

BEFORE PUBLIC LAW BOARD NO. 6043

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION
IBT RAIL CONFERENCE**

and

ILLINOIS CENTRAL RAILROAD COMPANY

Case No. 53

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The ten (10) day suspension imposed upon B&B Carpenter Eric D. Barnette for violation of General Rule H in connection with making inappropriate, threatening and/or vicious statements about another employee on Saturday, July 7, 2007 at the Walmart in Kosciusko, Mississippi is based on unproven charges, unjust, unwarranted, excessive and in violation of the Agreement (System File S.A082107.2/134-107-22).
2. As a result of Part 1 above, Mr. Barnette shall be granted remedy in accordance with Rule 33(i) of the Agreement."

FINDINGS:

By notice dated July 13, 2007, the Claimant was directed to attend a formal investigation to ascertain the facts and/or determine the Claimant's responsibility, if any, in connection with an incident in which the Claimant allegedly made threatening statements about another employee while the Claimant was out of service and at a Wal-Mart. The hearing was conducted, as scheduled, on July 20, 2007. By letter dated July 27, 2007, the Claimant was notified that as a result of the hearing, he had been found guilty as charged and was being assessed a ten-day suspension. The Organization thereafter filed a claim on behalf of the Claimant, challenging the Carrier's decision to suspend him. The Carrier denied the claim.

The Carrier initially contends that the investigation in this matter was fair and

impartial. The Carrier asserts that the Claimant was given timely and proper notice of the investigation, the Claimant and his representatives were present throughout the investigation, they were permitted to hear and question all witnesses, and they were permitted to make any and all statements they deemed necessary. The Carrier argues that the Claimant and his representative did not take exception to the conduct of the proceedings, and the Organization never alleged, during the on-property handling of this matter, that the proceeding was flawed in any way. The Carrier submits that any Organization argument to the contrary before this Board would be a new argument, and therefore untimely, improper, and not ripe for consideration.

The Carrier maintains that the record contains substantial probative evidence that the Claimant made statements of a vicious and threatening nature in the presence of a fellow employee and that employee's wife. Addressing the Organization's position that Cairncross' testimony was hearsay, the Carrier emphasizes that this is misguided because Cairncross testified as to what he, and his wife, actually heard and witnessed while in direct conversation with the Claimant while at the Wal-Mart store. This is not hearsay evidence.

The Carrier points out that Cairncross was present and involved in direct, person-to-person conversation with the Claimant. While there may be some merit to the Organization's position that Day's and Barfield's testimony was second-hand and hearsay, this argument is irrelevant to and cannot render void the first-hand testimony of Cairncross. The Carrier contends that any assertion that Cairncross' testimony constitutes hearsay is patently erroneous.

The Carrier then argues that a noticeably common thread in prior Awards holds that hearsay is admissible in arbitration. Moreover, when it corroborates direct evidence or testimony, hearsay is worthy of consideration.

The Carrier asserts that Cairncross testified, without equivocation or exception, to the conversation between him and the Claimant, including the threatening statements made by the Claimant against Norris, the Claimant's supervisor. The Carrier contends that the Claimant had been involved in a previous incident in which the Claimant was suspended for violating the same Rule H, due to the same type of threatening and vicious behavior as in the instant case.

The Carrier submits that it cannot disregard reports indicating that an employee is threatening another employee. All such incidents must be investigated. In this case, Cairncross acted correctly and responsibly when he reported the Claimant's threats of vicious harm to his supervisor, and the Carrier had a responsibility to investigate this report.

The Carrier maintains that Cairncross' testimony is credible, and the record contains substantive probative evidence to prove that the Claimant violated the rule with which he was charged. The Carrier emphasizes that it has met its burden of proof in this matter, and the only remaining issue is the quantum of discipline.

The Carrier insists that once it has been determined that the charge(s) have been proven, it is prudent to consider the Claimant's past discipline history in determining an appropriate measure of discipline. The Claimant's record contains numerous letters of caution, warnings, reprimands, and suspensions. The Carrier contends that based on the

proven violation and the Claimant's discipline history, the discipline imposed was warranted.

The Carrier emphasizes that numerous tribunals have held that when charges are proven by probative evidence, then a carrier's imposition of discipline must remain unaltered unless it is determined to have been unreasonable, arbitrary, or capricious.

The Carrier asserts that if the Board is compelled to consider remedy, then any compensation due the Claimant must be subject to offset of all compensation earned by him in any other employment, in accordance with Rule 33(i) and the well established practice on this property.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that in considering the merits of this dispute, it is necessary to remember that the entire incident took place while the Claimant was off duty, away from the Carrier's property, and not in contact with the employee about whom the comments were made. Pointing to prior Awards, the Organization asserts that under these circumstances, the Carrier had no rights whatsoever to charge or discipline the Claimant. The Organization argues that there can be no doubt that the Carrier far exceeded the reach of its authority in the instant matter and the discipline cannot stand.

The Organization maintains that it is absurd to think that the Carrier seriously considered the Claimant's comment to be threatening or vicious in light of the fact that it immediately returned the Claimant to duty under the supervision of the supervisor he allegedly threatened.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the evidence and testimony in this case, and we find there was sufficient evidence in the record to support the finding that the Claimant was guilty of violating Carrier Rule H when he made inappropriate, threatening, and vicious statements about another employee on July 7, 2007, at the Wal-Mart in Kosciusko, Mississippi. Although the Organization made an excellent argument about the fact that this was off-duty and off-property conduct where the employee who was being threatened was not present, the record reveals that there was a sufficient nexus between the threat and the workplace to support the Carrier's taking disciplinary action against this Claimant. In many situations, the employer does not have the authority to issue discipline for off-duty conduct. However, if there is a sufficient nexus, and there is one in this case, then the employer has the right to issue discipline to the employee for conduct that took place while the employee was off duty.

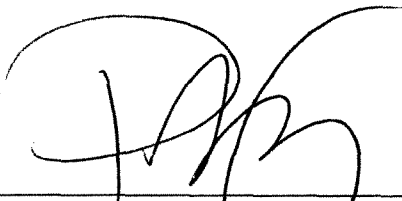
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case was issued a ten-day suspension for making the threatening statements relating to an employee while he was off duty. The Claimant's

disciplinary record includes a fifteen-day suspension for violating General Rule B in 2007, as well as a five-day suspension for violating General Rule H. In 2006, the Claimant signed a waiver and agreed to a thirty-day suspension for failing to follow instructions and for excessive absenteeism. There were previous disciplinary actions that took place against the Claimant in 2003 and 2005. Given that disciplinary background, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it issued the ten-day suspension to the Claimant in this case. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: May 10, 2010



CARRIER MEMBER

DATED: May 10, 2010