

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

vs.

**BNSF RAILWAY COMPANY**

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Case No. 523 -- Award No. 523 -- M. Brownlee  
Carrier File No. 14-19-0193  
Organization File No. 2421-SL13C5-1912

**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Mario Brownlee (3040979), Seniority Date 08-15-2018, for the removal of the Claimant's Level S 30 Day Record Suspension and 3 Year Review Period. In addition, we request all record of discipline be removed from the Claimant's record. The Claimant shall be made whole as a result of the Carrier's violation, including the following compensation(s).

**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, M. Brownlee, has been employed by the Carrier since May 21, 2018. On May 6, 2019, following an investigation, the Carrier found Claimant guilty of, on March 20, 2019, misconduct and discourteous behavior toward other employees and indifference to his duties. The Carrier determined that Claimant had violated Maintenance of Way Operating Rule (MOWOR) 1.6 Conduct and assessed him a Level S 30-day Record Suspension with a three-year review period.

At the time of the incident, Claimant was working as a Trackman on mobile maintenance gang TMGX2513. At approximately 12:30 p.m., Track Supervisors Brian Alarid and Vince Munoz encountered Claimant's gang replacing ties at Joffre Main 1 and stopped to observe the group's briefing. A crew member noticed that Claimant was missing, and Foreman Charles Romero sent a fellow Trackman to get him. When Claimant arrived, Mr. Romero continued the

briefing. At some point, Mr. Romero received a train calling and handed the briefing over to another crew member to continue.

Mr. Alarid testified at the investigation; neither Mr. Romero nor Mr. Munoz appeared. Written statements from Mr. Romero and Mr. Munoz were read into the hearing record.

Mr. Alarid stated that once Mr. Romero left the briefing to address the trains, Claimant walked back to his truck before the briefing had concluded. Written statements from two employees, however, including the one who read the briefing, stated that the briefing was completed when Claimant left.

When Mr. Romero returned, Mr. Alarid testified, he informed him that Claimant had gone back to the truck and asked if he would like Mr. Alarid to go talk to Claimant. Mr. Romero agreed, stating that this was a recurring behavior for Claimant.

Mr. Alarid further testified that he and Mr. Munoz pulled over to Claimant to ask him how he was doing and if everything was okay, to which Claimant responded he was "enjoying the fresh air." Mr. Alarid asked him why he was not attending the briefing and whether he was asleep in the truck. Claimant, according to Mr. Alarid, then asked him and Mr. Munoz several times "who the hell" they were, even though, Mr. Alarid maintained, he had introduced himself to Claimant the day before.

Mr. Alarid explained that Claimant asked why they were harassing him, to which Mr. Munoz responded that they just wanted to make sure he was okay and that everyone was pulling their weight. He stated that he told Claimant he was not harassing him, but he noticed that he was apart from the group, and was there for his safety and well-being to see what was wrong. He stated that Claimant eventually told them he was going to call Human Resources. Mr. Alarid stated that they told Claimant if they needed to take it higher they could call Roadmaster Gerardo Gonzalez or Division Engineer Ray Chavez. Eventually Claimant asked if they were done with him because he needed to get back to his work, and the encounter ended.

Mr. Gonzalez testified at the investigation that on the day at issue the Division Engineer called him to come to Fort Sumner to talk to an employee who had been reported for misconduct by Track Supervisors. He arrived and he asked the Claimant what had occurred. He stated that Claimant told him Track Supervisors drove up to his location, asked him if he was okay, and that was all that was said. Mr. Gonzalez maintained that Claimant never said anything about being harassed, so he asked Claimant why he had stated that he was going to call Human Resources. Mr. Gonzalez stated that Claimant told him that was not true.

Mr. Gonzalez testified that he told Claimant he would get him together with the Track Supervisors the next day and they would all figure it out. He stated that he thought at that point that the matter was pretty much resolved, but the next day he had to tell Claimant the matter would proceed to investigation, apparently on the decision of the Division Engineer. Mr. Gonzalez explained that he was the ultimate supervisor of this crew, that Claimant had never been disrespectful to him, and that he believed the matter could have been handled by a coach and counseling.



Claimant testified that Mr. Romero had handed off the briefing to employee Cheney Hancock, who read the briefing. When Mr. Romero returned, he explained that the briefing was over but to stand by since they would still have to run trains. At that point, Claimant stated, he returned to his work area.

Claimant continued that Mr. Alarid and Mr. Munoz approached his work area in their vehicle and asked, "what's wrong with you?" When Claimant replied that nothing was wrong, they asked if he liked his job. Claimant explained that he was simply waiting on the train. The men continued to ask why he left the job briefing and asked whether he had been sleeping in his truck, both of which Claimant repeatedly denied, and threatened to call Roadmaster Gerardo Gonzalez. Claimant asked them to stop harassing him and eventually went back to his work. He denied cursing at them or threatening them.

Claimant had no discipline record prior to this incident.

The Carrier argues that it has provided substantial evidence that Claimant exhibited misconduct, discourteous behavior, and indifference to duty in violation of MOWOR 1.6. If Claimant honestly felt and thought he was being harassed, he should have told Mr. Gonzalez during their conversation that day. The Carrier calls into question Claimant's credibility and maintains that there are no statements corroborating Claimant's side of the story.

The Carrier asserts that Claimant walked away from the briefing before it was complete. Track Supervisors Alarid and Munoz approached Claimant to check on his well-being and see if he was okay because he left the briefing before it was over. When they approached him, Claimant asked them who the hell they were, exhibiting misconduct, discourteous behavior, and indifference to duty. The Carrier states that according to the investigation transcript, this type of behavior was common for Claimant. The evidence clearly supports Claimant's guilt, and the level of discipline assessed was appropriate.

The Organization notes that Claimant is a relatively new employee, and Mr. Alarid and Mr. Munoz questioned him without ever introducing themselves. Claimant felt that he was being singled out and harassed, and he asked them to stop. The Organization also points to Mr. Gonzalez's testimony that this was not a serious violation, and had he been able to sit down with the three men and discuss what happened, it could have been handled another way, perhaps with coaching and counseling. There is no basis for the instant discipline, and the claim should be sustained.

We have reviewed the record in its entirety, and find that the Carrier has failed to meet its burden of proving Claimant's guilt of these charges by substantial evidence. As the Organization notes, Claimant had less than a year's service at the time of this incident, and there is no evidence that he had ever even been counseled about his performance, notwithstanding the Carrier's hearsay evidence that Mr. Munoz found him a constant problem for apparently wandering off during job briefings. Even if he did, on this occasion, the record indicates that the briefing was either completed or ending, and this would hardly have been the sort of incident that required the assessment of serious discipline.

As for Claimant's subsequent interaction with the two Track Supervisors, while the Carrier argues that Claimant was not a credible witness, the hearing accounts of what occurred do not vary substantially. The two Track Supervisors approached and began to question him in a manner that, even by the testimony of Mr. Alarid, seems heavy-handed, repeatedly asking him what appear even on the cold record to be intrusive, personal questions. The two men were not Claimant's supervisors, and although Mr. Alarid maintained he had introduced himself to him the day before, by both Mr. Alarid's and Claimant's testimony he repeatedly asked the two men who they were, a not unreasonable question given the nature of the interaction.

At worst, by Mr. Alarid's account, Claimant asked the two men "who the hell" they were. He used no other profanity and made no other threats other than, according to Mr. Alarid, a threat to call Human Resources because he believed they were harassing him. The Organization contends that it was that "threat" that caused the matter to proceed as it has, and it does indeed appear that such was the case.


Mr. Gonzalez, who did supervise Claimant, believed that the matter did not require serious discipline, and we agree. At worst, Claimant needed to be more mindful of his attendance at briefings, and he could have perhaps been more polite in his dealings with the two Track Supervisors. But these are hardly the sort of serious offenses which would justify burdening the record of a new employee with the level of discipline which could subject him to dismissal for another offense any time in the following years. The claim will be sustained.

#### **AWARD**

**Claim sustained. The Carrier is ordered to remove all mention of the instant discipline from Claimant's personal record and to make him whole for his losses in connection therewith, if any. The Carrier is directed to comply with this Award within 45 days.**

  
**DAN NIELSEN**  
Neutral Member

  
**LOGAN MCKENNA**  
Carrier Member

  
**JEFFERY L. FRY**  
Organization Member

**Dated this 16 day of May, 2023.**