

PUBLIC LAW BOARD NO. 7633

Brotherhood of Maintenance
of Way Employees Division - IBT Rail Conference

and

Union Pacific Railroad Company
(Former Missouri Pacific Railroad Company)

Case No: 061
Award No: 061

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline (dismissal) imposed on Mr. D. Wilson by letter dated October 9, 2015 for alleged violation of GCOR Rule 1.6 (Conduct) was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP540JF15/1640555 MPR).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Wilson must now be awarded ‘... the removal of the alleged violation of Rule 1.6 Conduct (6) Quarrelsome and that part vthat (sic) reads , ‘ Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or it's employees is cause for dismissal and must be reported . Indifference to duty or to the performance of duty will not be tolerated,’ Rule 1.12, Weapons, as contained in the General Code of Operating Rules, effective April I, 2015, and the Violence and Abusive Behavior in the Workplace Policy, revised March 15, 2015. and the removal of the Level 5, Discipline from the Claimant’s Personnel record, with all seniority unimpaired, to be and compensated for all lost time beginning August 22, 2015, through and including on a continuous basis until this matter is settled for the Claimant’s respective straight time rate of pay and all the overtime rate of pay that the Claimant would be compensated had he not been unjustly removed from active service of the Union Pacific Railroad, Vacation , Hospitalization , and any and all expenses the may have acquired to include meals, lodging, and mileage at the current negotiated rate of \$.57.5 cents a mile from the Claimant’s place of residence at 32 Buena Park Circle, Manvel, Texas 77578 to the Holiday Inn Metairie, New Orleans Airport 2261 North Causeway Boulevard, Metairie, Louisiana and returning the Claimant’s place of residence, causing him to be forced in a worse position, a loss of wages , work opportunity and causing him financial hardship.’ (Employees’ Exhibit ‘A-3’).”

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 September 4, 2015, Investigation held September 22, 2015, "to develop the facts and place responsibility, if any, while employed as Track Assistant Foreman on Tie Gang 9180, at Shreveport, Louisiana, near Milepost 390.3, Shreveport Subdivision at approximately 0730 hours, on August 21, 2015, you were allegedly engaged in a verbal altercation with another employee, and during the course of the altercation allegedly pulled a knife on the employee. These allegations, if substantiated, would constitute a violation of Rule 1.6 Conduct (6) Quarrelsome, 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," Rule 1.12, Weapons, as contained in the General Code of Operating Rules, effective April 1, 2015, and the Violence and Abusive Behavior in the Workplace Policy, revised March 15, 2015. Please be advised that if you are found to be in violation of this alleged charge the discipline assessment may be a Level 5, and under the Carrier's UPGRADE Discipline Policy may result in permanent dismissal. You are being withheld from service pending the results of this investigation and hearing."

In a discipline letter dated October 9, 2015, the Carrier found that "the evidence more than substantially supports the charges against you. The following charge has been sustained: While employed as Track Assistant Foreman on Tie Gang 9160, at Shreveport, Louisiana, near Milepost 390.3, Shreveport Subdivision, at approximately 0730 hours, on August 21, 2015, you were engaged in a verbal altercation with another employee, and during the course of the altercation pulled a knife on the employee. This is found to be in violation of the following rules and/or policies: 1.6: Conduct - Quarrelsome. Additionally, Rule 1.6: Conduct stipulates that 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. Effective immediately, you are hereby dismissed from all service with the Union Pacific Railroad.”

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 Organization argues that the Carrier’s notice letter was defective because it did not “apprise of the ‘precise’ identity of the person that Claimant was allegedly involved with in the course of committing these charged rule violations.”, and thus was not in compliance with Rule 22(c)(1). Rule 22(c)(1) requires that: “Prior to the investigation, the employee alleged to be at fault will be apprised in writing of the precise charges sufficiently in advance . . .” The Carrier’s notice letter did apprise of the “precise charges”, thus complying with Rule 22(c)(1). Additionally, there was never any doubt, nor dispute, about the identity of the other employee involved, from the time the incident occurred, through the date of the Investigation.

The Organization also argues that the Carrier failed to comply with the Rule 22(e) disciplinary decision time limit. Rule 22(e) requires the Carrier to “make every effort to render such decision within twenty (20) calendar days following the date the investigation is concluded.” The Investigation took place on September 22, 2015. The Carrier “rendered” its decision on October 9, 2015, less than 20 days later, thus satisfying the time requirement of Rule 22(e). The Board notes that also on October 9th, the Carrier mailed the decision via US Postal Service 2-day Priority Mail.

Turning to the merits, it is clear that the genesis of this incident was the other employee’s failure to comply with Claimant’s instructions, issued by Claimant as an Assistant Foreman. However, the Carrier proved by substantial evidence that Claimant was quarrelsome by intentionally engaging in, and then re-engaging in, verbal altercations with the other employee.

The Carrier also proved by substantial evidence that Claimant pulled a knife on the other employee during the course of the latter verbal altercation.

This case hinges in large part on witness credibility, particularly that of Claimant and the eyewitness member of the same Gang who testified at the Investigation. 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.

Additionally, Claimant admitted during his testimony at the Investigation that he engaged, and then re-engaged, in verbal altercations with the other employee. Among Claimant's salient testimony in this regard:

[the instigating employee] said . . . if he got off the machine, then he was gonna fight me. . . Well, he come down to where I was and he just- with the cursing at me and you know, one thing led to another and we just started going back and forth cursing each other and he asked me to step out to the road and we walked out there. It kept going on. He wanted me to pull hardhat and vest off. I told him it wasn't gonna make a difference whether I did or not and he turned around and started pulling his off and when he turned back around we started arguing again. Transcript p. 60, emphasis added.

. . .

Q Okay. So at this point in time, did your voices get elevated when you were out in the road?

A Yes, we were still yelling at one another.

Q Okay. You were- were you yelling or were your voices elevated because of the noise?

*A Well the noise was different from there. I mean, so we was still- I mean, **it was still a heated argument.***

Transcript p. 55, emphasis added.

...

Q Was the reason- what was the reason why you moved out to the road? Was it because of the noise?

*A No, **because he asked me to come out to the road.***

Transcript p. 53, emphasis added.

The record establishes that Claimant *knew* that the other employee wanted to engage in a physical altercation, and that that was the purpose of going “out to the road”. Claimant had a working radio, but did not call for a supervisor, or call RCC. Claimant did not disengage. Instead, Claimant voluntarily accompanied the other employee across three (3) sets of tracks to get to the road, knowing that a physical altercation was the other employee’s stated intent.

Regarding the knife, Claimant testified that he had the knife in his hand, down by his side, with the blade folded closed, with the intent to use it, albeit solely in self-defense, to protect himself from the other employee. There is no evidence, nor allegation, that the instigating employee had, or threatened to use, any weapon of any sort. It is undisputed that there was no physical contact at all, though the other employee was taking off his PPE and asking Claimant to do the same. Claimant testified he did not feel threatened, but did not want to get beaten up. Transcript p. 49. Yet Claimant – an Assistant Foreman -- accepted the instigating employee’s clear “invitation” to go “out to the road” in the first place.

Claimant was asked at the Investigation:

Q Earlier testimony it was said that Mr. Jones put his hands up saying put the knife away, put the knife away? Is there any truth to that?

A I don't know if he saw the knife or not. I mean, I had the knife down beside me.

Transcript p. 49.

The Board notes that Claimant did not directly answer the above question. Claimant also testified that, "A couple of the operators came out to stop what was happening." Transcript p. 61. One of these operators testified at the Investigation, and directly contradicted Claimant's testimony about the knife. This witness got to within approximately 25 feet of Claimant when Claimant was on the road. Among the salient Investigation testimony of this eyewitness operator, part of the same Gang, found by the Investigation to be credible, is:

Q Okay. And did you see a knife being pulled out?

A I didn't see it [being] pulled out, but as I was walking to the road to try to say hey, you know, let's settle our differences later and let's go to work, I did see Mr. Wilson with a knife in his hand and I also saw him close it and put it in his pocket shortly before Mr. Johnson [the supervisor] pulled up.

Transcript p. 34-35. Emphasis added.

...

Q Okay. Alright. Now whenever you first noticed the knife, it was in Mr. Wilson's hand, but did he have it next to or close to Mr. Jones?

A It was in his right hand and it was out in front of him. His arm was not fully extended. It was closer to his body. And Mr. Jones had his hands to his side about waist level; kinda like he was backing off from him and telling him to drop the knife and he told him that multiple times as he was backing away from him.

Transcript p. 34-35. Emphasis added.

...

Q When did you see this knife?

A I had got off my machine to walk over to the road to tell the two of them, you know, let's just back up and you know, whether they can settle it later or whatever, and I had got to where I was two tracks away from him, so approximately 20 to 25 feet.

Q Are you a- so that's 25 feet and you're saying you saw a knife?

A *Yes, sir.*

Q And you're saying that- according to your testimony, you said that **the blade was out?**

A *Yes.*

Q And you saw this from about 25 feet away?

A *Yes, sir.*

Transcript p. 40.

. . .

*As I was walking towards them like I said **I noticed the knife and Shawn** [Jones, instigating employee] **had said drop the knife and was backing away.** At that point I didn't feel it was safe for me to go get myself involved in the confrontation with the weapon, so that was when I turned around and went back to my machine and called Mr. Johnson [supervisor]- . . . -to get Mr. Johnson there-.*

Transcript p. 64-65. Emphasis added.

. . .

Q Okay. Now **is there a chance that the knife was in his hand closed?**

A *No.*

Q You **definitely saw the blade?**

A *Yes, sir.*

Q Okay.

A The blade was a different color than the handle and the blade was a bright shiny steel color and you could see the light on it.

Q Okay. And you don't think that there was a chance that you saw something reflecting or do you think that what you saw was absolutely the blade of the knife?

A I'm positive it was the blade of the knife.

Transcript p. 66. Emphasis added.

The Board does not find substantial evidence that the knife constituted a prohibited weapon in violation of Rule 1.12, in and of itself, or exceeded the 3" blade length permitted for use as a tool. The eyewitness' testimony in this regard was inconclusive, and the record evidence does not include the knife itself, or a measurement of its blade length.

In summary, though it was the other employee who refused to follow Claimant's work-related instruction, and who initially expressed the desire to engage in a physical altercation, Claimant's admitted conduct included knowingly and intentionally engaging and re-engaging in quarrelsome behavior with the other employee. This was quarrelsome behavior that Claimant could have disengaged from, and/or for which he could have called a supervisor or RCC with his working radio, but instead, Claimant knowingly accompanied the other employee "to the road". The Organization argues that calling a supervisor was not a viable option because the incident took place in a remote location. However, it is undisputed that the incident took place at the west end of the yard, and the supervisor arrived quickly on the scene from the east end of the yard – heading to the scene upon his own volition, immediately, when he "overheard on the radio a tail end of a heated argument." Transcript p. 25.

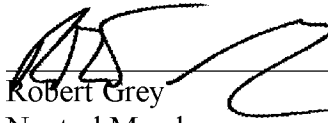
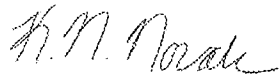
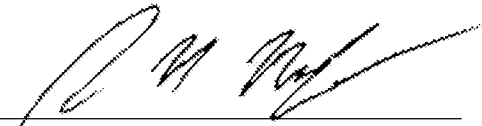
Moreover, Claimant's admitted conduct escalated an incident of unarmed verbal altercations into an incident of armed conflict, albeit without any physical contact or weapon contact taking place.

There is substantial evidence in the record to uphold the Carrier's discipline determination. The Organization's defenses are not persuasive. The Board notes Claimant's ten (10) years of employment with the Carrier, without similar previous discipline. However, the Carrier's concerns about such proven serious misconduct, in the nature of workplace violence, by *any* employee, and particularly by an Assistant Foreman, with an open knife displayed in his hand, are 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: March 20, 2018
Katherine Novak
Carrier Member
Andrew Mulford
Labor Member