

**PUBLIC LAW BOARD NO. 5850**

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**BNSF RAILWAY COMPANY**

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Case No. 505 – Award No. 505 – R. Dorsey  
Carrier File No. 14-18-0621  
Organization File No. 2410-SL13C5-1829

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Carrier file# RDV-MOW-2018-01662, Richard Dorsey (1779594) Seniority date August 25, 2008, for reinstatement with seniority rights restored and all entitlement to and credit for, benefits restored, including vacation, and health insurance benefits. The Claimant shall be made whole for all financial losses as result of the violation, including compensation for: 1) straight time pay for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of suspension from service (this amount is not reduced by any outside earnings obtained by the Claimant while wrongfully suspended); 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service. 3) Overtime pay for lost overtime opportunities based on overtime paid to any junior employee for work the Claimant could have bid on and performed had the Claimant not been suspended. 4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly dismissed from service commencing August 01, 2018, continuing forward and/or otherwise made whole. All notations of the dismissal should be removed from all Carrier records.

**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, R. Dorsey, had been employed by the Carrier since 2008. On September 21, 2018, following an investigation, the Carrier found Claimant guilty of misconduct during the morning briefing when he engaged in a verbal altercation with threats of violence and racial slurs on August 16, 2018 in Arkansas City Yard on the Red Rock Subdivision. The Carrier dismissed him from service.

Assistant Roadmaster Chad Hestermann testified at the investigation that he was supervising the TP48 gang on the day at issue. He prepared a written statement following the incident, which he read into the hearing record.

Mr. Hestermann stated that the incident began when the foreman was giving the daily briefing, and employee Raymond Munoz, who was also charged in this incident, teased Claimant about paying attention. Claimant and Mr. Munoz had a side conversation, and supervisor Brandon Stewart asked them to pay attention. The two employees replied that they were, but continued their private conversation.

Mr. Hestermann explained that the conversation between the two employees got louder, and, although most of the conversation was inaudible, "everyone" could tell that tempers were escalating, and the body language started to change for the worse, so he and Mr. Stewart went over and separated them.

They decided to have private discussions with the employees, because they had not really heard the conversation. Mr. Hestermann stated that Mr. Munoz was visibly upset and told them Claimant had asked where his green card was and that he was going to call ICE (Immigration and Customs Enforcement) on him. Mr. Hestermann stated that Mr. Munoz told him he interpreted Claimant's comments as racist and that he wanted to escalate the matter. Mr. Hestermann maintained that Claimant admitted making these remarks, but only after Mr. Munoz said several times, "F. . . you," and that he was going to kick Claimant's ass.

Mr. Stewart's statement was also entered into evidence; he did not attend the investigation. In the statement he recited that he heard the employees arguing to the point where he felt it necessary to intervene. The statement recounts that he heard something along the lines of "do you have card, will have ICE pick you up, kick ass, you're a drunk."

Mr. Hestermann stated that he and Mr. Stewart decided to remove both employees from service, and obtained written statements from them.

Mr. Munoz recited in his statement that during the briefing, when he asked for an instruction to be repeated, Claimant turned to him and asked if he had kids and, if so, he should play with them because Claimant was not in mood and would whip his ass. Mr. Munoz stated that he laughed and asked what Claimant was going to do, and he said whip him. After the briefing, Mr. Munoz recounted in the statement, he told Claimant not to threaten him, at which point Claimant asked about a green card and ICE, and Mr. Munoz responded by asking if "that was all he (Claimant) had."

According to Claimant's statement, he asked a question and thought Mr. Munoz acted as though it was stupid. He replied that he was not in the mood for smart comments, and Mr. Munoz replied "f you" and "kick ass," several times. The statement recounted that after the briefing the Roadmaster asked if everything OK and Claimant said it was.

Mr. Hestermann stated at the investigation that he believed the employees had been quarrelsome and discourteous to the group. He acknowledged that this was his opinion, how he interpreted events. He added that he spoke to the other gang members but acknowledged he had no information about how any of them felt about the incident. He stated that he did not believe that comments about a green card or ICE were normal banter for the gang. He acknowledged that this was just a verbal incident, nothing physical.

At the hearing, Mr. Munoz testified that Claimant's comments were not offensive. The statements about "whipping ass," and the like were not threatening, and he was not offended. This was normal, joking banter. Mr. Munoz believed the situation was taken out of context because the supervisor, Mr. Stewart, was new to the gang and did not know how the employees got along. Everyone on the gang, he stated, was laughing and joking. Mr. Stewart blew things out of proportion. Mr. Munoz testified that he and Claimant were joking the entire time, and none of the comments, including remarks about a green card or ICE, were serious or threatening.

Claimant also testified at the investigation that he was never threatened or insulted by anything said by Mr. Munoz during the instant encounter. He knew that Mr. Munoz was joking, and such joking is commonplace among the employees on this gang. The other employees were actually laughing and giggling. Claimant stated that he told Mr. Hestermann and Mr. Stewart that there were no issues between himself and Mr. Munoz.

The Organization introduced into evidence a statement from Zachary Gommert, the foreman on TP48, reciting that nothing unusual happened at the relevant time, just normal gang chatter. A statement from Marc Gomez, the assistant foreman, stated that everyone was laughing and cutting up at the briefing, and the matter was exaggerated beyond what it really was.

No one present at the time, including Claimant and Mr. Munoz, chose to take the matter to management. The two employees wrote statements because management requested them.

Claimant's personal record shows disciplinary incidents in 2011, 2014, and on August 26, 2016, all for operating violations. Claimant was still within the review period for the 2016 occurrence at the time of the instant incident.

The Carrier contends that the record shows that Claimant's remarks to Mr. Munoz were discourteous, quarrelsome, and hostile. For an employee to aggressively question another about his immigration status, threaten to call ICE and to whip him is unacceptable and cannot be tolerated by the Carrier.

The Carrier states that portraying such conduct as joking is not persuasive and is not an excuse for Claimant's behavior. Claimant and the Organization attempt to characterize what occurred as shop talk, but such talk crosses the line when it becomes offensive, racial and

threatening. The Carrier contends that it has met its burden of proving Claimant's guilt by substantial evidence.

As for the penalty, the Carrier points out that this was Claimant's second serious rule violation during a review period for a prior Level S issued on August 26, 2016, and, according to the Carrier's Policy for Employee Performance Accountability (PEPA), he was subject to dismissal. There is no reason to disturb that penalty here.

Finally, the Carrier states that, in the unlikely event the Board upholds the claim, the Organization seeks damages in excess of those allowed by the parties' Agreement. Therefore, any award should be limited accordingly.

The Organization contends that Claimant was joking with Mr. Munoz throughout this encounter, and, as he explained at the investigation, the written statement he tendered at the time was only partially correct, as he was asked to write it in a rush, on the spot, and it did not accurately, or in any depth, reflect what actually occurred. This matter was the result of the presence of a new supervisor, Mr. Stewart, present that day, and he did not understand how the gang worked and believed that the employees were serious rather than joking as they often do.

Mr. Stewart did not appear at the investigation, and Mr. Hestermann acknowledged that what he presented was only his own interpretation and opinion as to what occurred. Claimant and Mr. Munoz testified consistently that they were only joking in a manner common on this gang, and that view was confirmed by statements from the foreman and assistant foreman.

The Organization argues that Claimant committed no misconduct and the claim should be sustained.

We have carefully reviewed the record in its entirety. The Carrier's evidence in this case consists primarily of the testimony of Mr. Hestermann who, along with Mr. Stewart, observed two employees having a side conversation, which bothered no one, and escalated it into an incident in which they questioned them, required them to provide statements, removed them from service, and, ultimately subjected them to serious discipline. Mr. Hestermann acknowledged that he did not hear whatever was said between them. Mr. Stewart whose statement recited that he had, did not testify at the hearing.

Nevertheless, the two employees essentially acknowledged that they had made the comments the Carrier attributes to them. In their statements, Mr. Munoz described that he laughed at Claimant's comments, and Claimant stated that at the end he told the supervisors there were no issues.

At hearing, both employees maintained steadfastly that they had been joking throughout and that neither they nor anyone else on the gang was upset or threatened by it. They did not bring the matter to management's attention. The gang's foreman and assistant foreman provided written statements confirming that such joking was commonplace on this gang. Although Mr. Hestermann testified that he spoke to the other gang members about their view of the incident, he admitted that he had no information from them which could support a stronger view of the incident. To the

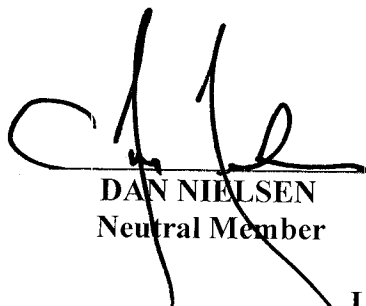
extent that the employees' statements given after the incident might appear stronger than their testimony at hearing, the employees explained that they were ordered to provide the statements, had little time to do so, and that they did not fully explain what had occurred.

The Carrier dismissed Claimant based on a verbal exchange, witnessed from a distance, and not heard by the only Carrier witness present at the hearing. Mr. Stewart was in fact new to the gang and might not have been aware of how its members interacted. While the Carrier might disapprove of the language used during this exchange, it has the burden of proving that it was in fact, not just "quarrelsome or discourteous," as Mr. Hestermann put it, but actually insulting, threatening, and racist, to an extent that it would support the conclusion that the ultimate penalty was justified.

The Carrier has failed to meet its burden of proving that such is the case. Claimant and Mr. Munoz maintained steadfastly at hearing that they were joking. Their foremen confirmed in written statements that such was the case, and that it was commonplace behavior on the gang. Mr. Hestermann spoke to the other gang members and apparently obtained no information to indicate otherwise. The Carrier has proven only that Claimant and Mr. Munoz used certain words. It has not met its burden of proving, by substantial evidence, that the context in which Claimant and Mr. Munoz used those words showed that they were intended, or were understood to be, insulting, threatening or racist, as would be necessary to support the charges leveled against Claimant. The claim will therefore be sustained as indicated below.

#### AWARD

**Claim sustained. Claimant shall be reinstated to his previous position and made whole for his losses in accordance with the parties' Agreement, and all references to this discipline shall be stricken from his personal record.**



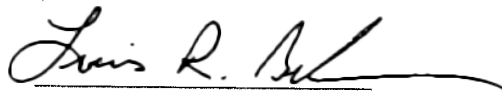
**DAN NIELSEN**  
Neutral Member

**I dissent:**



**SAMANTHA DAIGLE**  
Carrier Member

**I concur:**



**LOUIS R. BELOW**  
Organization Member

**Dated this 9th day of June, 2021.**