

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: 067  
Award No: 067

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. W. Howell for allegedly engaging in a verbal confrontation resulting in an altercation on November 7, 2015 while assigned as a welder helper on Gang 9254 was without just and sufficient cause (System File UP549JF15/1645862D MPR).
2. As a consequence of the violation referred to in Part 1 above, Claimant W. Howell shall be allowed the remedy prescribed in 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 November 10, 2015, Investigation held November 17, 2015, “to develop the facts and determine your responsibility, if any, in connection with the below charge: On 11/07/2015, at the location of Houston, Texas, near Milepost 234.4, on the Houston West Belt, while employed as a Welder Helper on Gang 9254, you allegedly engaged in a verbal confrontation with another employee, resulting in an altercation. This is a possible violation of the following rule(s) and/or Policy: 1.6: Conduct Quarrelsome; 1.7: Altercation. 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. Under the MAPS Policy, this violation is a Dismissal event. Based upon your current status, if you are found to be in violation of this alleged charge, Dismissal may result.”

In a discipline letter dated December 4, 2015, the Carrier found that “the evidence more than substantially supports the charges against you. The following charge has been sustained: On 11/07/2015, at the location of Houston, Texas, near Milepost 234.4, on the Houston West Belt, while employed as a Welder Helper on Gang 9254, you engaged in a verbal confrontation with another employee, resulting in an altercation. This is found to be in violation of the following rule(s) and/or policy: 1.6: Conduct - Quarrelsome; 1.7: Altercation. 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 underlying facts of this incident are not in dispute. At the time and place of occurrence it was not unusual for the 20 or so Gang members to engage in non-malicious oral commenting, joking, “poking” or “ranking” with each other during similar down time situations. Claimant and Mr. Hudson were engaging in such “banter” or “shop talk” on the date in question. They had been roommates for approximately one month at this point. For reasons neither could remember at the Investigation, their discourse rose to the level of a single exchange of unwelcome, personally insulting comments, as follows: Mr. Hudson made such a remark to Claimant. The remark included the use of a common but vulgar word that both employees admitted in the Investigation was an unacceptable word to use in the workplace. Claimant responded with a similar remark to Mr.

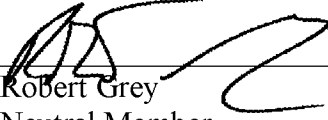
Hudson, including the same common but vulgar word in this reply remark. Neither remark was said in loud or threatening manner.

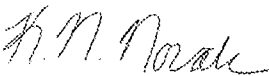
These two employees were not face-to-face, were not in each other's physical space, and neither was threatening the other. At the time, Mr. Hudson was sitting a row behind Claimant, who was also seated, with his back to Mr. Hudson. Claimant was looking down at his phone. Without warning, Mr. Hudson stood up suddenly, sending his chair sliding across the floor behind him. In an instant, Mr. Hudson reached over and punched Claimant, once, in the face, causing a laceration above Claimant's eye. Claimant remained seated and did not engage or respond in any manner to Mr. Hudson's physical attack. The Foreman quickly interceded and removed Mr. Hudson from the room without further incident.

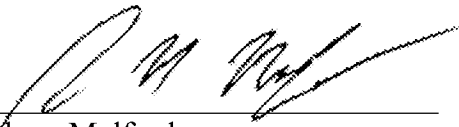
Under the facts and circumstances of this record there is no evidence to suggest that Claimant knew or should have known that his in-kind reply remark to Mr. Hudson's personally insulting remark would provoke a physical attack by Mr. Hudson. Nor is there substantial evidence that Claimant engaged in an oral confrontation or a physical altercation. There is substantial evidence in the record to uphold the Carrier's determination that Claimant's reply was quarrelsome, though the Board finds it was just barely so. The Board finds that termination is excessive under the facts and circumstances of this record. Therefore, Claimant is reinstated to service with full seniority unimpaired, but without back pay.

AWARD:

Claim sustained in accordance with the Findings.

  
Robert Grey  
Neutral Member  
Dated: March 20, 2018

  
Katherine Novak  
Carrier Member

  
Andrew Mulford  
Labor Member