

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7048

AWARD NO. 35, (Case No. 35)

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member

Samantha Rogers, Carrier Member

David D. Tanner, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing March 26, 2007, when Claimant F. Todecheeny (6545289) was issued a 10-day record suspension for inappropriate conduct toward D. L. Tenoria from a report received on March 2, 2007. The Carrier alleged violation of Maintenance of Way Operating Rule 1.6, 1.7 and 1.12 and Maintenance of Way Safety Rule 1.2.9; and**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing March 4, 2007, continuing forward and/or otherwise made whole."**

FINDINGS:

Public Law Board No. 7048, 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 have participated in accordance to the Agreement that established the Board.

On March 5, 2007, Carrier notified Claimant and Mr. D. L. Tenorio to appear for a formal Investigation on March 12, 2007, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, in connection with possible violation of Rules 1.6, 1.7 and 1.12 of the Maintenance of Way Safety Rules, in effect October 30, 2005, as supplemented or amended, concerning

report received March 2, 2007, alleging your inappropriate and hostile conduct while assigned to Gang RP-17, and Mr. Tenorio's alleged possession of a weapon and threatening behavior of bodily harm towards Mr. Todecheeny."

On July 10, 2007, Claimant was notified that he had been found guilty as charged and was issued a 10-day record suspension.

The undisputed facts are that Claimant has a service date with the Carrier of October 16, 1975, and at the time of the alleged incident he was working on the Regional Gang TRPX0017 Rail Relay Gang RP17 as a section man on Position 08844. On March 2, 2007, Claimant reported to Carrier's Manpower Planner that one of his co-workers D. L. Tenorio had repeatedly been verbally abusive and threatened to physically harm him.

It is the Organization's position that the Claimant has 32 years of service with a good work record. It argued that the record substantiates that the Claimant the older and weaker of the two involved employees was verbally harassed and physically threatened by the younger, stronger employee Tenorio. It contended that the Claimant made a good faith report that he was subjected to working in a hostile work environment and for having followed procedures for bringing this to the Carrier's attention he was instead rewarded with discipline. It further argued the Claimant was not granted five days as required by Rule 40C of the Agreement to obtain witnesses and prepare for his defense. It concluded by requesting that the discipline be rescinded and the Claim be sustained as presented.

It is the position of the Carrier that the record proves that Claimant was afforded his contractual rights and was not denied a fair and impartial Hearing. It points out that when the Organization advised the Hearing Officer that the Claimant had not been afforded five days for preparation prior to the Investigation the Hearing Officer asked the Claimant and the Organization if they wanted a postponement and both chose to proceed with the Hearing. It further argued that no evidence was presented which verifies that Claimant was subjected to harassment, therefore, the letter he submitted to the Carrier regarding Tenorio's alleged behavior was inappropriate towards Tenorio. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the Investigation was held in compliance with the applicable provisions of Rule 13(a) the Discipline Rule and Appendix No. 11 and the Claimant was not denied his "due process" Agreement rights account of the alleged violation of Rule 40C.

The Carrier has an obligation to do everything in its power to prevent violence in the workplace and insure that its employees are not subjected to a hostile work environment. To help avoid such conditions from arising it has encouraged its employees to report inappropriate acts.

While employees are encouraged to report improper behavior they are equally expected to not make frivolous or inaccurate charges. The instant case comes down to the fact that the Claimant accused in writing and testified that his co-worker Tenorio had verbally abused and threatened him on several occasions whereas Tenorio testified he had not. Both employees acknowledged that members of the rail gang often joked around which included an element of horseplay. Claimant testified that his co-worker had threatened to cut him with his knife and had pulled on his seat belt while he was driving. On page 11 of the Transcript, Assistant Roadmaster, G. Marcellus when asked what he knew about the incident testified as follows:

"We did find, we did find that there was some parties in the van that had witnessed Mr. Tenorio pulling on Mr. Todecheeny's seat belt while he was driving. In fact individuals say that this has been, this had been going on for a couple of weeks." (Underlining Board's emphasis)

On page 12 Marcellus was questioned about the knife and he responded as follows:

"A We heard that the knife was pulled.

Q And who told you this?

A Mr. B. J. Tom. We also heard that Mr. Tenorio did have a knife at certain times...."

On page 51 of the Transcript B. J. Tom testified that he saw Tenorio drop a small pocket knife, but he never saw him pull it on anyone. Further review of the Transcript substantiates that on page 56 - 57 W. Smith, Machine Operator testified as follows:

"Q Do you ride in the same van that Mr. Tenorio and Mr. Todecheeny do?

A Yeah, yeah, We joke a lot and stuff like any other gang, and when Dale was choking I thought they were joking, but apparently not so it came to this point.

Q Have you ever seen Mr. Tenorio pull on Mr. Todecheeny's seatbelt while he was driving?

A That's what I mean, I thought they were joking....

Q So you did see Mr. Tenorio pull Mr. Todecheeny's seatbelt?

A Yeah.

On page 62 of the Transcript Tenorio was questioned by the Hearing Officer whether he carried a knife at work and he confirmed that he did.

On page 105 Tenorio was asked the following question and testified as follows:

"Q Did you mean, I know Mr. Todecheeny took it in a threatening manner, but did you actually to threaten him or his life or place him in any danger?"


A No, sir, I thought we were just joking around." *(Underlining Board's emphasis)*

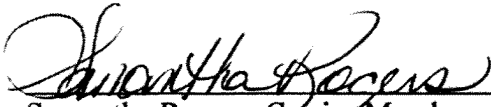
In the aforementioned testimony Tenorio did not deny the fact that his behavior could be construed to have been threatening. The record further verifies that Tenorio carried a knife while on Carrier property without its permission and/or authorization, however, there were no witnesses that confirmed whether he threatened Claimant with it. The evidence also confirms that when the Claimant was driving a company van Tenorio pulled and/or jerked on his seat belt on several occasions which had a choking motion. That action in of itself was potentially dangerous to not only the Claimant, but everyone else that was in the van. It is not clear whether Tenorio intentionally meant to threaten the Claimant, but it is very clear that his behavior characterized as "joking around" was inappropriate and gave the Claimant reasonable grounds for concern and belief that it was threatening behavior. Therefore, the report filed by the Claimant was not a violation of Carrier Rules and the Carrier did not prove that the Claimant purposely filed an improper report with intent to besmirch Tenorio's character or do him harm.

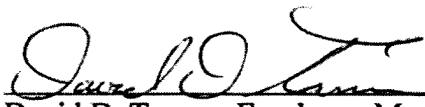
The Board finds and holds that the discipline is rescinded and removed from the Claimant's disciplinary record and the Claim is sustained as presented. Claimant is returned to his prior disciplinary status in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA).

AWARD

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.


William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member


David D. Tanner, Employee Member

Award Date: 12/6/10