

PUBLIC LAW BOARD NO. 6302
CASE NO. 239

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline (dismissal) imposed on Claimant W. Clark, Jr. by letter dated December 23, 2011 for alleged violation of General Code of UPRR Rule 1.6 Conduct (3) Insubordinate and UPRR Workplace Violence Policy was without just cause, arbitrary, unwarranted and in violation of the Agreement (System File D-1248U-201/1564544).

2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove this discipline from Claimant W. Clark, Jr.'s record and compensate him for all losses, including wages, benefits, seniority rights and any other losses suffered as a result of the Carrier's improper discipline.”

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant, a 30 year employee, was working as a Welder Helper on Gang 8572 on November 4, 2011 when one of the gang members raised a Good Faith Safety Challenge

at the beginning of the shift, resulting in an incident occurring between Claimant and Manager Farrar. Claimant was removed from service pending investigation and received a Notice of Investigation (NOI) dated November 15, 2011 charging him with insubordinate behavior when he displayed aggressive actions and disrupted a meeting on the bus between the Manager and gang members and made threats towards the Manager and Foreman. An Investigation was conducted on December 7, 2011 and, by letter dated December 23, 2011, Claimant was found guilty of the charges and in violation of Rule 1.6 Conduct (3) Insubordinate, and the Carrier's Workplace Violence Policy, and was assessed a Level 5 dismissal. This claim protests the imposition of that discipline.

The evidence at the Investigation reveals that Manager Farrar was called away from his normal duties to come to the bus containing the gang members to deal with a safety issue that had not been resolved by the Foreman and Supervisor to the employees' satisfaction. The Foreman, Supervisor and Assistant Foreman, as well as the employee making the safety challenge, were not on the bus with the other gang members when the Manager entered. He asked what it was about and was told what was occurring by various gang members, voiced his opinion in support of what the Foreman had done, which did not sit well with many gang members who continued a heated discussion. Claimant, who was known to Carrier and all of the gang members as a Vietnam Veteran who suffered from PTSD, began to experience the signs of an oncoming anxiety attack due to what he felt were lies and a bad attitude exhibited by the Manager, and went to the front of the bus informing the Manager that he needed to leave the bus. Claimant explained that this was a coping mechanism he had been taught in a class that Carrier sent him to as well as in EAP, and that he was to remove himself from the stressor as soon as possible before his anxiety got out of hand, which he was attempting to do by trying to exit from the bus. Manager Farrar claimed not to have any knowledge of Claimant's PTSD condition, and admitted standing in the aisle and blocking Claimant's path and

repeatedly telling him to sit down, as he felt that the gang had called him there and they all had to listen to the discussion until it was completed.

Manager Farrar testified that Claimant was getting agitated, and came toward him at the front of the bus, he put up his hand in front of him like a stop sign, and Claimant made contact with his hand and then got completely out of control, stating out loud that he was pushed or touched by Farrar and that he was going to call someone. Farrar stated that he felt it was time to get Claimant off the bus, but he refused to leave, and Farrar informed him that he would contact a Special Agent and have him removed. Farrar testified that Claimant made a whole bunch of random statements and threats to rip his "M..F...ing" head off if he touched him again, and that Farrar left the bus and, while making contact with the Special Agents, saw Claimant leave the bus with the Supervisor. None of the 6 employees who were on the bus and testified at the investigation indicated that they heard Claimant make any threats, and all stated that it was clear that Claimant just wanted to get off the bus to cool down but Farrar refused to let him do that, repeatedly telling him to sit down. Their written statements submitted at the time of the incident confirm their testimony.

Supervisor Larson testified that he got on the bus after Farrar left and Claimant remained, that Claimant made some threatening comments in relation to what he was thinking about doing to Farrar and told the Foreman Humpherys, who had approached to talk to Claimant, that he was next. Larson stated that he tried to calm Claimant down, told him he could make his phone calls, and eventually let him leave the bus and had another employee make sure he was safe when walking about. Larson told Claimant he was removed from service for having a confrontation with a Manager and Claimant left the property as instructed.

Claimant testified that he tried to explain to the Manager that he needed to get off the bus, but that Farrar poked him and said to sit down, that he felt that he had been manhandled but tried very hard to control himself in the manner he had been taught, and did not respond aggressively or inappropriately. He stated that he did not threaten anyone, that he was not violent, and that it was an urgent situation and an emergency for his own and others' safety that he get off the bus when he felt the trigger to his anxiety occurring. Claimant acknowledged that all of his other supervisors, including Larson and Farrar on previous occasions, had accommodated him and let him cool off by removing himself from the situation for a time, but that on this occasion Farrar's ego did not permit him to back down, and the situation unfortunately escalated. Claimant testified that he accepts the consequences when he does something wrong, and doesn't fault others, but does not feel that he was at fault in this situation and was only reacting the best way he had been taught to a stressful situation, never intending to be disrespectful or insubordinate.

Carrier argues that there were no procedural errors in the conduct of this Investigation, Claimant received all due process rights, and there is substantial evidence in the record to support the charges that Claimant was insubordinate and threatened his Manager and Foreman. It notes that the Level 5 dismissal is warranted based on the severity of the infraction and is in compliance with its UPGRADE policy.

The Organization contends that Carrier failed to meet its burden of proving the validity of the charges against Claimant. It maintains that Carrier did not refute its contention that it failed to prove a violation of the Workplace Violence Policy on the property once the issue was clearly raised, and the record does not support a determination of guilt. The Organization argues that Carrier did not establish that Claimant was insubordinate, but that he noticed signs of an oncoming anxiety attack and tried to exit the situation in the coping mechanism taught to him at EAP. It points out that Carrier and all gang members were well aware of Claimant's PTSD sustained as a result

of his service in Vietnam, had accommodated him by permitting him to remove himself from the situation when necessary in the past, and that his request to do so at this time by exiting the bus was not unreasonable under the circumstances that he found himself in.

The Organization asserts that it was the Manager's actions in repeatedly physically preventing Claimant from exiting the bus that exacerbated the situation and placed Claimant in an untenable position, resulting in the exchange between them. It relies on the numerous mitigating factors including Claimant's length of service, known medical condition, the fact that he was hard-working and well liked, the absence of a prior disciplinary record, and the uniqueness of the circumstance which was exacerbated by the Manager's inappropriate response to Claimant's repeated requests to leave the bus as bases for finding that the dismissal penalty was too harsh and did not serve a rehabilitative purpose, citing Third Division Awards 21760, 26584.

A careful review of the record convinces the Board that Carrier failed to meet its burden of proving, by substantial evidence, that Claimant violated the Workplace Violence Policy. It is noted that Carrier never addressed the Organization's evidence in support of its contention that no threats were uttered or heard on the property in any of its denials. The fact that Farrar and Claimant found themselves in a situation where tempers were flared may well have accounted for the types of things said or heard during heightened sensitivities. It was clear that Farrar believed that Claimant was completely out of control at the time he attributes him making threats, which were not overheard by anyone on board the bus and vehemently denied by Claimant. Larson indicated that the statements Claimant said in his presence were about what he felt like doing to Farrar, and were not directed at Farrar himself, who was not on the bus at the time. Claimant telling the Foreman (who was attempting to approach and speak to him when he was trying to gain control of himself) to stay away and that he was next, were not uttered in a manner that could be considered threatening. At that time, Supervisor Larson made clear to

Foreman Humpherys to allow Claimant space and to let him leave the bus. Larson commented that his concern was for Claimant's safety, not his own.

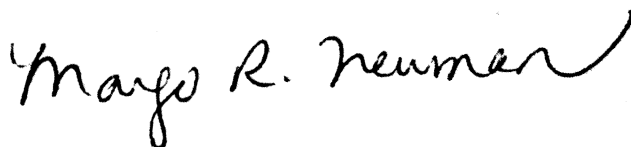
With respect to the allegation of insubordination, while what occurred from Farrar's perspective - Claimant's continued refusal to obey his reasonable instructions - could well meet the technical definition of insubordination, the record makes clear that everyone who was present during the incident on the bus, with the exception of Farrar, understood that all Claimant was trying to do was remove himself from the situation to cool down, which was the accepted way for him to deal with anxiety attacks. Farrar clearly did not appreciate that Claimant was expressing a medical need to have some space, although most witnesses recall him saying that he wanted to get off the bus to cool down. Carrier does not dispute it had knowledge of Claimant's medical condition, or the appropriateness of his attempting to exercise a coping mechanism by trying to exit the bus, but relies on the fact that it was reasonable for Farrar to give him the instruction to remain. Under the particular circumstances of this case, the evidence fails to support the conclusion that Claimant's persistence was intended to challenge Farrar's authority or show disrespect to him by refusing to comply with his instructions, and, therefore should not have been considered to fall within the coverage of Rule 1.6 (3) Insubordinate Conduct. However, Claimant was not without fault in this confrontation, as he did not make clear to Farrar at the time that he was trying to avoid an anxiety attack by removing himself from the bus, and did later utter, what would otherwise be considered, threatening statements.

In any event, the Board concludes that, in assessing the penalty of dismissal in this case, Carrier failed to take into account the myriad of undisputed mitigating factors that existed and were repeatedly pointed out by the Organization at the hearing, and in its correspondence on the property. For all of these reasons, we find that the penalty of dismissal was excessive and arbitrary. See, Third Division Awards 21760, 26584. Since

Claimant has since retired from service, we direct that his record reflect that his dismissal was overturned and that a 60 day suspension was substituted in its place, and that he be made whole for lost wages and benefits associated with the period between 60 days after his dismissal and the effective date of his retirement.

AWARD:

The claim is sustained in accordance with the Findings.



Margo R. Newman
Neutral Chairperson



K. N. Novak
Carrier Member



Andrew Mulford
Employee Member

Dated: 9-17-14

Dated: 9-17-14