

PUBLIC LAW BOARD NO. 7660
CASE NO. 15

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES

PARTIES
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY
[Former Southern Pacific Transportation Company (Western Lines)]

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s dismissal of Claimant R. Jaques by letter dated July 1, 2013, in connection with allegations that he was quarrelsome on May 8, 2013 and careless of safety of himself and others on May 14, 2013 was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File T-1345S-702/1590735 SPW).
2. As a consequence of the Carrier’s violation referred to in Part 1 above, the Carrier shall now remove any mention of the discipline from Claimant R. Jaques’ personal record, fully reinstate him along with all vacation, insurance and retirement benefits, along with compensation for all straight and overtime work opportunities missed as a result of the inappropriate 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 was a Utility Tractor Operator working as a backhoe operator on Gang 8959 in Eugene, OR, who entered service on April 19, 2012. The May 20, 2013 Notice of Hearing charges Claimant with being quarrelsome on May 8 and careless of the safety of himself and others on May 14, in violation of Rule 1.6 (1) & (6). The July 1, 2013 Notice of Discipline finds him guilty of the charges and assesses him a Level 5 dismissal. The instant appeal resulted.

The specifics of the charges were brought forward at the June 18, 2013 Investigation. On May 17, 2013 MTM Abbott was approached by the Foreman and co-workers of Claimant about their hesitancy to work with him due to his unsafe conduct. Investigation reveals that on May 8 Claimant was on a personal phone call in the truck when his Foreman asked him to put on the lookout vest and fill out the booklet, there was an exchange of words, and, when the direction was repeated and Claimant was told to get to work (while he was still on the phone), Claimant referred to his Foreman as an asshole, and wadded up the vest and booklet and threw them at his Foreman, hitting him in the face, and saying that he should fill it out. Claimant was directed to report what had occurred to MTM Abbott, but chose not to do so, explaining that he wanted to work things out with the Foreman himself, which he did through a later conversation and apology. Claimant testified that he was provoked by the Foreman's rude and loud comments attempting to disrupt a phone call that he had been expecting and permitted to take. Claimant stated that he was seated in the back passenger seat and threw the vest through the front truck window in the direction of the Foreman, but did not intend to hit him with it.

On May 14, while the gang was working changing rail, Claimant was asked to retrieve some bolts from the truck, which he did, and, according to both Track Laborer TJ and the Foreman, he threw the bolts in TJ's direction when he did not know they were coming, necessitating TJ moving out of the way quickly to avoid being hurt. While admitting that small tools and other track material (OTM) are sometimes tossed into an

area where they will be needed, the Foreman testified that the bolts were thrown too close to TJ's head to be viewed as anything other than Claimant throwing them at him, and TJ testified that they were thrown overhand, not tossed underhand. TJ did not believe that Claimant purposefully intended to hit him, which Claimant denied, but he and the Foreman felt that what occurred was a very unsafe act. After learning of the gangs' concern, MTM Abbott did not speak directly to Claimant, but discussed the matter with his Director, and it was decided to charge Claimant with these conduct violations.

Carrier argues that there is substantial evidence in the record to support the charge that Claimant was both quarrelsome with his Foreman on May 8, as well as engaged in an unsafe act that placed the safety of TJ in jeopardy on May 14, 2013. It notes that, while disagreements between employees and near misses as a result of an unsafe act may occur on the property, they are specifically listed as Conduct violations under Rule 1.6, which can lead to dismissal for a first offense due to their serious nature. Carrier maintains that Claimant is a short term employee, and that there are no mitigating factors present which would support the reduction of the penalty, pointing out that Claimant has had attendance issues in the past.

The Organization contends that both of the incidents proven in the Investigation are common place on the railroad, are not the type of actions contemplated by Rule 1.6 Conduct violations, and do not support the harsh dismissal penalty without progressive discipline. It asserts that the Foreman unnecessarily provoked Claimant by loudly interrupting a phone call he was permitted to take concerning an attempt to secure a car for transport to work, and that TJ admitted that he did not believe that Claimant was intentionally out to hit him with the bolts. Absent the necessary intent, the Organization argues that Carrier failed to prove a violation of Rule 1.6 in this case.

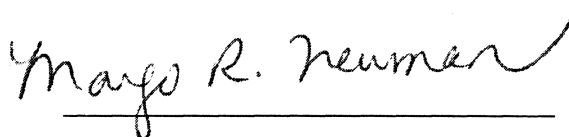
A careful review of the record convinces the Board that Carrier has met its burden of proving that Claimant was guilty of a violation of Rule 1.6 (1) Careless of Safety and (6) Quarrelsome. Claimant's disrespectful conduct and inappropriate action toward his

Foreman on May 8, by ignoring his requests to come to work and perform lookout duties, and his direction to report to his Manager after throwing the vest and booklet and hitting the Foreman in the face, cannot be classified as the type of normal disagreement that occurs between employees on a daily basis. Neither are they excused by what Claimant felt was provocation by the Foreman's loud and repeated interruption of his telephone conversation. Nowhere during the Investigation did Claimant state that he told his Foreman that he would perform the requested task as soon as he was finished with his telephone conversation, which he claims was his intention. Rather, he threw the equipment at his Foreman as further evidence of his refusal to comply with the work assignment.

The record also reveals that both the Foreman and TJ felt that Claimant's method of retrieving the requested track bolts and throwing them to the area needed, which was where TJ was located, was an unsafe act that was too close for comfort, and was not like the orderly tossing of OTM to an area where no one may be hit or injured. We are unconvinced that the fact that near misses do occur on the property, or that Claimant may not have intended to hit or harm TJ, minimizes the seriousness of dealing with materials in a careless manner that could have adverse safety consequences. Since these examples do meet the listed Rule 1.6 Conduct categories for which Claimant was cited and disciplined in accordance with the Level 5 penalty set out in the UPGRADE policy for Rule 1.6 violations, and no specific intent to harm is required by that rule, we cannot find that Carrier's assessment of a Level 5 dismissal to Claimant in these circumstances was arbitrary or an abuse of its discretion.

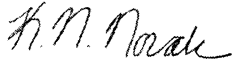
AWARD:

The claim is denied.



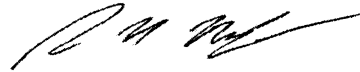
Margo R. Newman
Neutral Chairperson

Dated: 1/15/2016



K. N. Novak
Carrier Member

Dated: 1/15/2016



Andrew Mulford
Employee Member

Dated: 1/15/2016