NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 58
and	)
	) Award No. 37
UNION PACIFIC RAILROAD COMPANY	)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: November 15, 2004

STATEMENT OF CLAIM:

1. The dismissal of Truck Driver Johhny R. Gonzalez for his alleged conduct unbecoming an employee in connection with remarks allegedly made against his foreman and a manager was without just and sufficient cause, based on unproven charges and in violation of the Agreement (System File MW-04-63/1391703).

2. As a consequence of the violations referred to in Part (1) above, Truck Driver Johnny R. Gonzales shall now be reinstated back to work with all his seniority rights unimpaired, including all his vacation rights to be allotted back to him, for all loss of expenses that were incurred while going to and from the investigation held in Del Rio, TX. We are requesting for his personal record and all carrier records to be cleared of all charges. It is further our position that the carrier allot him back all other rights that are due to him and including all loss of compensation under the provisions of the current collective bargaining Agreement.

FINDINGS:

Public Law Board No. 6402, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On November 13, 2003, Carrier notified Claimant to appear for an investigation on November 26, 2003. The notice alleged that Claimant violated Rule 1.6 on four occasions: on October 20, 2003, at a private residence by stating that he would shoot his foreman and manager; on August 27, 2002, by stating that he would shoot his manager if he fooled with Claimant; on November 28, 2002, by stating that he would shoot a convenience store clerk; and on October 25,

2003, by telling a B&B Carpenter that his manager and foreman were going down. The hearing was held as scheduled. On December 16, 2003, Claimant was notified that he had been found guilty of the charge and dismissed from service.

Agreement Rule 21(a) provides:

> An employee who has been in the service sixty more than (60) calendar days and whose application has not been disapproved will not be dismissed or otherwise disciplined until after being accorded a fair and impartial hearing. The Carrier will make every effort to schedule and hold a formal investigation under this rule within thirty (30) calendar days from the date of occurrence to be investigated except as herein provided or from the date the Carrier has knowledge of the occurrence to be investigated.

The Organization contends that Carrier violated Rule 21(a) with respect to the incidents alleged to have occurred on August 27, 2002, and November 28, 2002. Carrier contends that its first knowledge of those incidents occurred on November 1, 2003. The Organization disputes this contention, observing that conflicts between Claimant and his supervisors were discussed at an informal conference in January 2003, and arguing that Carrier had knowledge of these incidents as a result of that conference. In light of the significant issues concerning the timeliness of the investigation with respect to the two incidents alleged to have occurred in 2002, we shall address the two incidents alleged to have occurred in October 2003 first, as both such incidents occurred less that thirty days prior to the hearing.

The notice charged Claimant as follows:

> On approximately October 25, 2003, you allegedly told B&B Carpenter M. H. Martinez that Desi, your Manager, and foreman, Hector, 'were going to go down', indicating harm.

We have scoured the record and can find no testimony based on the personal knowledge of the witness testifying that supports this charge. Similarly, we can find no document admitted into evidence, based on the personal knowledge of the person completing the document, that supports this charge. The sole evidence supporting this charge came from Truck Driver R. Cooper. Mr Cooper, however, conceded that he did not witness the alleged statement; he merely related what Mr. Martinez had reported to him. The Special Agent who investigated the Claimant testified that when he contacted Mr. Martinez, Mr. Martinez declined to answer questions or provide a statement. A finding of guilt that is based solely on third party reports, rather than reports based on the personal knowledge of the reporter, is not based on substantial evidence. Accordingly, we hold that Carrier failed to prove this charge by substantial evidence.

The notice also charged Claimant as follows:

> On approximately October 20, 2003, at a private residence, you allegedly made the statement to the effect you would shoot your Manager and Foreman.

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In contrast to the charge concerning the incident of October 25, 2003, this charge was supported by testimony based on personal knowledge. Car Foreman A. L. Talamantez testified that on October 20, 2003, he was at his mother's house when Claimant stopped by. According to Mr. Talamantez, Claimant was complaining that his foreman and manager told him that he could no longer drive the gang truck because he possessed only a Class B commercial driver's license while a Class a license was required. Mr. Talamantez related:

> He told me they were messing with my livelihood and my family, my wife has been sick, I need this job but if it does not get straightened out I will just have to put a bullet into each one of them. . . . he sounded and looked serious.

Claimant testified and denied making the threat. However, as an appellate body, we are in a comparatively poor position to resolve credibility conflicts because we do not observe the witnesses testify. Consequently, we generally defer to the credibility determinations made on the property. Deference to the determination to credit Mr. Talamantez's testimony over Claimant's is particularly appropriate in the instant case. Mr. Talamantez testified that he had known Claimant for thirty years and the record contains no evidence of any personal hostility between them. Indeed, when asked for a reason why Mr. Talamantez would fabricate such a story, Claimant was unable to offer one. Accordingly, we hold that Carrier proved the charge related to the October 20, 2003, incident by substantial evidence.

Threatening to shoot one's supervisors, or to shoot anyone for that matter, is an extremely serious offense. Certainly, Carrier need not run the risk of retaining in its employ, an individual who threatens to shoot his supervisors. That risk was particularly aggravated in the instant case because of the on-going friction between Claimant and his supervisors. We hold that, standing alone, the October 20, 2003, incident justified Claimant's dismissal. Consequently, we find it unnecessary to address the timeliness of the charges concerning the incidents alleged to have taken place on August 27, 2002, and November 28, 2002. Even if we were to find that those charges were not timely, we would still deny the claim.

AWARD

Claim denied.

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, February 13, 2005