review period, issued on August 25, 2010, for failing to establish and document working limits on authority on August 2, 2010.

The Carrier first asserts that Claimant received a fair and impartial investigation. In particular, the Carrier states, the investigation notice was issued timely and provided Claimant and his representative with sufficient information concerning the alleged violation to prepare a defense.

On the merits, the Carrier asserts that this case is not complicated. Foreman Lucero, the Carrier notes, testified that he felt threatened by Claimant and no longer wanted to work with him. Further, the Carrier points out, two eyewitnesses testified that there was an argument and yelling between Claimant and Mr. Lucero. Most importantly, the Carrier states, Claimant admitted that he "cussed out" Mr. Lucero, in violation of the

Carrier's conduct rule. It is well established, the Carrier states, that such an admission is sufficient to satisfy the Carrier's burden of proof, and the cumulative evidence conclusively establishes Claimant's guilt. Clearly, the Carrier concludes, Claimant violated Rule 1.6.

With respect to the penalty assessed, the Carrier notes that the PEPA provides that two serious, Level 8 offenses within a 12-month review period can subject an employee to dismissal. Claimant's record, the Carrier points out, shows two discipline events within his 12-month review period, including one for an incident similar to the one at issue. The Carrier concludes that this Board has no basis upon which to overturn Claimant's dismissal and requests that the claim be denied.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. First, the Organization asserts that Claimant was denied a fair and impartial hearing. The Organization notes that the investigation notice cited no rule Claimant had allegedly violated, but the Hearing Officer allowed a rule to be entered into evidence. Moreover, the Organization points out that, over its objection, employee statements were allowed into evidence at the investigation even though the employees were present and available for questioning.

On the merits, the Organization asserts that the record evidence leads to the logical conclusion that Claimant was persecuted for reporting a safety condition and holding to his belief that it posed a significant risk to Carrier employees and the public. The Organization points to Mr. Lucero's testimony that their supervisor, Mr. Walters, had known for two weeks about problems with the tires on the backhoe and trailer, but nothing had been done to correct the situation. Moreover, the Organization notes, the other employee testified that Claimant stated that the situation presented a "f... ing safety issue."

The Organization states that the language Claimant used on this occasion is of the sort used daily, and the other employees on the gang took no exception to the language or tone he used to express his frustration with management's failure to address the safety issue. Had Claimant not spoken up, the Organization argues, the bad tires could have caused a blowout, resulting in injury or even death. Claimant's dismissal, the Organization urges, amounts to borderline harassment for his reporting this safety issue. The Organization requests that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no evidence of any procedural violation or irregularity which denied Claimant his right to a fair and impartial investigation. The investigation notice in this case provided ample detail to allow Claimant to understand the allegations against him and be prepared to respond.

On the merits, there is very little dispute about what actually occurred, although the two principals characterize it quite differently. Mr. Lucero perceived Claimant's actions as a disrespectful, threatening verbal attack, while Claimant characterized it as a

run of the mill conversation motivated by Mr. Lucero's failure to address safety concerns he had previously raised.

Claimant might well have had grounds for frustration with respect to the condition of the vehicle tires, and employees pursuing questions of safety are entitled to a certain amount of latitude, given the primacy of safety issues for all parties within the industry. The use of profanity is not unheard of on the railroad, and not every argument between an employee and a supervisor – even profane arguments – can be characterized as violating the norms of the workplace. Some are simply arguments, and the line between the two things can be a matter of differing perception as between the two participants in the argument. Such incidents do not lend themselves to broad generalizations, and must be assessed on the specific facts to determine which side of the line they fall on.

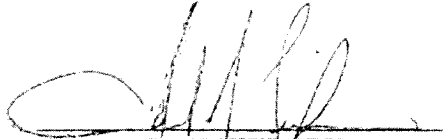
Having carefully reviewed the specific facts in this case, we find no reason to overturn the Hearing Officer's conclusion that Claimant engaged in a profane verbal confrontation, repeatedly berating his superior, in the presence of other employees, and that this rises to the level of an altercation within the meaning of the rules. We view the confrontation as aimed more at the Foreman's proper exercise of his disciplinary responsibilities than at any concern over safety. Claimant aggressively pursued the argument after Mr. Lucero assured him the safety problems he had raised would be addressed, and steered the argument to what appears to have been the primary motive for his verbal attack, which was Mr. Lucero's reporting of his napping on the job. In connection with that, Claimant called his foreman a "f---ing rat" and, by implication, an "asshole."¹ It is evident that Claimant thought he could bully his supervisor, and indeed that was the entire thrust of his conversation that day. It is the effort at bullying his supervisor, together with directing profanities at him (as opposed to simply using them as part of the conversational flow) that distinguishes this from the run of the mill workplace argument. The abuse was directed at Mr. Lucero as an individual, and not at the situation, and it was motivated by Claimant's hostility to Mr. Lucero's legitimate actions as a supervisor. We therefore conclude that the Carrier has met its burden of proving Claimant's guilt by substantial evidence.

With respect to the penalty assessed, Claimant was a short-term employee, with one similar offense already on his record, and another Level S offense only days earlier. The Carrier's PEPA permits termination for a second Level S offense, and we cannot say that the choice of penalty here represents an unfair, arbitrary or discriminatory exercise of the Carrier's discretion to determine penalties.

¹ Claimant advised Mr. Lucero that "I can be a f---ing asshole too" in connection with his intention to monitor Lucero's behavior and report misconduct to Mr. Walters.

AWARD

Claim denied.



DAN NIERSEN
Neutral Member



SAMANTHA K. ROGERS
Carrier Member



DAVID TANNER
Organization Member

Dated this 20th day of April, 2012.