

PUBLIC LAW BOARD NO. 5696

AWARD NO. 28

CASE NO. 28

BURLINGTON NORTHERN RAILROAD

PARTIES

TO DISPUTE:

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The Carrier unjustly dismissed Mr. M. J. Cole from service for allegedly being argumentative in violation of Carrier Rules 1.6, 1.6.1, and 1.7 on the morning of October 10, 1995.

(2) As a consequence of the Carrier's violation referred to above, Claimant's seniority shall be restored, he shall be paid for all wages lost and discipline shall be removed from his record.

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant, a 3 year service employee, was working as a trackman on Gang 320 under the direct supervision of Foreman Wendell Boler at the

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time of the October 10, 1995 incident leading to his dismissal for insubordination.

The October 24, 1995 investigation reveals that the gang was working on President's Island on October 10, 1995 and began its safety briefings at around 7:30 a.m. Boler left the area while the gang was stretching to show some drivers where to dump their loads of rock for the gang to work on that day. He returned to the tool house area around 8:45 a.m. and the gang had not left to begin work yet, apparently waiting for him outside by their trucks. Boler prodded the truck driver along, indicating it was time to go to work, and went inside the office to retrieve some paperwork he had to send to the Roadmaster that morning.

Claimant was speaking on the telephone in the office at the time Boler entered and, according to Boler, he said to Claimant "Are you going to work with us today? It's time to go to work." Boler testified that he has said something similar to all gang members at different times to get them going. Boler then left the office and went outside toward his truck. Boler stated that a minute later Claimant came up to his face by the door to his pickup truck and curse him repeatedly, calling him a "motherfucker" and indicating that he was not treating him like a man and was holding him back. Boler testified that Claimant was very angry and was on the verge of violence, stating that he was going to straighten him out in his own way. Boler testified that Claimant walked a few steps away from him and then returned, slapping his hand off of the handle to his truck and threatening him again, saying that he did not know who he was dealing with. Boler asked if Claimant was issuing a threat, and Claimant replied that it was a promise. Boler asked if he wanted to accompany him to see Williams, and Claimant said that he would go in his own vehicle.

Boler testified that while Claimant was repeatedly cursing him, he did not respond in kind. Boler stated that all he said was that they needed to go back to work, but Claimant continued cursing him, stating that his treatment was race-related. At one point Boler indicated to Claimant that perhaps his treatment of him was related to the fact that he produced less than others, his work was unsatisfactory and he needed a little more prodding to be a team member. Claimant apparently took offense to this and testified that he worked very hard and resented this comment. The record contains documentation from Boler concerning prior problems he had with Claimant's attitude, lack of participation or pulling his load and following orders.

According to Claimant, Boler cursed him and called him a "motherfucker" when he came into the office and told Claimant to get off the phone. Claimant testified that no man should have to take such cursing, so he followed Boler outside and an argument ensued. Claimant stated that both he and Boler were cursing each other, but that it was Boler's comment that ignited the situation. Claimant denied touching Boler or threatening him, indicating that if he wanted to do something to him he would just do it, not threaten to do so. Claimant testified that he and Boler have had words before and he felt Boler had a personal vendetta against him since he arrived on the gang. Boler is the only foreman Claimant has worked under since arriving in Memphis.

Relief Yardmaster James Huey testified that he came upon the confrontation between Claimant and Boler when it was in progress, and witnessed Claimant continually cursing Boler. He stated that Boler did not curse during the ten minutes he was there and only once told Claimant that they needed to get back to work. Huey recalled some discussion about

being on the phone and getting back to work, but did not get the entire drift of the discussion. Huey did not see Claimant make any physical contact with Boler.

The record makes clear that Claimant went to work after this confrontation and Boler reported the situation to Dunaway who instructed him to take Claimant out of service. At Boler's request, he was accompanied by special agents when he went to the job site to remove Claimant. Claimant testified that it was unfair that he was removed while Boler was still working because they were both participants in the incident and both did not comply with the rules, indicating that management did not listen to his side of the story.

Carrier argues that the investigation supports its conclusion that the Claimant was insubordinate on October 10, 1995, violated the cited rules, and that dismissal was warranted. The Organization argues that Claimant was not solely responsible for the incident in question and protests his dismissal.

A review of the entire record convinces us that Carrier has sustained its burden of proving by substantial evidence that Claimant was insubordinate on October 10, 1995 during his confrontation with Boler. While Claimant contends that Boler was also cursing at him and started the incident by doing so, the only witness to part of the discussion corroborates Boler's claim that Claimant did all the cursing and that Boler merely attempted to get Claimant back to work. In the absence of any mitigating factors or evidence that Carrier's treatment of Claimant was different from others who engaged in similar conduct, the Board is unable to conclude that the discipline imposed was arbitrary or unreasonable.

AWARD:

The claim is denied.

Margo R. Newman

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Neutral Chairperson

Thomas M. Rohling

Thomas M. Rohling
Carrier Member

E. R. Spears

E. R. Spears
Employee Member

Fort Worth, Texas
October 30, 1997