

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 472 – Award No. 472 – Romero
Carrier File No. 14-14-0113
Organization File No. 160-SF13A2-135

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing December 18, 2013, when Claimant, Chris N. Romero (1709732), was dismissed for quarrelsome, discourteous and hostile behavior toward his co-worker and supervisor while working as a foreman at approximately 9:00 am on December 18, 2013, on the Hereford Subdivision near West, Texas (sic). The Carrier alleged violation of the BNSF Railway Maintenance of Way Operating Rules (MOWOR) 1.6 Conduct, MOWOR 1.3.3 Circulars, Instructions, and Notices, Human Resources 90.2 Workplace Harassment Policy and General Notice (GN) 12 BNSF Policy Information.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this dismissal and he be reinstated, with seniority, vacation, all rights unimpaired and pay for all wage loss including overtime commencing December 18, 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, Chris N. Romero III, had been employed by the Carrier since 2006. On December 20, 2013, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged quarrelsome, discourteous, and hostile behavior toward his co-workers and supervisors while working as a Foreman on TSE0976 on the Hereford Subdivision near West Texico on December 18, 2013. The notice stated that the Carrier's first knowledge was December 19, 2013. The notice stated that the investigation would determine possible violation of Maintenance of Way Operating Rules (MOWOR) 1.6 Conduct, MOWOR 1.3 Circulars, Instructions and Notices, HR 90.2 Workplace Harassment Policy and GN 12 BNSF Policy Information. Following the investigation, the Carrier found that Claimant had committed the misconduct alleged and dismissed him from employment.

MOWOR 1.6 **Conduct** provides, in relevant part:

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 cause for dismissal and must be reported . . .

Carrier **Human Resources Policy 90.2** provides, in relevant part:

II. Purpose

This policy helps ensure that BNSF Railway provides equal opportunity employment to all employees and applicants for employment and a work environment that fosters mutual respect and working relationships free of harassment, discrimination, violence or threats of violence.

At the time at issue, Claimant was the Foreman on Section TSE0976 in Clovis, New Mexico. Carrier Supervisor Rail Trains Eric Hurt testified at the investigation that during their morning briefing he heard Claimant, on the radio, calling his co-worker, Foreman Joshua Teets, about a truck Mr. Teets was using. He heard Claimant state that he would meet Mr. Teets at his work location and talk to him. Mr. Hurt stated that he was at the back of the train when Claimant arrived and walked up to him, upset about the use of the truck.

Joshua Teets, a Foreman in Clovis, New Mexico, testified that on the day of the incident both he and Claimant wished to use a particular vehicle to run their Forms Bs.

He had the truck, and Claimant wanted it. He explained that Claimant showed up at his work location and told him he needed the truck, but Track Supervisor Philip Arlington, who was in charge that day, had already told Mr. Teets that he, rather than Claimant, could use the truck. Mr. Teets was up on his truck, and Claimant was on the ground, and the two had a discussion about the truck. No one else heard their conversation.

The next day, December 19, 2013, Mr. Teets provided a written statement as to what had transpired:

Incident with Chris Romero just east of West Texico crossover at rail pick up train. The incident started over the use of a company vehicle. I needed it to run a Form B, and Chris wanted to use it also, but had a section truck he could use, so Phillip Arlington told me I could use the pickup.

Then Chris showed up at my work location when he was supposed to b(sic) running his own Form B 30 miles away. He started yelling at me that I'd better not fuck with him and there is a reason no one here messes with him. I believe he was threatening me the way he said it. told (sic) me that when he tells me to do something that I had better do what he says. He continued to yell a bunch of stuff at me, like he was going to bump me all over this railroad. That he is my boss. I just told him that he needed to leave and go to work and that trains were trying to call him. I stayed on the train up and away from him so there would b(sic) no physical altercation. he (sic) came all the way to Texico for one reason only, and that was to yell and cause problems. He finally walked away and then started in on Eric Hurt. I could not hear what was said since i(sic) started to do the work i(sic) needed to do.

Roadmaster Philip Hunt testified that he was Claimant's direct supervisor on the day at issue, but he was not present during the alleged incident. On December 20, 2013, he participated in a telephone interview with Claimant and Human Resources representative Guardiola Hermalinda. He jotted down some notes. Ms. Hermalinda asked most of the questions, and Claimant stated that he had had an altercation with his wife coming to work and might have brought the situation to the job, which he should not have done.

Mr. Hunt added that Claimant seemed truly sorry and remorseful about what had happened. Mr. Hunt stated that Claimant told him it was the first time in 20 years he would not be spending Christmas with his family and it was on his mind, and he attributed the incident to that mental state. He stated that Claimant told him he should just have taken some time off. Claimant also requested anger management counseling. Mr. Hunt stated that Claimant had never been rude or quarrelsome to him.

The record also includes an e-mail from Carrier Officer Rick Smith, who participated in the incident's investigation, to Mr. Hunt, dated December 18, 2013. It stated:

Myself and Larry Perez met Mr. Romero at his work site. When we approached he greeted us and then gave a Safety Briefing about his protection and what the work group was doing. Mr. Romero was very professional to Larry and myself. I asked Mr. Romero to give me some detail with his conversation earlier in the day. Mr. Romero stated he had been trying to get hold of someone to see about using a different truck to set up and run his Form B out of. He did not want to use the section truck. He stated his day did not start off very good at home before he came to work and that he might have showed some of his frustration at work. During the conversation with Mr. Hurt, there was something said about he (Mr. Hurt) did not care about how the division handled things. This bothered Mr. Romero because he stated that he does care about the division. Mr. Romero is now meeting with the collector (sic).

I talked to Mr. Romero and he broke down a little in my office that his personal life at home was not going very good. I offered the number for the EAP and asked that he make the call to get someone to talk to. I will need to talk to Mr. Hurt and see what he has to add.

At the investigation, Mr. Teets explained that Claimant showed up at his work location; he characterized his comments as discourteous, as Claimant raised his voice and was yelling. He acknowledged that Claimant would have had to yell in any event to be heard given the distance between them. He explained that when he saw Claimant approach, he was about three cars from the engine, and climbed up because he knew Claimant was aware he could not just jump on his train.

Mr. Teets stated that he wanted to keep his distance so there would not be any problems and neither he nor Claimant would get in trouble. He maintained that he did not feel threatened, just did not want to take any chances that such behavior could occur. Mr. Teets acknowledged that he knew Claimant was upset, so he removed himself from the situation to diffuse it.

Mr. Teets acknowledged that the remarks recited in the first paragraph of his statement were, as far as he could remember, made by Claimant during the incident. He added that he created distance because he did not know what Claimant was planning, and had no idea as to his intentions. Therefore, he acted to protect both of them. He maintained that he never felt threatened because Claimant never moved toward him. He did not believe that an act of violence was about to occur. Mr. Teets stated that Claimant called and texted him several times to apologize.

Claimant testified at the investigation that both he and Mr. Teets had Form Bs on the day at issue, and he had tried to reach Mr. Teets but could not reach him, so he traveled to his work location to talk about the pickup. Claimant acknowledged that there was a section truck available.

Claimant acknowledged that his conversation with Mr. Teets was a little loud with the engine and machines running. He maintained that he did not argue with Mr. Teets at all. Claimant denied having made any of the threatening remarks attributed to him in Mr. Teets' e-mail statement. He denied having yelled at Mr. Teets. He denied that Mr. Teets ever told him he had felt threatened. He stated that he was only 12 miles away from his work location, not 30. He stated that he and Mr. Teets had some radio communication that day, but only concerning operational matters.

Claimant's personal record shows a formal reprimand issued on November 6, 2012 for failure to comply with instructions, and a Level S 30-day record suspension, with a 36-month review period, issued on June 27, 2013 *for careless for safety* and negligence resulting in damage to a vehicle.

The Carrier asserts that this case is not complicated. As Supervisor Eric Hurt testified, on December 18, 2013, Claimant walked up to him, upset that he had to use the section truck while another employee used the truck he apparently preferred. Following the incident, Roadmaster Hunt and Human Resources interviewed Claimant two days later, and Claimant regretted what had occurred and admitted he allowed a personal situation to carry over to work. This testimony, the Carrier argues, establishes that Claimant indeed had an altercation as alleged.

The Carrier also points to the written statement of Claimant's co-worker Mr. Teets, who wrote, at the time of the incident, that he felt threatened when Claimant left his Form B 12 miles from his own Form B and came to his work location to "cuss" and yell at him. While the Carrier acknowledges that Mr. Teets attempted to downplay this testimony during the hearing, it notes that Mr. Teets did state that he climbed up on a train to get away from Claimant because he knew he was upset. In addition, the Carrier points out, Mr. Teets testified that Claimant later called and texted several times to apologize, an indication Claimant knew he had done something wrong.

The Carrier states that where, as here, there is contradictory testimony, it is the role of the Hearing Officer, not this Board, to assess credibility, and the Hearing Officer's determination that Claimant was less credible than the other witnesses should not be disturbed. Not only was he threatening and discourteous to a co-worker, the Carrier notes, Claimant acknowledged he traveled more than 10 miles from his jobsite to where Mr. Teets was working when there was no reason for him to be there. The record, the Carrier maintains, is sufficient to meet its burden of proving Claimant's guilt by substantial evidence.

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 maintains that Claimant violated no Carrier Rules, and merely went to Mr. Teets' job location to discuss the use of a truck, after making several attempts to contact Mr. Teets. He told Mr. Teets he would be traveling to his location, a fact confirmed by Carrier witness Mr. Hurt, who only heard radio conversation and was not present at the scene of the alleged incident. Mr. Hurt, the Organization stresses, never heard or saw Claimant acting in a quarrelsome, discourteous or hostile manner towards anyone.

The Organization points out that Carrier witness Mr. Hunt, Claimant's direct supervisor, was also not present during the alleged confrontation and admitted that Claimant was never quarrelsome, discourteous or hostile towards him. No one else, the Organization stresses, observed the confrontation either.

As for Mr. Teets, the Organization notes his testimony that there was a lot of noise and Claimant was yelling in order to communicate, not to be aggressive. In addition, the Organization points out, Mr. Teets stated several times that he did not feel threatened by Claimant and never feared that the confrontation would lead to violence. Mr. Teets, the Organization stresses, stated that he was up on the train because he had work to perform there and was not really paying attention to Claimant.

The Organization further recites Claimant's testimony that he made several attempts to contact Mr. Teets, as they had discussed the previous day that Claimant would need the truck. When he was unable to do so, he went to Mr. Teets' work location for the sole purpose of discussing the truck usage situation and never made any of the threatening comments attributed to him. He acknowledged that he raised his voice, but only because it was noisy there. Claimant also stated that he never threatened Mr. Teets, which Mr. Teets, in his testimony, confirmed.

Finally, the Organization states that although Mr. Hunt testified about an alleged telephonic post-incident interview, he failed to provide any documentation of that interview, such as a transcript or written statement. Therefore, Mr. Hunt's testimony of what was said relates second-hand information probably distorted by interpretation and opinion.

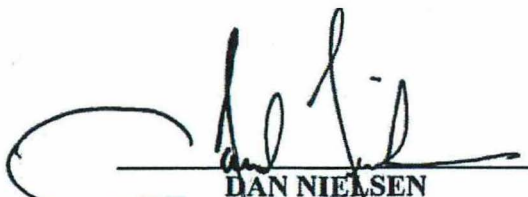
The Organization concludes that the Carrier has failed to prove its charges against Claimant by substantial evidence. Therefore, The Organization states, the discipline assessed is arbitrary, excessive and unwarranted. The Organization urges that the claim be sustained.

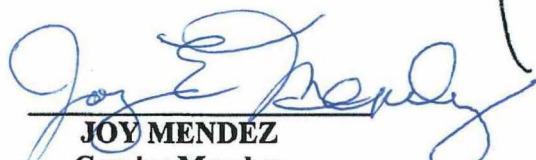
The Board has carefully reviewed the record in its entirety. There is no dispute that on the day of the incident, Claimant left his work site and traveled a substantial distance to Mr. Teets' work location to continue a dispute as to the use of a Carrier vehicle. Mr. Teets attempted at the hearing to downplay the incident somewhat and maintained that he did not feel threatened. However, he acknowledged that events transpired as he described them in the written statement he prepared the day after the incident, in which he recounted that Claimant made profane and threatening remarks, and that Mr. Teets physically removed himself from the situation to prevent matters from escalating. Mr. Hunt testified that in a telephone interview with Claimant and a Human Resources representative, Claimant acknowledged that he had brought a personal situation to work, and that he was very remorseful and requested counseling. An e-mail by Carrier official Rick Smith describes Claimant's state of mind similarly.

It is for the hearing officer to determine credibility, and the hearing officer determined that the Grievant's general denial of these allegations at hearing was not credible. The Board notes, however, that this was a one-time incident involving a long service employee with no history of any such behavior, acting under personal stress. The Board also notes that is evident from the testimony at hearing that the Carrier's own witnesses, on reflection, concluded that Claimant's actions were not as egregious as they initially appeared, and that he almost immediately demonstrated a sincere remorse for his errors. Their testimony cast the events and Claimant in a more sympathetic light than did the initial reports. Leniency is the province of the Carrier, and not the Board, but the Board does have the responsibility to assess the totality of the record evidence, and to assess the appropriateness of the penalty in light of that evidence. On the specific facts of this case, the Board concludes that the appropriate penalty is an actual suspension through the date of this Award, with Claimant being reinstated to his former position on the condition that he receives appropriate anger management counseling as determined by the EAP program, and that he cooperates in that counseling.

AWARD

**Claim sustained in part. The termination is converted to a time served suspension. Claimant will be reinstated to his former position, without backpay for the period since his termination, on the condition that he participate in an appropriate anger management program as determined by the Employee Assistance Program.
The Carrier shall comply with this award within 45 days.**


DAN NIELSEN
Neutral Member


JOY MENDEZ
Carrier Member


DAVID SCOVILLE
Organization Member

Dated this 12th day of Oct., 2016.