

PUBLIC LAW BOARD NO. 7660
AWARD NO. 197

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) imposed upon Mr. J. Steed, by letter dated May 5, 2020, in connection with allegations that he failed to comply with Rule 1.6: Conduct - Quarrelsome; 1.6: Conduct - Discourteous; 1.7 Altercations; Item 10-I: Union Pacific Railroad Policies - Policy to Address Violence & Abusive Behavior in the Work Place - Dismissal and 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 was excessive, arbitrary, disparate, imposed without due process, without the Carrier having met its burden of proof, and in violation of the Agreement (System File JN-2048U-404/1737966 UPS).

2. As a consequence of the violation referred to in Part (1) above, Claimant J. Steed shall “***be made whole by returning Claimant to his former status, and compensating him for all wage and benefit loss suffered by him for his termination. We also request the alleged charges be expunged from his personal record.’ (Employees’ Exhibit A-2).”

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 has been employed by the Carrier for over 5 years and worked as a B&B Truck Driver on a 3-man gang at the relevant time. Claimant received a Notice of Investigation dated April 15, 2020, advising him that he was being charged with allegedly using vulgar and taunting language with his foreman and co-worker and exhibiting aggressive and hostile behavior against the co-worker on April 7 at the B&B shop in Ogden, UT. He was removed from service pending investigation on April 8. The Investigation was held on April 23, 2020, and Claimant was served with a Notice of Discipline Assessed dated May 5, 2020, finding him guilty of the charges in violation of Rules 1.6 Conduct - Quarrelsome & Discourteous; 1.7 Altercation; and the Policy to Address Violence and Abusive Behavior in the Work Place (SSI Item 10-1), and dismissing him from service. This claim protests such action.

The record establishes that Claimant was not at work on April 6, and was texted by his Foreman that the crew was going to work in Elko, Nevada the following day. When he reported to work on time at the B&B shop in Ogden, he was told that he was driving the other boom truck with the man basket to Elko (a 4 hour drive) and would operate it there in aid of a steel repair being performed. Claimant admittedly became upset, protested the assignment (as he did not feel comfortable with it), and started calling his Foreman various vulgar names including a manager cock sucker, back stabber, chicken shit and stupid. His co-worker intervened and said that Claimant did not have to talk to them that way. Claimant admittedly said what are you going to do about it, and,

according to the co-worker, followed him into the shop, stating that he feared that he was going to hit him. When the co-worker turned to face Claimant, the co-worker testified that Claimant threw his elbow into him hard enough to push him against the door. He testified that Claimant elbowed him again on his way out of the office. Claimant denied elbowing him, hitting him, or intentionally touching him, while admitting that he brushed up against the co-worker when they were both in the office doorway at the same time. No one witnessed the physical contact.

The co-worker went to his truck and called the Manager to report the physical contact and what had occurred. He admitted that he would not have done so were it not for the physical contact. The Foreman testified that Claimant walked toward the truck where the co-worker was sitting and talking on the phone, indicating that he would end it right now, and he said not to hit him. Instead, it is admitted that Claimant apologized to both the Foreman and co-worker and initiated shaking their hands to put the conflict behind them. There is no dispute that nothing else happened at the Ogden shop or during the work day at Elko. While the Manager reported to the job site there, he said nothing to Claimant about any inappropriate behavior or contact, and did not remove him from service. It was not until the following day, when the crew reported back to the Ogden shop, that each of the employees was interviewed, and gave written statements, and Claimant was questioned. Special Agent Davies was informed of a complaint of workplace violence, so that he was in the vicinity during the interviews and also conducted his own interviews to determine if there was probable cause (a 33% chance) to refer the matter of the contact to the prosecutor for a determination of whether to prefer charges. Davies testified that he found probable cause since it was admitted that some contact was made, but did not determine whether or not it was intentional.

At the Investigation, Claimant explained that his fiancée's mother was diagnosed with Stage 4 cancer the prior day, and that, when he got to the job site and was informed

that they were going to take equipment he was not familiar with to perform steel repair work which was not within his qualifications, he became upset and said things he later regretted. He did apologize at the time for his inappropriate actions, and felt that everything was resolved by the time the crew left the Ogden shop. He confirmed that no one ever spoke to him about workplace violence or his actions that day or the next, until they returned to the Ogden shop, when he was interviewed and taken out of service. Although he denied engaging in any workplace violence, he expressed remorse at his actions and a desire to continue his career with the Carrier.

The Carrier contends that it proved by substantial evidence that Claimant violated Rule 1.6 by being discourteous and quarrelsome with his foreman and co-worker, as well as Rule 1.7 and its Workplace Violence Policy when he elbowed his co-worker pushing him into the office doorframe. It asserts that it is admitted by both Claimant and Cutts that contact was made, and Special Agent Davies determined that there was probable cause to forward the case to the prosecutor to determine if the contact was intentional and merited moving forward with criminal charges. The Carrier argues that Claimant having a bad day does not excuse his behavior or the fact that he made physical contact with a co-worker after making abusive statements to him and his Foreman. It maintains that the appropriate penalty for these types of serious violations is dismissal, relying on Third Division Award 31910.

The Organization argues that Carrier failed to meet its burden of proving that Claimant engaged in any violent behavior in the workplace, or that he violated Rule 1.7. It asserts that Claimant was having a bad day due to personal issues discovered the day before, that he acted inappropriately by calling his Foreman and co-worker derogatory names, and, at best, was quarrelsome and/or discourteous. The Organization posits that Carrier did not act as if it was concerned that Claimant was a threat to anyone, as it proceeded to have him drive the truck and work with the crew the entire day and stay

overnight, and did not raise any issue with his conduct, or remove him from service, until the following day. It notes that Claimant apologized for his conduct and shook hands with the individuals involved before the crew headed to Elko, and there were no issues or incidents for the remainder of the day or the next day. The Organization contends that the discipline imposed was arbitrary and excessive under the circumstances, where Carrier failed to prove all of the charges and Claimant immediately showed remorse for his actions, and that its extremely harsh discipline was neither progressive nor corrective in nature, citing PLB 7660, Awards 14, 18, 20, 21 & 119.

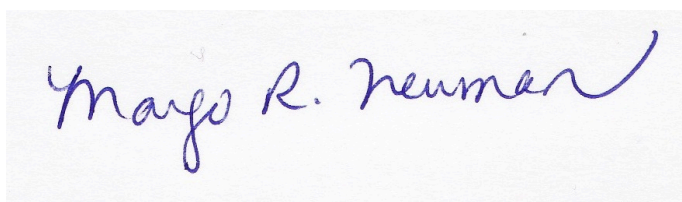
A careful review of the record convinces the Board that Carrier has met its burden of proving that Claimant violated Rule 1.6 Conduct - Quarrelsome and Discourteous - when he mouthed off at both his Foreman and co-worker, using vulgarity and taunting language. However, we are unable to conclude that Carrier established, by substantial evidence, that Claimant engaged in an altercation or workplace violence. The only two participants in the interaction had different stories, and, since the determination to assess discipline was made by other than the Conducting Officer, no assessment of credibility went into the conclusion that the charges were proven. See, PLB 6302, Award 144. Additionally, Carrier's officers did not act as if they feared that Claimant might engage in workplace violent behavior after his verbal confrontation, since they did not remove him from the workplace or even speak to him about the issue until the following day. Rather, they permitted him to continue to the work site and perform his assigned duties, admittedly without any issues.

There is no doubt that the charges of a physical altercation and workplace violence were a main factor in Carrier's assessment of the penalty of dismissal in this case. While Claimant engaged in appropriate workplace behavior in violation of Rule 1.6, there is no proof that he engaged in an act of hostility that would bring into play the final paragraph of that Rule. As was the case in Awards 20 and 21 of this Board, we find that that the

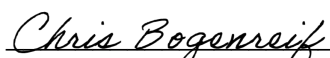
penalty assessed was excessive under the circumstances, and that there are factors present that militate against the dismissal penalty in this case, including the fact that there is no contention or proof that Claimant has shown himself to have any propensity to violence. Accordingly, we conclude that a lesser penalty should be substituted under the facts of this case. Claimant shall be returned to work with full seniority and benefits, but with a time served suspension substituted in place of the dismissal. Claimant shall receive no back pay in this case, and should take whatever steps are necessary to obtain the skills needed to deal with disagreements at work without resorting to verbal confrontations and potentially threatening comments.

AWARD:

The claim is sustained, in part. The Carrier is ordered to make the Award effective on or before 30 days following the date of the Award.



Margo R. Newman
Neutral Chairperson


Chris Bogenreif
Carrier Member


John Schlismann
Employee Member

Dated: January 18, 2023

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