

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5905
AWARD NO. 53, (Case No. 53)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION – IBT RAIL CONFERENCE**

vs

GARY RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Ryan Hidalgo, Employee Member
Lauren K. Hart, Carrier Member:

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

1. The suspension of Mr. J. Martinez for violation of U.S. Steel Code of Ethical Business Conduct Principle 2, U. S. Steel Prevention of Workplace Violence Policy, Maintenance of Way Safety Rules 1.14, 1.15 and 1.52 in connection with allegedly entering into a verbal confrontation with a coworker and conducting himself in a careless, discourteous, quarrelsome, unprofessional and/or harassing or threatening manner toward another coworker is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File A 11 25 14/GW-32-14 EJE).
2. As a consequence of the violation referred to in Part 1 above, the Organization requests that Claimant J. Martinez be exonerated of all charges in accordance with Rule 57(c) and be reimbursed for all wage loss sustained as a result of the Carrier's action. Claimant J. Martinez should have his record cleared of all charges and not affected by this decision."

FINDINGS:

Public Law Board No. 5905, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

The undisputed facts indicate that on September 17, 2014, Claimant was employed as a Trackman on a Maintenance of Way track crew in the U.S. Steel, Gary Work Plant. It was alleged that at approximately 2:30 p.m. on the aforementioned date Claimant threatened another coworker without being provoked. Because the Carrier believed there could be validity to the allegations which were of a serious nature the Carrier brought charges against the Claimant.

On September 22, 2014, Carrier notified Claimant to appear for a formal Investigation on September 26, 2014, concerning in pertinent part the following charge:

“...to develop all facts and determine your responsibility, if any, in connection with the following charges, wherein you allegedly:

- 1. Entered into a verbal altercation with a coworker.**
- 2. Conducted yourself in a careless, discourteous, quarrelsome, unprofessional and/or harassing or threatening manner toward other coworker.**

These actions are alleged to have occurred on September 17, 2014 at about 2:30 p.m. and may be in violation of the U.S. Steel Corporation Code of Ethical Business Conduct Principle 2, U.S. Steel Prevention of Workplace Violence Policy, Maintenance of Way Safety Rules 1.14, 1.15 and 1.52.”

On October 3, 2014, Claimant was notified that he had been found guilty as charged and was assessed a 30 day suspension with required attendance to Anger Management Training Class.

The Board notes the instant case is a companion case to Case No. 52 which involves the same Claimant and is a disciplinary dispute involving similar behavior and Rules that resulted in a dismissal that occurred after the subject dispute.

Relevant Carrier Rules that are pertinent to this dispute are as follows:

1.14: Civil, courteous and socially acceptable conduct is required of all employees in their dealings with the public, their subordinates and each other. Boisterous, profane, vulgar or abusive language is forbidden. Employees must not enter into altercation with any person, no matter what provocation may be given, but will make note of the facts and report to their immediate superiors.

1.15: Employees who are insubordinate, dishonest, immoral, quarrelsome, or otherwise vicious, or who are careless of the safety of themselves or others, or who do not have, or fail to exercise, good judgment will not be retained in the service.

1.52: Scuffling, fighting, horseplay or playing jokes on fellow employees will not be tolerated. Violation of any part of this rule is sufficient cause for dismissal.

Additionally, there are two corporate policies that are pertinent to this case which are U.S. Steel Corporation Code of Ethical Business Conduct Principle 2 and U.S. Steel Prevention of

Workplace Violence Policy which will not be reiterated, but were attached as Carrier's Exhibit C and are incorporated as part of this Award.

It is the position of the Organization that there is nothing in the record that substantiates the Claimant made any threats towards a coworker on September 17, 2014, as there were no witnesses to the alleged incident. It argued the transcript established that the Claimant maintained that he did not threaten a coworker, Mr. Demmond, at any time on the date in question despite Mr. Demmond's contentions otherwise. It further argued the record shows that Claimant and Mr. Demmond offered contradictory testimony regarding the alleged incident at the Claimant's Investigation. According to it, the Carrier based its decision to suspend the Claimant, upon the testimony of a sole witness (i.e., Mr. Demmond) who the Claimant testified might have had a grudge against the Claimant (See page 12 of the transcript). The Claimant suggested that Mr. Demmond might have fabricated the incident in retaliation for the Claimant having reported to management that on two occasions Mr. Demmond left his work truck in a filthy condition for the next shift. The Organization concluded by requesting that the suspension of the Claimant be rescinded and the claim be sustained as presented.

It is the Carrier's position that it properly suspended the Claimant and the discipline was appropriate. It argued that the record shows that on September 17th the Claimant was walking through the Virginia Street Tunnel to start his shift, wherein he confronted Mr. Demmond and verbally threatened him. It asserted that the Claimant told Mr. Demmond he would "kick his ass" and referred to him as a "bitch". It further argued that the 30 day suspension with required attendance by the Claimant to Anger Management Training Class was lenient considering the fact that the infraction was very serious and was a potential standalone dismissible offense. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and determined that the Investigation was held in compliance with Rule 57(a). The claim will be resolved on its merits.

The Carrier has an obligation to do everything in its power to discourage and prevent violence in the workplace and ensure that its employees are not subjected to a hostile work environment. With that responsibility comes the equally important requirement that the Carrier must meet its burden of proof regarding an accusation that an employee's behavior has contributed to a hostile environment.

The Claimant's defense in the instant matter is essentially the same defense that the Claimant offered in his dismissal dispute, Award No. 52, Case No. 52, namely that his coworkers

were not telling the truth with the additional argument that the witness against the Claimant might have had a grudge against him.

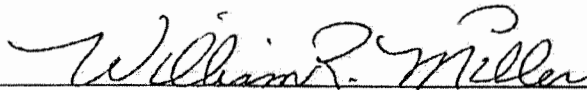
At the Investigation, one witness, Claimant's accuser, testified against the Claimant regarding the alleged incident and his accusations of the Claimant's alleged behavior were not corroborated by any other witnesses. Claimant denied those accusations. The Board is faced with a case wherein two employees have offered widely different versions of the same incident with no proof offered by either employee as to which version of the incident was correct. Additionally, no evidence was offered as to why the Board should place greater credence in one employee's testimony over the other employee. In a similar disciplinary dispute, Third Division Award No. 32890, the Board stated in pertinent part:

"The Board has thoroughly reviewed the record in this case. In sum, the Board finds that the Carrier has not carried its burden of persuasion, which is a particularly heavy one in the case of dismissal. The record contains a direct conflict of testimony between Claimant and Carrier's primary witness against him, with no supporting testimony for either position. In such a situation, where the contradictory evidence can truly be said to result in a "net wash", the party with the burden of persuasion – in this case the Carrier – must lose. Accordingly, the instant claim is sustained."

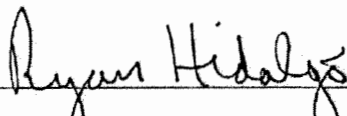
The reasoning set forth in the aforementioned Award is directly on target with the subject dispute and will be followed. The Board has determined that the Carrier did not meet its burden of proof, therefore, the Board finds and holds that the Claimant's suspension is rescinded and the Claimant will be made whole in accordance with Rule 57(c) for his wage loss.

AWARD

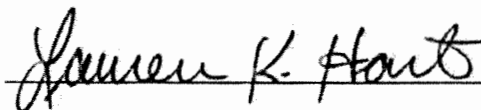
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman & Neutral Member



Ryan Hidalgo, Employee Member



Lauren K. Hart, Carrier Member

Award Date: 10-5-17