

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 538 – Award No. 538 – D. Golden
Carrier File No. 14-20-0044
Organization File No. 0493-SL13C5-1959

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Heartland District 900 employee Mr. Dean Golden (9011438) for removal of the Claimant's Level S 30 day actual suspension and three (3) Year Review Period. The Claimant should be made whole for financial losses as a result of the alleged violation, including compensation for straight time wages lost during the investigation. All notations of the issued discipline 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, D. Golden, has been employed by the Carrier since 1989. On December 26, 2019, following an investigation, the Carrier found Claimant guilty of misconduct when he made inflammatory statements about exempt employees. The Carrier determined that Claimant had violated Maintenance of Way Operating Rules (MOWOR) 1.6 Conduct and assessed him a Level S 30-day Actual Suspension with a three-year review period.

The facts of this case are largely undisputed. At all times relevant, Claimant was working as a foreman on a surfacing gang out of Cuba, Missouri. Dane Freshour, Regional Director of Human Resources, appeared at the investigation via teleconference, to which the Organization objected. He testified that one of his primary responsibilities is to investigate complaints that come through the Carrier's Human Resources hotline. He stated that on or about November 18, 2019,

he received three anonymous calls on alleging that Claimant and Regulator Operator Mr. Pontius audiotaped Roadmaster Chad Lee in an attempt to have him fired. Mr. Freshour explained that he collected statements from Claimant as well as other employees. He provided a copy of Claimant's signed statement dated November 18, 2019, which he explained was a standard statement summarizing questions Mr. Freshour asked of Claimant. It states, in pertinent part:

Mr. Golden, I am looking into concerns that have been raised through the system Hotline. I have formatted some standard questions below that will help us understand the facts of the case. I will take notes and then send them to Mr. Mendoza, so that you can review and make any adjustments to accurately reflect your statement. He will then return the signed statement to me.

Please respond to the questions below and provide a statement for the record.

...

- 1) **What is your position?** I am the Foreman on the Cuba surface surfacing gang.
- 2) **How did you get along with Roadmaster Chad Lee?** He was my boss; we got along fine. We did not have any conflicts that I know of.
- 3) **Have you ever told other employees that you and Mr. Pontius set him up for termination?** No... I don't believe so.
- 4) **Have you ever mentioned to other employees that if you did not like the new Roadmaster that you would target him?** No, I don't think I did... I don't believe that I have mentioned that.
- 5) **Have you mentioned to other employees that if the Company sent a Roadmaster that you did not like that you would "fuck them" and to do that you just have to be smarter than they are?** I might have said something about that... Yes.
6. **Anything else that we need to know:** It has been frustrating up here. Some of these Roadmasters and they don't understanding. No one listens to ideas from us because we do the work. The old Roadmasters taught us to do 110 percent and then let the trains run and keep the traffic moving. Let's say we are digging mud spots out for the FRA and they want you to do other work along with the task. You have to plan but not overdo it and take a risk. I was concerned that if the machine quits then it becomes a barrier to running trains. I was always I was always taught not to hold up traffic.

Mr. Freshour testified that he believed Claimant was truthful in his responses. Regarding question five, Mr. Freshour explained that the three hotline calls indicated that that was the statement Claimant had made and that it was not acceptable to use that term. Because of that, he recommended that the investigation continue, and he conducted interviews with other members of Claimant's work group. He also issued Claimant an anti-retaliation letter on November 18 so that Claimant did not start his own investigation or talk to other employees about the case until all facts had been gathered and analyzed.

Mr. Freshour further testified that he completed his investigation and determined that there was a possible violation on November 18 and conducted additional interviews with work group

members on November 19, which he asserted was standard practice to confirm the accuracy of the allegations and Claimant's statement. He reviewed his findings with Division Engineer Dennis Mendoza on November 22. Based on Claimant's response to question five, Mr. Freshour explained that Claimant did violate the Carrier's Equal Employment Opportunity, Anti-Discrimination, and Harassment policy.

Mr. Mendoza testified at the investigation that as the Division Engineer for St. Louis, he is also Claimant's manager. Mr. Freshour notified him about the hotline calls and asked him to assist with a Human Resources investigation. Mr. Mendoza set up a meeting between Mr. Freshour and Claimant wherein Mr. Freshour asked Claimant the six questions summarized in Claimant's signed statement. Mr. Mendoza was present with Claimant during the questioning and opined that there was reason to question whether there was more to Claimant's responses that Claimant did not state. The Organization objected to Mr. Mendoza's testimony regarding what he thought about Claimant's responses, and the Conducting Officer sustained the objection and proceeded.

Regarding question five, Mr. Mendoza testified that it did not reflect acceptable behavior under the Equal Employment Opportunity, Anti-Discrimination, and Harassment Policy and was not in line with how Carrier employees should conduct themselves. He explained that employees cannot discriminate in any respect, regardless of whether they like the other person or not or whether the person is named or unknown.

Mr. Mendoza further testified that Claimant violated MOWOR 1.6 because his conduct was immoral, quarrelsome, and discourteous. Specifically, he stated that the statement Claimant admitted to in question five was discourteous and quarrelsome. He explained that all employees are expected to abide by this rule and are held accountable for violating it.

Mr. Mendoza testified that he was not present for the original conversation between Claimant and another employee during which Claimant allegedly made the statement in question five, and he asked no further questions about the intent behind that statement. He further stated that the word "fuck" is used on the railroad but is not overly prevalent, especially not in the context in which Claimant used it.

At the investigation, Claimant testified that he did not audiotape any conversation with Mr. Pontius about Mr. Lee, nor did he audiotape anything else. Mr. Pontius had come to Claimant, his foreman, with concerns he had about his communications with Mr. Lee. Claimant explained that he told him to call Mr. Mendoza and speak with him about it first, then keep going up the chain of command. He further explained that is what he would do, and has done in the past, if he had any issues that he could not readily work out with the roadmaster.

Claimant clarified that in response to question three, he did not know how he could have set up Mr. Lee, who is also Claimant's roadmaster, as Claimant was not present when the issue between Mr. Pontius and Mr. Lee arose. Claimant further testified that he would not target a roadmaster he did not like, referencing question four, and explained that he answered yes to question five even though he was not sure that he said exactly that. He stated that it was probably not appropriate. Claimant testified that he "probably [did] not completely" comply with MOWOR

1.6, stating that his comment referenced in question five was likely more discourteous than anything.

Claimant explained that there is no telling how many times per day “fuck” is heard on the railroad, and it depends on who you are talking to. He testified that it is not a daily occurrence to hear someone say they would fuck over another employee that they did not like, and some people may find that more offensive than others. In that context, according to Claimant, it is probably not proper but is heard from time to time.

Regarding his answer to question five, Claimant testified that “you’ve gotta do what you gotta do” and go up the chain of command when there is an issue with a roadmaster. Claimant could not think of any way he would “set up” a roadmaster, nor did he push Mr. Pontius to take any action or encourage him to record anything. He explained that any reference in question five to something he said was more “locker room talk” than anything and he never had any intent to screw over a roadmaster. Claimant was not able to articulate why he made a statement like that in question five, and explained he probably spoke before thinking.

On October 22, 2018, Claimant received a Level S 30-day Record Suspension with a one-year review period for his failure to follow proper machine bunching procedures.

As an initial matter, the Organization raises two procedural arguments. First, it alleges that one of Carrier’s witness’ appearance via telephone violated Claimant’s due process right to confront his accuser. It further argues that it was unclear whether the witness on the telephone was being coached. Second, the Organization argues that the Hearing Officer improperly questioned another Carrier witness about what the witness believed, which was one-sided in favor of the Carrier’s case.

Addressing the Organization’s procedural arguments, the Carrier maintains that the conducting officer asked Mr. Freshour, who has almost 25 years of experience in HR, about his understanding of Claimant’s response to question five. In doing so, the conducting officer was not siding with the Carrier, but trying to determine how an expert would gauge the seriousness of Claimant’s response, which was proper. The Carrier further asserts that any argument by the Organization that the Carrier failed to comply with the Agreement is merely an attempt to defend misconduct and shift the blame to Carrier instead of Claimant. There are no facts to support such an argument and the Carrier maintains that the hearing was fair and impartial.

On the merits, the Carrier argues that it provided substantial evidence, including multiple admissions, of Claimant’s guilt. When asked about his responses to the HR questionnaire, Claimant provided uncertain answers such as, “No... I don’t believe so,” “No, I don’t think I did,” and “I don’t believe that I have mentioned that.” The Carrier contends that there should be no doubt as to whether a discourteous comment was made.

Further, the Carrier argues, Claimant’s response to question five clearly illustrates he was quarrelsome and discourteous. Indeed, Claimant admitted to using such language. The Organization tried to defend this by arguing that expletives are regularly used on the railroad, but

it is the context here that is important. Words are sufficient to violate the Carrier's rules, and there was no dispute as to the words Claimant used.

The Carrier lastly asserts that it showed Claimant leniency, as dismissal was warranted in this case. Such quarrelsome and discourteous behavior is not tolerated and, as such, the claim should be denied.

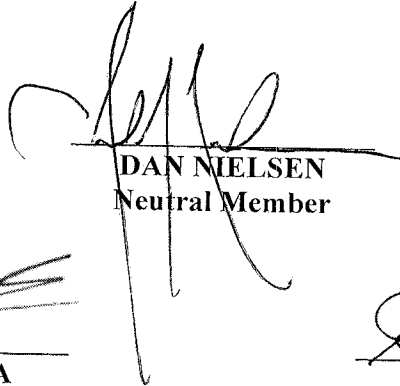
The Organization asserts that Claimant simply advised an employee experiencing an issue with a previous roadmaster. Since Claimant was the foreman, the employee confided in him and asked how best to handle the situation. Later, Claimant commented to co-workers that he would report any hypothetical future actions of an exempt employee if they were inappropriate. While Claimant may have chosen better wording for his hypothetical, Claimant was not discourteous or disrespectful to any employee nor did he plot to have anyone fired.

The Organization argues that an employee must act in order to violate a rule or policy, and Claimant's only act was advising another employee to contact the hotline about a roadmaster's inappropriate behavior. Claimant's discipline is based on speculation and sends a message to other employees not to report concerning behavior. Claimant was clear that he did not set anyone up for termination nor was he planning to pursue any action against any roadmaster. The Organization contends that Claimant did not violate any rules and took no part in the reporting or investigation of the Roadmaster in question, and as such, his claim should be sustained.

We do not find the parties' procedural arguments compelling and thus proceed to the merits of the case. We have reviewed the record in its entirety and find that the Carrier has failed to provide substantial evidence of Claimant's guilt. Despite testimony that statements were gathered from other employees, the Carrier provided no other evidence of the existence or content of the alleged statements. The Carrier rests its entire case on Claimant's borderline-vague statement that he "might have said something about" what he would do if there was a Roadmaster he did not like. A mere implication that Claimant may have used an obscenity in reference to a hypothetical supervisor that he dislikes does not constitute substantial evidence of his guilt; thus, we sustain the claim.

AWARD

Claim sustained. Claimant shall be made whole for any losses in accordance with the parties' Agreement, and all references to this discipline shall be stricken from his personal record. The Carrier is ordered to comply with this Award within 45 days.


DAN NIELSEN
Neutral Member


LOGAN MCKENNA
Carrier Member


JEFFERY L. FRY 03/24/2025
Organization Member

Dated this 24 day of March , 2025.