

BEFORE PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

UNION PACIFIC RAILROAD COMPANY

Case No. 29

Statement of Claim: Claim of the System Committee of the Brotherhood that:

1. The discipline (withheld from service and subsequent Level 5 dismissal) imposed upon Mr. A. Arteaga for alleged violation of Union Pacific Rules 1.6 and 1.13 in connection with charges leveled against him under letter dated September 1, 2000 was arbitrary, capricious, on the basis of unproven charges and in violation to the Agreement.
2. As a consequence of the violation referred to in Part (1) above, Mr. A. Arteaga shall now “ . . . be reinstated to service of the Carrier on his former position with seniority and all other rights restored unimpaired, compensated for all wage and benefit loss suffered by him, and the alleged charge(s) be expunged from his personal record.”

Background:

A. Arteaga, a Welder with two years' seniority, was instructed by his foreman, M.R. Acosta, to work on a frog¹ that was outside the track on August 30, 2000. After Acosta had left the work area temporarily, Track Supervisor D. Brown approached Claimant and directed him to make a boutet weld on the inside of the track. Claimant responded that Acosta had told him to work on the frog. When Brown told Claimant that it was more important to make a boutet weld, Claimant became quarrelsome. Brown then departed, instructing Claimant to make the weld.

¹ A “frog” is a device that permits wheels on one rail to cross an intersecting rail.

Claimant then telephoned R.A. Clark, Manager of Track Maintenance, and asked whether he should follow Acosta's directive to work on the frog or Brown's directive to make the boutet weld. After Clark instructed him to make the boutet weld, Claimant proceeded to do so, completing the weld during that same day.

Later on August 30, Manager Clark held a meeting with Claimant, Brown and Acosta to remind Claimant that Brown had the authority to countermand a prior directive by Acosta. During the meeting, Claimant, whom Brown regularly had called "boy" and "kid" and had accused of being incompetent and having a poor work ethic, asked Brown why he treated him as if he were one of his children. Brown replied that, if Claimant were one of his children, he would pull off his belt and whip him. Claimant, interpreting that as a threat, asked Brown if he wanted to go outside and settle things, even though Claimant, who is of small stature, acknowledged that Brown would probably prevail. Meanwhile, Brown was laughing. When Claimant then became loud, stating that he would "kick" Brown's "ass," Clark sent him home.

In a letter dated September 1, 2000, the Carrier notified Claimant of an investigation and hearing on September 13, and withheld him from service pending the outcome of the investigation. During the hearing, the Hearing Officer stated early in the proceeding:

. . . What we hope to develop through the testimony of Mr. Smoot and Mr. Gallegos, is that attempts were made back on those dates, with verbal instruction, to hopefully get Mr. Arteaga on the right track. . . . Mr. Gallegos and Mr. Smoot have testimony, and it has to do with problems in the past with Mr. Arteaga, obviously, or they would not be here. (Tr. At 20, 23).

After the hearing, by letter dated October 10, 2000, the Carrier dismissed Claimant for failing to

comply with Track Supervisor Brown's oral instructions to make the boutet weld and for later attempting to provoke an altercation with Brown, in violation of Rules 1.6 and 1.13, effective April 2, 2000, which provide in pertinent part:

Rule 1.6 Conduct

Employees must not be:

* * * * *

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 sufficient cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be condoned.

Rule 1.13 Reporting and Complying with Instructions

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

Carrier's Position:

The Carrier asserts that Claimant was afforded all appropriate procedural safeguards and a fair hearing. In that connection, the Carrier notes that Claimant and his Representative were allowed to make a thorough presentation of his case.

Furthermore, the Carrier argues that it clearly proved, as was confirmed by Claimant's own testimony, that Claimant resisted and delayed following Track Supervisor Brown's directive to make the boutet weld. In addition, the Carrier urges that several witnesses established that Claimant engaged in quarrelsome and threatening behavior toward Brown at the meeting called by Clark to explain that he should follow Brown's directives without checking with Clark. Because of the serious nature of these offenses, the Carrier submits that its decision to terminate

Claimant's employment was not arbitrary, capricious or an abuse of its discretion and should therefore be upheld.

Organization's Position:

The Organization claims that Claimant did not receive a fair and impartial hearing, as the Hearing Officer betrayed his bias by stating early in the proceeding: "What we hope to develop through the testimony of Mr. Smoot and Mr. Gallegos, is that attempts were made back on those dates, with verbal instruction, to hopefully get Mr. Arteaga on the right track."

On the merits, the Organization first claims that the Carrier failed to prove that Claimant was insubordinate. In that connection, the Organization contends that Claimant acted reasonably by telephoning Manager of Track Operations Clark for guidance when Claimant was presented with conflicting directives from two supervisors. The Organization also emphasizes that, after obtaining swift clarification from Clark, Claimant promptly carried out Brown's directive to make the boutet weld.

In addition, the Organization argues that Brown provoked the altercation that took place later in the day by telling Claimant that, if he were one of Brown's children, he would take out his belt and whip him. The Organization also emphasizes that previously Brown had belittled Claimant by calling him "boy" and "kid" and by unfairly disparaging his competence and work ethic. Because Brown inappropriately provoked the altercation, the Organization claims that the Carrier arbitrarily and capriciously dismissed Claimant.

Findings:

The Hearing Officer was required to conduct a fair and impartial hearing. He gave the

appearance of bias in favor of the Carrier, however, by stating near the outset of the hearing:

“What we hope to develop through the testimony of Mr. Smoot and Mr. Gallegos, is that attempts were made back on those dates, with verbal instruction, to hopefully get Mr. Arteaga on the right track.” Such a statement, suggesting that he had prejudged that Claimant had been on the wrong track, tends to taint the overall proceeding with bias.

On the merits, the Carrier met its burden of proving that Claimant was insubordinate, in violation of Rule 1.13, Reporting and Complying with Instructions, by becoming quarrelsome with Supervisor Brown when given a directive, and by delaying compliance with the directive until after he telephoned Manager of Track Operations Clark to ask whether he should comply with it.

The Carrier also charged Claimant with being quarrelsome and threatening Supervisor Brown, in violation of Rule 1.6, Conduct, at a counseling meeting held by Manager Clark. A preponderance of the evidence supported the Carrier’s position, as Claimant was loud and abusive at the meeting, invited Brown outside, and threatened to kick his “ass.” The undisputed evidence also showed, however, that Brown inappropriately provoked Claimant by laughing at him and by stating that, if Claimant were his child, he would pull out his belt and whip him. The evidence also showed convincingly that Brown often had earlier called Grievant, who is short in stature, “boy” and “kid,” and had repeatedly demeaned Claimant’s competence and work ethic.

Under these circumstances, the Carrier abused its discretion by dismissing Claimant. As discussed above, the hearing was tainted by the apparent bias of the Hearing Officer. In addition, Supervisor Brown antagonized and provoked Claimant. There is no place in the workplace for belittling an employee. Likewise, there is no place for Claimant’s disrespectful

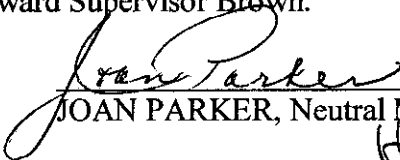
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and threatening behavior towards Supervisor Brown. In that connection, a preponderance of the evidence showed that Claimant violated Rule 1.6 by inviting Supervisor Brown outside and by threatening to kick his "ass." In addition, as discussed above, Claimant violated Rule 1.13, Reporting and Complying with Instructions, by becoming quarrelsome and by delaying compliance with Supervisor Brown's directive to make the boutet weld.

For the reasons stated above, the Carrier will be required to reinstate Claimant to his former position without back pay and with no loss of seniority. Claimant, however, will be indefinitely and permanently placed on final warning for his insubordination and use of abusive and threatening language toward Supervisor Brown. In the future, if Claimant again engages in such conduct, he will subject himself to dismissal.

Award:

The claim is granted in part. The Carrier shall reinstate Claimant without back pay, and without loss of seniority. Claimant shall be indefinitely and permanently placed on final warning for insubordination and for using abusive and threatening language toward Supervisor Brown.


JOAN PARKER, Neutral Member


CARRIER MEMBER

DATED: 4-7-04


ORGANIZATION MEMBER

DATED: 4-7-04