

PUBLIC LAW BOARD NO. 7633

Brotherhood of Maintenance
of Way Employees Division - IBT

and

Union Pacific Railroad
(Former Missouri Pacific Railroad)

Case No: 049
Award No: 049

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline (dismissal) imposed on Claimant J. Pierce, by letter dated November 19, 2014, for alleged violation of General Code of Operating Rules (GCOR) Rule 1.6, Conduct, (4) Dishonest, (5) Quarrelsome and (7) Discourteous, as well as the part that reads, ‘... *Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated...*’ (Emphasis in original) (Employees’ Exhibit ‘A-1’) and the Violence and Abusive Behavior in the Workplace Policy was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP521JF14/1617358D MPR).
2. As a consequence of the violation referred to in Part 1 above, the Carrier shall now dismiss all charges, remove the discipline from Claimant J. Pierce’s record, compensate Claimant for all time lost (straight and overtime), immediately return Claimant to service immediately and grant all other relief as contemplated under Rule 22(f).”

FINDINGS:

Public Law Board No. 7633, upon the whole record and all the evidence, finds the parties involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction of the dispute herein; the parties were given due notice of hearing before this Board and they participated therein.

The Claimant was disciplined pursuant to a Notice of Investigation dated October 23, 2014, and an Investigation held on November 6, 2014 “to develop the facts and place responsibility, if any, that while employed as Truck Operator on Gang 9156, on October 14, 2014, through October 16, 2014, you allegedly engaged in harassing, hostile and quarrelsome behavior when you repeatedly called multiple Carrier officers. In addition, you were allegedly dishonest when speaking with Carrier officers and threatened violence against other employees. . . .”

In a discipline letter dated November 19, 2014, the Carrier found that “more than a substantial degree of evidence was presented to warrant sustaining all charges brought against you for this violation. Your actions are found to be in violation of Rule 1.6 Conduct, (4) Dishonest, (6) Quarrelsome, and (7) Discourteous, and the part that reads, *“Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated,”* as contained in the General Code of Operating Rules, effective April 7, 2010, and Violence and Abusive Behavior in the Workplace Policy, revised March 15, 2014. Under the UPGRADE Progressive Discipline Table, this violation requires the assessment of LEVEL 5, which is permanent dismissal. Therefore, your record, as of this date, has been assessed a LEVEL 5 violation of the UPGRADE Discipline Policy and you are hereby dismissed from the service of Union Pacific Railroad Company.”

The Organization appealed the discipline and the Carrier denied the appeals. The dispute was not resolved during a settlement conference and progressed to arbitration. This matter is now before the Board for final and binding resolution. The Board has carefully reviewed the entire record in this case, including the arguments and awards provided in support of the parties’ respective positions, whether or not specifically addressed herein.

The Board finds the Organization’s procedural objections unpersuasive. The Board does not condone the Hearing Officer’s decision to have the Organization designate just one of the two representatives present, “to speak so that I’m dealing with one set of questions”, despite the Hearing Officer’s invitation to the Organization to “feel free” to take recesses to confer. This being said, the Board notes that both Organization representatives (and Claimant) were present at the Investigation, were not restricted from conferring with the Claimant or each other, and did not

request any recesses to confer. But, to be clear, this Award does not stand for, and shall not be cited for, the proposition that the Hearing Officer's decision in this regard was authorized by the Agreement. Under the unique facts and circumstances of this record, including Claimant's proven egregious misconduct, it did not constitute prejudice or lack of due process.

Claimant was hired on April 1, 2013. On October 13, 2014 Claimant worked half an hour of overtime cleaning his truck. It is undisputed this overtime was not approved in advance. The next morning (October 14, 2014) Claimant's Manager, R. Diazdeleon, spoke with Claimant about the previous day's truck-cleaning overtime. Claimant contends that during this conversation he was berated by the Manager, and cursed at and yelled at by him. The Manager denied the accusations. Claimant reported the incident. He did not agree with how his report was handled. He reported the incident and its handling further up the Carrier's chain of command. Claimant's conduct while doing so is the basis of the discipline leading to this hearing.

In doing so, from the incident through October 16, 2014, Claimant made a total of 89 telephone calls to five (5) Carrier officials, as well as to some Executive Assistants. The record contains substantial evidence that while doing so Claimant was aggressive, argumentative, belligerent, confrontational, disrespectful, harassing, and threatened to continue to harass. Claimant continued to make such telephone calls even after being warned by Carrier officials and Texas law enforcement officers. Additionally, the record contains substantial evidence that while doing so Claimant made a credible threat to go "old school" by using a baseball bat on railroad managers and supervisors.

Among the salient testimony regarding these telephone calls, found in the Investigation to be credible, are:

Testimony of Assistant Vice President of Engineering, P. A. Danner:

I followed up with Mr. Pierce. It was a little after 8:00 p.m. that same day. At the start of the call, Mr. Pierce said that he was drinking beer and much calmer now. The call started out calmer, but pretty quickly Mr. Pierce became belligerent and it got worse as the call went on. You know, he said he absolutely wasn't gonna come back to work unless the supervisor and manager were fired. He also wanted to

receive a bump or walk off there's really no provision for that in the agreement. . . . He called me again at 9:29 p.m., 9:31 p.m., 10:00 p.m. At 11:07 p.m., I picked up the call. I let him know that it was far too late for him to be calling me and I reminded him I said I'd call him in the morning. . . . On the 14th, I called Mr. Pierce once. I called him and then promised to follow up. It was 8:24 p.m. that day. He had called me multiple times. I don't have an exact count for the 14th. It was a half dozen or more. . . . [It] really ramped up the next day though. . . . But I got calls at 8:58 a.m., 9:17 a.m., 9:43 a.m. I was in meetings. I took the call at 10:18 a.m. It was about a 20-minute call. I told him follow-up questions ought to go to Louis Martinez, the Director, because I know he didn't want to work with his manager. I was directed into talking to Occupational Health-Nurse to get instructions on how to get cleared fit for duty. . . . He, again, tried to talk me out of investigation. I let him know that we were required to do this. He uh-He told me-He was kind of trying to bargain with me saying, hey.- he offered he would, quote, call it all off, stop harassing people and calling if we would give him this bump. And he kind of changed now from wanting the supervisor and manager fired to getting them training. And he threatened to sue, talked about having great lawyers. It was-It was really a very aggressive, belligerent tone he was taking. . . . I was aware he had been badgering the executive assistants and I followed up with them, and that is when I learned that morning Mr. Piece had lied to Nancy Brantley, the executive assistance to the CEO. He had told her, you know, quote, no one called me [him] back. And this is, in my opinion, his attempt to get through her to get to the CEO. He was ultimately successful getting through the CEO, but keep in mind, Jay Gilliam called him back, Mark Jones called him back, and I called him back. . . . The uh-The calls that-Keep in mind, I'm not the only one getting called. Lots of folks are getting called and-and harassed here. I kept getting called. At 5:45 p.m., I took the call. The police had been sent to visit Mr. Pierce, explained to him it was against Texas law for him to harass folks with calls like he was doing. His reaction was to call me at 5:45. I took the call. I specifically told him at this point his calls had reached the level of harassment. He should not call me anymore. His response was that having police visit him was harassment. He threatened to continue calling. He said he'd call anytime he wanted. He re-He continued to call 5:56 p.m., 6:26 p.m., 9:08 p.m., 9:21 p.m. twice, 9:22 p.m., 9:24 p.m., 9:25, 9:29, 9:32. I got 19 calls in total on 10/15 alone. Ten of those calls were after I specifically told him the calls were harassing and-and the police had told him the same, so-But to me, 7:15 was when we had dishonesty. We had a significant level of harassment and-at least specifically on the calls that I received. . . . I actually was working in between meetings and on my layover of my flight

to try to get to the bottom of things. I was trying to find a way to get Mr. Pierce back to work. It was really-That changed when I learned he lied to Nancy. You know, I was willing initially to say well, he's-he's upset, I understand that, but then it just kept getting worse and worse. And you know, dishonesty is a one strike and you're out. I mean, that's an ethics thing. But that was-things for me changed dramatically late to-late the morning of the 15th from learning that.

Testimony of Director of Track Programs, L. Martinez:

On Tuesday, October 14th, I received a call from Manager Donny Juneau. Mr. Juneau called and was-notified me that he was looking at removing Mr. Pierce from service for a fit for duty evaluation. Thereafter this took place, and this was also on Tuesday, October 14th, I received seven calls from Mr. Pierce between the times 4:00 p.m. and 7:03 p.m. Central Standard Time. I answered two of Mr. Pierce's calls, one at 4:00 p.m. and also the one at 10:03 p.m. The 4:00 p.m. call was a short discussion due to being on an airplane. The 10:03 call lasted for approximately one hour. . . . This continued the following day, Wednesday, October 15th. I received 25 calls from Mr. Pierce between 7:58 a.m. and 9:58 p.m. And thereafter, on Thursday, October 16th, 2014, I also received an additional two calls from Mr. Pierce. Every call-Well, in total, I received 34 calls. I answered three of the 34 calls within a 48-hour timeframe. All three discussions had the same tone. Mr. Pierce was very confrontational, he was very argumentative, would not listen, and was very disrespectful. He had a lot of threatening tones. He threatened our jobs. He threatened with lawsuits and also threatened-threatening with physical retaliation. . . . The one physical retaliation threat, at the specific time it was made that he would use a baseball bat on all railroad supervisors and managers. And that came in place, he said, because the HR group doesn't do their job. The-And he feels he just needs to go back to old school, and by going back to old school, he would take-he said just take a baseball bat and use that on all railroad managers and supervisors. . . I considered that to be a credible threat.

Claimant disputes much of the above and other testimony regarding what happened, including the alleged tone and content of the Carrier-answered calls among the 89 telephone calls he made. Additionally, both Claimant and Manager Diazdeleon (with whom the underlying truck-cleaning-overtime-discussion incident occurred) testified at the Investigation. Thus, this case hinges almost entirely on witness credibility.

It is well-settled law that the Board does not have *de novo* jurisdiction. Rather, it sits in review. Witnesses testify at the Investigation, not at the Board. Therefore, credibility determinations are made by the Investigation Hearing Officer, on the property. The Board generally does not overrule Hearing Officer credibility determinations, unless they are not supported by the record. The Board has thoroughly reviewed the record and finds the Hearing Officer's on-property credibility determinations are supported by the record. The Board notes that the Carrier's witnesses withstood thorough and rigorous cross-examination by the Organization.


The record contains substantial evidence overcoming Claimant's defenses: that he was removed from service in retaliation for reporting an incident of alleged inappropriate conduct by a supervisor up the chain of command; that he was understandably frustrated, and concerned over loss of job and income; that his hearing deficit causes him to struggle to communicate, leading to his being misunderstood during this incident, particularly on the telephone; that his nerves may have made him speak in an off color manner; that his "going back to old school" and "take a baseball bat to all railroad supervisors and managers" comments were not serious and were misunderstood to be threats; and that he did not engage in any behavior which constituted a threat or qualified as workplace violence.

Even assuming, *arguendo*, that Manager Diazdeleon spoke to Claimant in a tone and manner that no supervisor or manager should speak to an employee, the record supports the Carrier's position that same would not provide a sufficient basis to justify Claimant's proven egregious misconduct in response thereto. Especially by an employee with less than two (2) years of service who continued the egregious misconduct after warnings from Carrier officials and Texas law enforcement officers.

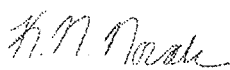
There is substantial evidence in the record to uphold the Carrier's discipline determination. The Organization's defenses are not persuasive. The discipline assessed by the Carrier was not arbitrary, capricious, or an abuse of discretion under the facts and circumstances of this record, and will therefore not be disturbed by this Board.

AWARD:

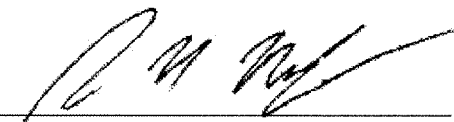
Claim denied.



Robert Grey
Neutral Member
Dated: 10/20/17



Katherine N. Novak
Carrier Member
Dated: 10/20/17



Andrew Mulford – I DISSENT
Labor Member
Dated: 10/20/17