

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 54, (Case No. 54)**

**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 September 30, 2009, when Claimant Efren G. Orozco (6425888), was issued a Level S 30-day Record Suspension with 3 years probation concerning his involvement in a Work Place Violence Incident/Conduct on August 9, 2009. The Carrier alleged violation of MOWOR 1.6 Conduct.

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 September 30, 2009, continuing forward and/or otherwise made whole."

(Carrier File No. 14-09-0184) (Organization File No. 10-13A2-093.CLM)

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.

The facts indicate that on August 9, 2009, the Claimant was involved in a confrontation with fellow employee R. Cuellar over the use of a Carrier Gang Truck which escalated beyond a debate. Carrier Officers investigated the incident and subsequently determined that the Claimant might have some culpability.

On August 18, 2009, Claimant was directed to attend a formal Investigation on August 23, 2009, which was mutually postponed until September 3, 2009, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged involvement in a Work Place Violence Incident/Conduct at approximately 1530 hours on August 9, 2009 at MP 7.5, while assigned as Foreman, Corwith Yard."

On September 30, 2009, Claimant was notified that he had been found guilty as charged and was issued a Level S 30 Day Record Suspension with a three year probation period.

It is the Organization's position that the Carrier erred in its discipline as it did not meet its burden of proof. It argued that the record indicates that on the date in question Claimant had been asked by Roadmaster Taylor to operate a Production Tamper for the day which began at 4:00 a.m. After working all day the Roadmaster moved the employees vehicle to a location they were in the process of moving to. When the Gang arrived at approximately 3:00 p.m., the vehicle was not at the site. The men on the gang split up and walked each direction down the tracks in an attempt to find the vehicle. Claimant then called the Roadmaster and reported the vehicle as missing or possibly stolen. Subsequently, the Roadmaster located the vehicle and discovered that employee R. Cuellar was using it and directed him to return it to the Claimant so that he and his crew could travel home.

According to the Organization when Cuellar returned the vehicle, that he was not suppose to be using, the Claimant asked him to get out and stated he would drive and drop him off at his vehicle. It suggested that Cuellar refused and continued to sit in the vehicle with the van running and the air conditioner running full blast while the Claimant and his crew stood outside in the blazing sun. Claimant then opened the driver's side door, reached inside, turned the vehicle off and removed the keys. Then he attempted to reach inside the vehicle and unbuckle the seat belt and told the Cuellar to get out and get in the back. When Cuellar refused to cooperate Claimant called the Roadmaster who instructed him to get out of the vehicle and told him he would send someone else to pick him up. The Organization acknowledged there was some argument between the parties with Cuellar cussing at the Claimant, but there was no intent on the Claimant's part to harm employee Cuellar. It further argued that even if the Carrier could have produced evidence to support it charges (which it did not) the discipline issued is excessive in proportion to the actual event that transpired. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that substantial evidence was produced that Claimant was guilty as charged. It argued that Claimant violated Rule 1.6 Conduct. It argued that there is direct testimony from a witness at the incident that the Claimant tried to unbuckle the seatbelt of another employee and pull him from the van and there was improper language used by both employees in Spanish and English. It argued that the discipline in this incident was lenient and it closed by asking that the discipline not be disturbed.

The Board has thoroughly reviewed the transcript and record of evidence and determined that the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11, therefore, the claim will be resolved on its merits.

The Carrier has an obligation to do everything in its power to discourage and prevent violence in the workplace and ensure that its employees are not subjected to a hostile work environment. The Carrier has alleged that the Claimant violated Rule 1.6 Conduct which states the following:

"Employees must not be:

- 1. Careless of the safety of themselves or others**
- 2. Negligent**
- 3. Insubordinate**
- 4. Dishonest**
- 5. Immoral**
- 6. Quarrelsome**
or
- 7. Discourteous**

Any act of hostility, misconduct, or willful disregard or negligence affecting 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."

Despite the Organization's forceful arguments and colorization of the event of August 9, 2009, it was not able to overcome the testimony of Machine Operator Claude Alexander (a disinterested third party) who was questioned on page 81 of the Transcript and testified there was a verbal argument between Cuellar and the Claimant which escalated. He testified as follows:

"Claude Alexander: But it was not just a verbal argument.

Gary Marquart: Okay, so you're, you're stating that Mr. Orozco act-actually assaulted Mr. Cuellar?

Claude Alexander: If you call trying to drag him out of the truck and assault then that's that's it.

Gary Marquart: Did he pull on him for a long time or did he, is it just a?

Claude Alexander: Just, it was a quick hit and jerk."


The testimony of Mr. Alexander is consistent with that of Cuellar who testified on pages 56 - 58 that the Claimant grabbed his shirt and arm and tried to pull him from the van. The Board understands that the Claimant may have been frustrated by the fact that Cuellar was not assigned the vehicle in dispute and may not have been cooperative in its return, however, that was no excuse for him to put his hands on Cuellar and try to extract him from the van. The record is clear that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately 32 years of service with a service record that included a formal reprimand, suspension account of being quarrelsome with a foreman and dismissal subsequently reduced to a suspension. As previously stated the Carrier has an obligation to do everything in its power to create a safe work environment and in this instance it is clear that it took into consideration that the Claimant is a long time employee who over reacted, but still committed a serious breach of Carrier Rules. The discipline assessed did not result in any actual time off and it was lenient and corrective in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The Board finds and holds it will not be rescinded because it was not arbitrary, excessive or capricious.

AWARD

Claim denied.


William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member


David D. Tanner, Employee Member

Award Date: 6/13/11