

PUBLIC LAW BOARD NO. 5850

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

vs.

**BNSF RAILWAY**

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Case No. 495 – Award No. 495 – Claimant: Whitaker  
Carrier File No. 14-15-0254  
Organization File No. 100-SF13C5-156.CLM

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing March 23, 2015, when Claimant, Roy A. Whitaker (1779818), was disciplined with a Level S Actual Suspension for 88 days from March 23—June 18, 2015 for his conduct with a BNSF employee on March 23, 2015 at approximately 2:20 pm in Valley Mills, Texas on the Fort Worth Subdivision. The Carrier alleged violation of Maintenance of Way Operating Rule (MWOR) 1.1 Safety, MWOR 1.6 Conduct and HR 90.4 Violence in the Workplace.
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, with seniority, vacation, all rights unimpaired and pay for all wage loss commencing March 23, 2015, 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, Roy A. Whitaker, has been employed by the Carrier since 2008. On March 25, 2015, the Carrier directed Claimant to attend an investigation for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with his alleged conduct and threatening behavior to a BNSF employee on March 23, 2015 at approximately 1420 hours in Valley Mills, TX on the Fort Worth subdivision. The

Investigation Notice stated that the investigation would determine possible violation of MWOR 1.1 Safety, 1.6 Conduct, and HR 90.4 Violence in the Workplace. Following the investigation, the Carrier found Claimant guilty of the misconduct alleged and issued him an 88-day actual suspension, from March 23, 2015 through June 18, 2015, with a three-year review period.

Claimant was working as a McGregor Section Truck Driver at the time of the relevant events. Texas Division Engineer William Gomez testified at the investigation that at about 2:20 p.m. on March 24, 2015, at Valley Mills, Texas, General Director of Maintenance for the Gulf and Texas Divisions Craig Sloggett called him to join a conversation with Claimant. Mr. Sloggett had performed a housekeeping audit on Claimant's vehicle and, while discussing the matter, Claimant, Mr. Gomez stated, became angry and argumentative. Claimant stated that housekeeping was a waste of time, and when Mr. Gomez responded that a clean environment was a safe environment, Claimant stated, "You guys care more about housekeeping than you do about my fucking safety. It is a waste of time." Claimant, Mr. Gomez recited, then began to complain about working on a two-man section, asserting that the tasks he performed were unsafe for two people. Mr. Gomez added that he asked Claimant for detail, but he simply replied that they worked too hard. In particular, Claimant stated that he and his Foreman had to change out two plug rails behind the rail detector, which took one and one-half hours each, resulting in three hours of hard work. Mr. Gomez asked Claimant if that was all the work he performed for the day, and Claimant replied that it was. Mr. Gomez testified that he told Claimant if he was only working three hours out of an eight-hour day, there should be plenty of time for him to pace himself and avoid over-exertion.

At that point, Mr. Gomez added, Claimant became very angry and began to use profanity, stating that the Carrier did not care about "fucking safety," that he would hurt his "fucking back," and similar remarks. He then returned to the subject of the two-man crew, and Mr. Gomez told him that there were two-man crews working safely throughout the system. Claimant then asked "what idiot" decided to make the crew two-man, and Mr. Gomez replied that he had done so.

As the conversation continued, Mr. Gomez described, he asked Claimant if he could work safely every day, and Claimant replied that he could not. Mr. Gomez then removed him from service. Mr. Gomez testified that Claimant then lunged toward him, getting within an inch, yelling, and he told Claimant he needed to back up, which he did. Mr. Gomez stated that Claimant came back before he left the property, and asked Mr. Gomez if he pulled him out of service because he would not change out 10 rails per day. Mr. Gomez told Claimant that was not the case; he removed him because of his conduct and his statement that he could not work safely.

At that point, Mr. Gomez testified, Claimant walked closer to him, put his finger in his face, and said he would "get" him at the investigation. Mr. Gomez stated that Mr. Sloggett was present throughout the conversation, and Roadmaster John Wright was in the vicinity and witnessed some of the interaction.

Claimant testified at the investigation that the incident began when Mr. Sloggett approached him and asked to see the tools in his truck. As they talked, Claimant stated, he empowered himself to bring up a safety concern about working on a two-man crew. He explained that he then went over to look at what work needed to be performed on a track, when, about 15 minutes later, Mr. Gomez came over, asked him about a previous injury, and then, for no apparent reason, pulled him off to the side of the track where Mr. Sloggett was waiting. Claimant maintained that Mr. Sloggett asked him to repeat what he had told him earlier, so Claimant stated that he was using empowerment because he did not believe he could safely cut rail with just two people, as required by a new Rule. Claimant added that he brought up several other safety issues, and Mr. Sloggett and Mr. Gomez joked and ignored him. Claimant added that Roadmaster Wright joined the conversation about three quarters of the way through. No employees were close enough to witness what occurred.

As he continued to insist that rail could not safely be cut with just two people, Claimant testified, Mr. Gomez became hostile, got in his face and told him he was pulling him out of service. Claimant stated that as he walked to the truck to take him home, Mr. Gomez followed, came up behind him and started screaming, "Are you threatening me?" He maintained that Mr. Gomez "made a scene," and was very discourteous and hostile. Claimant maintained that he attempted to defuse the situation and told Mr. Gomez he would see him at the investigation. Mr. Gomez, Claimant added, continued to scream at him.

Claimant denied that he threatened Mr. Gomez or got in his face. He maintained that he never "cussed" or showed any quarrelsome behavior. He testified that Mr. Gomez lied about the incident. He also stated that he knows the Carrier's Rules, but Mr. Gomez, Mr. Sloggett and Mr. Wright do not.

Neither Mr. Sloggett nor Mr. Wright was present at the investigation on April 1, 2015. The Hearing Officer stated, due to the stark differences in Mr. Gomez' and Claimant's accounts of events, that she would recess the hearing so that Mr. Sloggett and Mr. Wright could be present to testify. The hearing was recessed over the Organization's objection. The Hearing Officer noted that Mr. Sloggett and Mr. Wright were available the following week, but the Organization representative's schedule would not permit him to return until May 19, 2015. The hearing continued on that date.

Mr. Sloggett testified that the incident began when he walked by Claimant's truck and they discussed that it was in good, clean condition. He stated that Claimant then began to talk about the unsafe situation he was in, that he could not work safely, and "began dropping the F bomb." He added that Claimant began to calm down and he brought Mr. Gomez over, at which point Claimant got excited again, continued to complain about his safety concerns with having to cut rail, that he needed more people, and he started swearing and getting in Mr. Gomez' face. He stated that Claimant was screaming and cursing, and he and Mr. Gomez made some phone calls for advice and then removed Claimant from service.

Mr. Sloggett, who did not remember ever meeting Claimant before, testified that he lost total composure and acted in a completely unprofessional manner. He was concerned that he would hit Mr. Gomez.

Roadmaster John Wright testified by telephone that he observed Claimant and Mr. Sloggett engaged in conversation, with Claimant repeating that he could not do his job safely. He stated that Claimant was "pretty demonstrative" with his actions, and he was using unacceptable language. After Mr. Gomez stated that he would remove Claimant from service, Claimant moved toward him and stated that he would see Mr. Gomez in an investigation.

Claimant's personal record show a Level S Record Suspension assessed on April 24, 2012, with a 36-month review period, for an operating violation, and a Level S Record Suspension, assessed on September 29, 2009 for exhibiting quarrelsome and discourteous behavior.

The Carrier first states that there is no merit to the Organization's various procedural arguments, as it cannot demonstrate any prejudice to Claimant. On the merits, the Carrier asserts that Claimant is guilty of the charges, as, on March 23, 2015, he was involved in an altercation with General Director of Maintenance Craig Sloggett and then Division Engineer William Gomez. The Carrier points to the written statement Mr. Gomez prepared that day, as well as his hearing testimony, in which he details that Mr. Sloggett called him to participate in a conversation with Claimant, who was complaining about a housekeeping audit performed on his vehicle and maintaining that housekeeping was a waste of time. The statement continues, the Carrier points out, that Claimant became very angry and began to use profanity as the conversation turned to the safety of his work on a two-man section. The Carrier notes that Mr. Gomez' statement recites that he asked Claimant whether he could work safely, and when Claimant replied that he could not Mr. Gomez removed him from service. The statement concludes, the Carrier states, that Claimant walked up to Mr. Gomez, put his finger in his face and stated that he would "get" him at the investigation.

The Carrier notes that Mr. Sloggett's account of the events is similar to Mr. Gomez', as he testified that Claimant totally lost composure and was yelling and screaming, and then got into Mr. Gomez' face. The Carrier adds that Mr. Sloggett stated he was afraid Claimant would hit Mr. Gomez. The Carrier further states that Roadmaster John Wright, who was present at the scene for some of the incident, heard Claimant use unacceptable language, heard Mr. Gomez and Claimant go back and forth as to whether Claimant could work safely and saw Claimant make a move toward Mr. Gomez when he stated that he was removing Claimant from service.

The Carrier explains that Claimant, in his lengthy testimony, gave a drastically different version of what occurred, portraying the conversation as a discussion of his concerns about working safely. Claimant also, the Carrier notes, maintained that he walked away when the conversation turned into an argument and Mr. Gomez got in his face.

Essentially, the Carrier states, Claimant portrays Mr. Gomez as the one who was quarrelsome and engaged in threatening behavior.

Claimant, the Carrier stresses, took no responsibility for his actions, and, during the investigation, brought up numerous irrelevant matters such as job briefings and injuries. There is no corroboration for Claimant's account, the Carrier notes, and the Hearing Officer did not credit it. It is well settled, the Carrier points out, that such credibility determinations should not be disturbed by an arbitration board. The Carrier also notes that Claimant has a similar violation on his record. The Carrier urges that it has met its burden of proving Claimant guilty by substantial evidence.

As for the penalty, the Carrier states that this was Claimant's second Level S violation within a 36-month review period, and, in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA), he was subject to dismissal. In choosing to suspend him, the Carrier adds, it showed leniency. Therefore, the discipline cannot be deemed arbitrary or excessive.

The Organization raises procedural and substantive objections to the discipline assessed against Claimant. In particular, the Organization argues that the hearing was recessed for 49 days, giving Carrier Officers additional time to fabricate testimony and resulting in Claimant being held out of service for 93 total days. On the merits, the Organization asserts that Claimant did nothing but raise safety concerns with Carrier management. The Carrier Officer, the Organization adds, became upset and removed Claimant from service. The Carrier has not met its burden of proving, by substantial evidence, that Claimant engaged in misconduct. Even if it had, the discipline, the Organization urges, is extreme, unwarranted and unjustified.

The Board has carefully reviewed the record in its entirety. First, we find no procedural error which denied Claimant his right to a fair and impartial investigation. While the Organization characterized the recess in the hearing as an effort to manufacture testimony, it is at least as fair to characterize it as an effort to secure eyewitness testimony that would clarify a critical disputed point. On the merits, this case turns on credibility, as the Carrier asserts. Three Carrier witnesses testified that Claimant raised a safety concern in a conversation about the condition of his truck and was loud, argumentative, swearing and lost his composure to the point that there was a fear of physical violence. Claimant's version is that the Carrier Officers, pulled him away from the track, for no apparent reason, into a conversation where they began to threaten and harass him. He accused them of lying, and stated that he knew the Rules whereas they did not. The Hearing Officer found the Carrier's version of events more credible and that determination, amply supported by the record, should not, as is well established, be disturbed by this Board.

Claimant engaged in serious misconduct. If he had safety concerns, he should have brought them to the Carrier's attention in a reasonable manner. Here, he brought them up, in an angry and profane manner, during a minor conversation about something else. He had no justification for acting as he did towards three Carrier Officers. His guilt has been proven by substantial evidence.

With respect to the penalty, the Carrier folded the time between the two hearing dates into a lengthy suspension. Given Claimant's conduct and his personal record, which includes a similar incident, we cannot say that the suspension was arbitrary or excessive.

**AWARD**

**Claim denied.**

  
**DAN NIELSEN**  
Neutral Member  
**MICHELLE McBRIDE**  
Carrier Member  
**DAVID SCOVILLE**  
Organization Member

**Dated this 21 day of August, 2017.**