

PUBLIC LAW BOARD NO. 7660

CASE NO. 4

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 Mr. C. Perea by letter dated February 25, 2013 in connection with allegations that he violated GCOR Rules 1.6 Conduct (1) and (6) Quarrelsome and Violence and Abusive Behavior in the Workplace when on January 29, 2013 he allegedly made a statement threatening bodily harm towards a fellow employee was without just and sufficient cause, unwarranted and in violation of the Agreement (System File D-1348U-305/1581644).

2. As a consequence of the Carrier’s violation referred to in Part 1 above, the Carrier must remove this discipline from Mr. Perea’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 is a 32 year employee who was working as a Signal Flag Foreman on Gang 9259 in Denver, Colorado, when he was removed from service on February 5, 2013 pending investigation on the charge that he allegedly made a statement threatening bodily harm toward a fellow employee. The Organization sent a letter in response to the Notice of Hearing requesting information concerning the specifics of the charge and identity of witnesses to be furnished prior to the hearing, as well as the attendance of a particular employee witness at the investigation. Both requests were not complied with. The Investigation was conducted on February 15, 2013, and, by letter dated February 25, 2013 Claimant was notified that he was found guilty of the charges in violation of Rule 1.6 Conduct (1) Careless of the safety of themselves or others and (6) Quarrelsome, as well as the Violence and Abusive Behavior in the Workplace Policy. Claimant was assessed a Level 5 dismissal in line with Carrier's UPGRADE Discipline Policy, and the Organization filed the instant claim protesting the discipline.

Carrier presented no witnesses at the hearing, and the Charging Officer testified in response to questions from the Organization, indicating that he had no knowledge of where the threat allegation originated, was directed to remove Claimant from service pending the outcome of the Investigation, and that Claimant never made any threats against anyone while on Company property. Carrier solely relied upon notes from a RMCC phone notification of a workplace violence report called in by Jefferson County District Attorney Criminal Investigator Rebecca Allanson on January 29, 2013, and her subsequent written letter dated February 13, 2013 submitted to Carrier's Special Agent. This letter indicates that Claimant was being charged with two unrelated felony counts and four misdemeanor counts, and voiced concerns about Claimant that the Investigator felt lent credibility to the victim's statement that Claimant made a threat to shoot a co-worker, which the Investigator admitted was "unsubstantiated." There was no identity of the victim or the circumstances of the "threat" and Investigator Allanson was not called to testify at the Investigation about the circumstances or her letter. Claimant denied making



any threats, and testified that all of the allegations against him were false. During the Investigation, the Organization made numerous objections about the conduct of the hearing, the multiple roles of the Hearing Officer, Carrier's failure to present any evidence either prior to, or at the hearing, and the fact that Claimant was removed from service prior to the hearing.

Carrier contends that Claimant received a fair and impartial hearing and all of the due process rights to which he was entitled under the Agreement. It maintains that hearsay is admissible in these type of proceedings, and there is no 6th amendment right to cross-examination outside of a criminal case, citing Public Law Board No. 4450, Award 15; Fourth Division Award 50281. Carrier asserts that there is substantial evidence in the record to support the charges, it has a Zero Tolerance Policy for threats in the workplace, and that the serious nature of Claimant's conduct required both his removal from service pending Investigation, as well as the imposition of the penalty of a Level 5 Dismissal, which is in accord with its UPGRADE Discipline Policy for a Rule 1.6 violation.

The Organization initially argues that the discipline should be dismissed without reaching the merits because Claimant did not receive a fair and impartial hearing or any due process, and that the hearing was a mere formality designed to uphold Claimant's previous removal from service rather than gather relevant facts, citing Fourth Division Award 1175. The Organization notes that Carrier's case is entirely built on hearsay, innuendo and speculation, and reliance in on an unsubstantiated statement, unproven charges and an unknown victim. It points out that the Hearing Officer did not make any effort to produce any witnesses who could substantiate the alleged threat made by Claimant, or provide the witness requested by the Organization, and refused to provide requested documentation or specificity of charges requested prior to the hearing.



As to the merits, the Organization contends that there is no evidence in the record substantiating the charges, the Charging Officer had no knowledge of the event precipitating the charges, and they relate to an incident occurring on a rest day when Claimant was nowhere near Carrier property. The Organization also asserts that Carrier has engaged in disparate treatment in this case, pointing to an incident where a Union officer was physically threatened with a knife by the Manager of Track Maintenance while at a company-sponsored event and Carrier did nothing to enforce its "Zero Tolerance Policy" against threats by taking any disciplinary action. It requests that the discipline be set aside and that Claimant be made whole for all lost pay and benefits resulting from the dismissal.

A careful review of the record convinces the Board that, even if we were to find that there was a fair and impartial hearing in this case, and that Claimant was afforded his right to due process at the Investigation, Carrier has failed to meet its burden of proving the charges by substantial evidence. In fact, there is no direct evidence that Claimant threatened to shoot a co-worker. Even the written statement relied upon Carrier to sustain the charges, without any explanation from its author, admits that such allegation is "unsubstantiated." It is not clear from the record the context within which the alleged threat was uttered, to whom, and under what circumstances. The parties' made reference to the fact that the Investigator who called in the report and wrote the follow-up letter was responding to a domestic violence situation, but the list of supposed charges being initiated against Claimant were not substantiated, nor were the Investigator's impressions of Claimant set forth in the letter in support of the credibility of the threat. While Carrier may rely upon hearsay evidence at an Investigation, it does so at its peril when it chooses to base a Level 5 dismissal decision solely upon such "evidence," especially in the face of first hand denials from Claimant. Under these circumstances, the discipline cannot stand. Carrier is directed to remove the dismissal from Claimant's record and compensate him for all lost wages and benefits resulting from it.



AWARD:

The claim is sustained.

*Margo R. Newman*

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Margo R. Newman  
Neutral Chairperson

*K. N. Novak*

K. N. Novak  
Carrier Member

*Andrew Mulford*

Andrew Mulford  
Employee Member

Dated: 10/3/14

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