

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 462 – Award No. 462 – Garcia
Carrier File No. 14-13-0327
Organization File No. 160-SF13A2-132

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing March 25, 2013, when Claimant, Guillermo J. Garcia (1698620), was disciplined with a Level S 30-day Record Suspension with a 1-year review period for his alleged misconduct and discourteous behavior when he harassed and entered into an altercation with fellow employee on March 6, March 14, and March 25, 2013, while working in Abo Canyon, while working as a B&B Mechanic. The date BNSF received first knowledge of this violation was April 3, 2013. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.6 Conduct, MOWOR 1.7 Altercations and 90.2 Workplace Harassment Policy.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated, if applicable, with seniority, vacation, all rights unimpaired and pay for all wage loss including overtime commencing March 25, 2013, continuing forward and/ or otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Guillermo J. Garcia, has been employed by the Carrier since 2006. On April 24, 2013, the Carrier notified Claimant to attend an investigation to ascertain the facts and determining his responsibility, if any, in connection with his alleged misconduct and discourteous behavior when he allegedly harassed and entered into altercations with fellow employees on March 6, March 14, and March 25, 2013, while working in Abo Canyon, as a B&B Mechanic on BBCX0271. The Notice stated that the Carrier's first knowledge of this alleged violation was April 03, 2013. Following the investigation, the Carrier found Claimant guilty of the misconduct alleged, in violation in violation of Carrier Maintenance of Way Operating Rules (MOWOR) 1.6 Conduct and 1.7 Altercations, and its Workplace Harassment Policy, and assessed him a Level S 30-day record suspension with a one-year review period.

MOWOR provide, in relevant part:

1.6 Conduct, Employees must not be:

5. Immoral

7. Discourteous

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

1.7 Altercations

Employees must not enter into altercations with each other, play practical jokes, or wrestle while on duty or on railroad property.

Carrier Corporate Policy, Workplace Harassment Policy provides, in relevant part:

II. Purpose

The purpose of this Policy is to provide a work environment that fosters mutual respect and working relationships free of harassment. BNSF does not tolerate verbal or physical conduct by an employee which harasses, disrupts, or interferes with another's work performance or which creates an intimidating, offensive or hostile environment.

III. Policy Requirements

1. All BNSF employees will treat others with dignity and respect. BNSF will take the necessary actions to prevent workplace harassment and will take prompt remedial action should any violation of this Policy occur.

4. Creating a hostile work environment is prohibited. Any harassing or offensive conduct in the work place whether committed by supervisors, non-supervisory employees, or non-employees is prohibited. . . .This includes . . .but is not limited to:

- (a) sexual flirtations, touching, advances or propositions
- (b) verbal abuse of a sexual, racial, ethnic or religious nature
- (h) ethnic or racial slurs
- (i) jokes or other derogatory remarks;
- (j) verbal, non-verbal; or
- (k) physical conduct

5. Employees are required to report harassment immediately...

6. Human Resources is responsible for investigating complaints of harassment under BNSF's internal complaint procedures. Such complaints are to be investigated promptly, impartially and confidentially. Employees are required to cooperate in any investigation. An employee who willfully obstructs an investigation may be terminated. A timely resolution of each complaint is to be reached and communicated to the parties involved (*emphasis added*).

V. Enforcement

Harassment and retaliation are considered to be misconduct. Any supervisor or manager who has knowledge of such behavior, yet takes no action to end it, is also subject to disciplinary action...

At the time at issue, Claimant was working as a B & B Mechanic/Carpenter. Structures Supervisor, Southwest Division. Dante Zuniga was the supervisor of both Claimant and Laborer and Welder Joe Lucero, Jr. Mr. Zuniga explained that on or about April 3, 2013, he conducted Mr. Lucero's annual review. Mr. Lucero told him about some incidents involving Claimant, and Mr. Zuniga asked him to follow up with a statement in an e-mail, which he did. The statement, dated April 16, 2013, recited:

Mr. Zuniga I'm going to go over what conversation we had at my yearly review. What I had told you the events that I had with Will Garcia. On one even (*sic*) was on March 6th approx. 4:00 p.m. I had called him on the radio and he addressed me yes little boy which I felt that was unprofessional and when we met up he grabbed my head and pulled it towards his crouch (*sic*). On another even was On March 14th he texted me while I was attending the welding class in Kansas, it said "that one of the new guys that got hired on our gang was going to be promoted to structures mechanic and that Jesus got it approved thru Donte." I knew that was a just him messing with me but when it comes to my work I really don't like to play like that. On March 25th while we were on a train derailment in Ft. Sumner NM, our new guy Tommy Torrez came up to me and said that Will told him that he was going to take my spot on our gang and that I was going to the El Paso gang Which I really don't care where I'm working at. It's a blessing to be working with the BNSF Structures dept. which I plan on being here till I retire so I really don't want to keep getting harassed, and being put down in front of my other co-workers or sub-contractors. As of March 25 Will has been acting very professional which has been a good working environment. This is the end of my statement. Richard Montoya knows about these actuations (*sic*).

Mr. Zuniga testified that after he received the statement he notified the Carrier's Human Resources Department, in accordance with Carrier policy, and Human Resources Director Hermalinda Guardiola handled it from there. He added that he did speak with Mr. Montoya, the employee identified in Mr. Lucero's statement, who said he had no personal knowledge of the events. He did not speak to Tommy Torres, the other individual named in Mr. Lucero's statement.

Mr. Zuniga conducted Claimant's annual review on April 18, 2013. He explained that its purpose was to discuss Claimant's performance in several areas, and to provide a forum for general discussion or questions. He did not discuss Mr. Lucero's allegations at that time, maintaining that the process was primarily a safety review, nor did he do so at thereafter. He did, however, pay closer attention to Claimant's behavior within his work group, and took no exception to his conduct. He testified that he saw no reason to pursue the matter with the two employees as they had apparently worked it out for themselves.

Eventually, Ms. Guardiola directed Mr. Zuniga to issue the Investigation Notice. At that point, Claimant called him and apologized for the general situation. Mr. Zuniga conceded that Claimant did not admit any of the specific allegations listed in the Investigation Notice.

Ms. Guardiola, Carrier Human Resources Director for the Southwest Division, testified at the hearing that she discussed the matter at issue with Mr. Lucero after Mr. Zuniga forwarded his e-mail statement to her. She explained that Mr. Lucero told her there had been a series of events between himself and Claimant, but that, in particular,

Mr. Lucero was offended that Claimant had referred to him as "little boy." She added that he told her he had not wanted to report Claimant but the comments had continued and he just wanted to be left alone to do his job.

Ms. Guardiola acknowledged at the hearing that she had never discussed the allegations with Claimant. She did speak to Mr. Montoya, who said his knowledge was limited to what Mr. Lucero had told him about Claimant's alleged conduct. She said she did not speak with Mr. Torres, because Mr. Lucero had not alleged that he said anything inappropriate or had witnessed any inappropriate conduct by Claimant.

Ms. Guardiola testified that her role under the Carrier's Workplace Harassment Policy is to speak with the individuals necessary to determine whether to proceed to formal investigation. In this case, she stated, those individuals were Mr. Zuniga, Mr. Lucero and Mr. Montoya. She explained that she had not spoken to Claimant because he would give his account at the formal investigation. The Union representative questioned her several times about the Human Resources investigation outlined in the Workplace Harassment Policy, and Ms. Guardiola repeated that the formal hearing was the forum for a complete investigation which would allow Claimant to present his version of events.

Mr. Lucero testified at the investigation that on March 6, 2013, one of the dates noted in his statement, he and Claimant were headed to the Abo Bridge to exchange vehicles. During their radio conversation, he stated, Claimant responded, "[Y]es, little boy," to something he said. He found the remark offensive. He stated that his foreman, apparently Jesus Ramirez, was in the vehicle and overheard the conversation but did not say anything about it.

Mr. Lucero maintained at the investigation that when they pulled over that day to exchange vehicles, Claimant grabbed him. He did not provide any details.

As for the March 14, 2013 alleged incident, Mr. Lucero recounted that he was in welding class and got a text from Claimant that someone had been approved to take his mechanic position. He stated that he knew it was not true and "it was just messing around . . ." He stated that he told Claimant he did not appreciate such comments.

Mr. Lucero testified that on or about March 25, 2013, he was waiting at the yard and met a new hire, and someone "messed with him" by telling him he would be moving to another gang. He discussed the incidents with his co-worker Richard Montoya, who told him he could call Human Resources or discuss the matter with Claimant directly. He chose the latter option and told Claimant to stop. There had been no further incidents since.

Mr. Lucero stated that he did not discuss these matters with Claimant again after his review with Mr. Zuniga. He testified that Ms. Guardiola called him after he wrote the e-mail statement and submitted it to Mr. Zuniga. He stated that she told him that the Carrier had policies in place and wanted him to be in a safe working environment.

Claimant testified at the investigation that he did not recall any specific conversations with Mr. Lucero over the radio on March 6, 2013. He specifically denied having grabbed Mr. Lucero by the head. He did not recall any specific text communication with Mr. Lucero. He denied having told employee Tommy Torres, on or about March 25, 2013, that Mr. Torres would take Mr. Lucero's spot and Mr. Lucero would go to El Paso. He stated that he and Mr. Lucero had exchanged only non-work-related texts and photographs, and Mr. Lucero took exception to some of his comments regarding photographs he had sent.

Claimant acknowledged that he called Mr. Zuniga after he received the Investigation Notice and they discussed the fact that Mr. Lucero had been offended and he apologized for putting them in the general situation. He specifically denied having apologized for committing any of the specific acts alleged.

The Organization entered into evidence two sworn affidavits obtained from other employees. One, from employee Richard Nance, recited that he was present in Abo Canyon, working with Claimant, on March 6, 14 and 25, 2013, and witnessed no discourteous or harassing behavior. The other is from B & B Foreman Jesus Ramirez, who stated that he never observed Claimant and Mr. Lucero alone together on any of the dates at issue, and never saw any misconduct, altercation or harassment.

The Carrier asserts that this case is not complicated. As Mr. Zuniga, Claimant's supervisor, testified, he conducted a review with Claimant's co-worker Joe Lucero, during which Mr. Lucero told him that Claimant's harassment was affecting his safe work performance. Mr. Zuniga asked Mr. Lucero to write a statement, in which he described three instances of harassment by Claimant.

The Carrier notes Mr. Zuniga's testimony that he then contacted Human Resources Director Hermelinda Guardiola and provided her Mr. Lucero's statement. The Carrier maintains that Ms. Guardiola investigated the matter by interviewing Mr. Lucero, and she then determined that Claimant's conduct could affect Mr. Lucero's safety.

The Carrier also asserts that although Claimant denied the three incidents occurred, he did admit that he and Mr. Lucero had discussed that Mr. Lucero wanted to "draw a line" between himself and Claimant because Mr. Lucero had been offended in certain ways. The Carrier maintains that Claimant's admission of this conversation, along with the fact Mr. Lucero felt compelled to report the matter to management, demonstrates that the alleged incidents in fact occurred. The Carrier contends that there was an admission of guilt sufficient to satisfy its burden of proving that Claimant committed the asserted misconduct. The Carrier states that the Organization's reasons that Claimant should not be held accountable are not persuasive. Claimant, the Carrier argues, did violate several Carrier Rules.

As for the penalty, the Carrier asserts that it was appropriate given the seriousness of the violation, Claimant's personal record, and the Carrier's Policy for Employee Performance Accountability (PEPA). The Carrier urges that the claim be denied.

The Organization raises strong objections to the discipline assessed against Claimant. The Organization states that Claimant has been charged and found guilty of conduct for which there is no supporting evidence. The Organization notes that the offended employee waited a month before reporting any of the supposed behavior, and might not have reported it at all but for the fact that it came up in his employee review. Further, the Organization stresses, Mr. Lucero stated that the behavior had been corrected, there had been no further incidents, and Claimant was conducting himself professionally.

The Organization also stresses that no Carrier Officer ever interviewed Claimant about the supposed incidents. Human Resources conducted no investigation. His supervisor, Mr. Zuniga, observed Claimant for three weeks and noticed no improper behavior at all, but nevertheless sent out the Investigation Notice. The Carrier has completely failed to meet its burden of proof, and the claim must be sustained.

We have carefully reviewed the record in its entirety. Claimant has been found guilty of three acts of serious misconduct. We agree with the Organization that the Carrier made this determination by conducting literally no investigation, and amassing virtually no evidence, against Claimant. This matter was flawed from start to finish, and there is no way the Carrier can be said to have met its responsibilities under its own Workplace Harassment Policy, or to have provided Claimant a fair and impartial investigation. The claim must be sustained.

We note that when Mr. Zuniga first heard of Mr. Lucero's complaint, he followed Ms. Guardiola's advice and obtained a written statement. He spoke to the one individual Mr. Lucero had supposedly confided in, but not to Claimant, the other employee who supposedly relayed one of the offensive messages, the foreman who supposedly witnessed two of the incidents, or to any other potential witnesses.

As for Ms. Guardiola, we must disagree with her position that the Carrier's Workplace Harassment Policy obligates her to do nothing but accept a complainant's information and proceed to formal investigation. The policy clearly envisions a prompt, full-blown investigation involving all those with relevant evidence, with a prompt conclusion communicated to all involved: "...complaints are to be investigated promptly, impartially and confidentially. Employees are required to cooperate in any investigation. An employee who willfully obstructs an investigation may be terminated. A timely resolution of each complaint is to be reached and communicated to the parties involved." Ms. Guardiola did nothing more than interview Mr. Lucero and his one witness. In her recitation of her conversation with him, she reported nothing more than what was contained in his short written statement. She apparently obtained no detail and no context, and did not even contact Mr. Lucero's foreman, who he described as present

during the most serious event. She gave Claimant no opportunity to explain or to provide witnesses. Under Ms. Guardiola's interpretation of her responsibility, the investigations portion of the Workplace Harassment Policy means nothing, because there would be a formal investigation every time an employee makes an allegation.

As for the formal investigation itself, Mr. Lucero described three incidents. He was offended primarily that Claimant called him "little boy," hardly a major incident and one which apparently did not register with his foreman who overheard the conversation. He then stated that later, when he and Claimant exchanged vehicles, Claimant "grabbed" him. He provided no detail or context for how or why such an incident supposedly came about. Again it appears that the foreman was probably present at the time, yet he submitted an affidavit that he had observed nothing untoward. As for the remaining incidents, it is difficult to discern how they amounted to anything more than mild workplace joking. One of the statements, according to Mr. Lucero, was not made to him by Claimant, but was described by another employee, Tommy Torres. The Carrier found Claimant guilty of misconduct for making that statement, without anyone even interviewing Mr. Torres.

This was a conflict between two employees, one of whom felt offended by the other. By his own account, Mr. Lucero consciously chose not to involve Human Resources. Instead, he told Claimant to stop it, and Claimant stopped it. This was a problem that was solved before it was ever mentioned to any member of management. It became an occasion for discipline only through an unusual reading of the harassment policy and an unfair and inadequate investigatory process. We order the discipline issued against Claimant rescinded and his personal record corrected accordingly.

AWARD

Claim sustained. The Carrier is ordered to comply with this Award within 45 days.


DAN NIELSEN
Neutral Member


JOY MENDEZ
Carrier Member


DAVID SCOVILLE
Organization Member

Dated this 9th day of June, 2016.