

PUBLIC LAW BOARD NO. 7660
CASE NO. 20

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY
(former Chicago and Northwestern Transportation Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s dismissal of Claimant G. Miller by letter dated February 12, 2014 for alleged violation of GCOR 1.6 Conduct (6) Quarrelsome and Rule 1.7 Altercation was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File B-1419C-101/1603468 CNW).

2. As a consequence of the violation referred to in Part 1 above, the Carrier shall now remove any mention of the discipline from Claimant G. Miller’s personal record, fully reinstate him along with all vacation, insurance and retirement benefits and 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, a 15 year employee, was working as a Crawler Backhoe Operator on Gang 3181 in Northlake, IL on January 24, 2014. A Notice of Investigation dated January 28, 2014 was issued on charges that he exhibited forms of threats and violence on Friday, January 24, 2014. The February 12, 2014 Notice of Discipline finds Claimant guilty of the charges and in violation of Rule 1.6 Conduct (6) "Quarrelsome", Rule 1.7 Altercation, and the Violence and Abusive Behavior in the Workplace Policy, and assesses him a Level 5 dismissal. The instant appeal resulted.

At the commencement of the February 4, 2014 Investigation, Local Chairman Rumler made a procedural objection based upon the language of Rule 19(A), which provides, in relevant part, that Claimant will be given reasonable (two working days) notice of the charges prior to the hearing. The Notice of Hearing is dated January 28, 2014, was delivered to Claimant late in the day on January 29, and directed him to report for an Investigation to be held on January 31; the Organization did not receive its copy of the Notice until January 31. These facts led the Organization to request a postponement of the hearing until February 4, 2014, which was granted.

At the Investigation, both Supervisor Reynolds and Claimant testified as to their interaction on Friday, January 24 which formed the basis for the charge. Reynolds explained that he told the gang at the job briefing that his Manager informed him that they were going on 24 hour extreme weather coverage and he needed everyone to work, that Claimant said he would not work, and he told him they would discuss it after the briefing. According to Reynolds, he and Claimant went to his office, he asked him what was up and why he said he would not work, Claimant responded that he was not into it and had no energy, and Reynolds stated that he would call Manager Chase and they would speak to him because he gave the order for everyone to work. Reynolds testified that Claimant became upset, turned to leave, saying that he could not make him work

overtime and he did not have to talk to Chase with him, and he told Claimant that if he left he would be pulled out of service for failure to comply with instructions.

Reynolds testified that Claimant said “fuck you” and slammed the office door shut, causing a number of ceiling tiles to dislodge and fall to the floor and desk area. As Reynolds approached his office door, Claimant opened it from the other side, and they were in close physical proximity, with Claimant repeating that he could not be forced to work overtime or talk to Chase with Reynolds. Reynolds stated that Claimant was visibly upset, and he gestured for him to leave, with his hand outside his office door at a 45° angle, and repeated to Claimant that he should leave his office. According to Reynolds, Claimant stepped in, and with his left forearm pushed against his chest, with his right fist balled up at eye level, stating that Reynolds should not point at him, and he began repeating himself and cursing (“fuck you” and “suck my dick”) as he left the office. Reynolds reported the matter to his Manager, who called the RMCC and Northlake Police Department, each reporting and taking written statements from the participants. Claimant was removed from the property and arrested for battery, but was released when it was determined that the facts did not support the charge.

Claimant denied having any physical contact with Reynolds, while admitting that he did use the alleged profanity as he was leaving the office after the confrontation. Claimant recalled explaining to Reynolds that the reason he did not want to work the weekend was because he needed rest, but he was told it was mandatory. Claimant stated that after he told Reynolds that he would rather speak with Manager Chase privately, Reynolds slammed down the phone, came around the desk, and followed him as he left his office, saying something about being fired. Claimant testified that while they were face to face, they exchanged curses, but there was no pushing or shoving, and he left when he was told that he was through for the day and to go home. Claimant denied losing his temper, indicating that the discussion was civilized until Reynolds slammed down the

phone and insisted that they talk to Chase together. Reynolds admitted that the interaction was quick, not building over time, and indicated that he did not fear serious bodily harm, but was unsure if Claimant was going to hit him, as he was yelling and screaming and visibly upset.

One employee who was in the adjacent area submitted a statement that he heard two raised voices and Claimant cursing as he walked away from the office. Two other statements were submitted from gang members who stated that during the job briefing, Reynolds said that one person did not have to work on the weekend snow schedule because they had enough, and that Claimant stated that it was him. Reynolds denied making that statement.

The Carrier argues that the Claimant was afforded a fair and impartial hearing, and was granted a postponement to have sufficient time to prepare a defense to the charges, in compliance with Rule 19(A). It maintains that there is substantial evidence in the record to support the charges, since the Claimant was obviously quarrelsome when he refused to do the assigned work and threatened and pushed his supervisor, engaging in a prohibited verbal and physical altercation in violation of the Workplace Violence and Abusive Behavior Policy. The Carrier notes that Claimant admitted cursing at his supervisor, and contends that the serious nature of the conduct merits dismissal, since a Rule 1.6 violation of this type is a Level 5 offence, relying on Public Law Board No. 7660, Case 151 Public Law Board No. 6621, Case 62.

The Organization initially contends that the claim must be sustained on procedural grounds, since the Carrier violated the two working day notice requirement contained in Rule 19(A). It asserts that the Carrier failed to meet its burden of proving a violation of the cited Rules and Policy in this case, noting that the Workplace Violence Policy was added on after the initial charge was served. The Organization points out that Reynolds

gave varying accounts of what occurred to the different police called to the scene, as well as at the Investigation, especially with respect to whether the Claimant pushed him or made a fist near his face, positing that his version of what occurred should not be credited where it conflicts with the Claimant's account of what took place. It argues that a verbal confrontation and some cursing does not amount to a violation of Rules 1.6 or 1.7, and does not support a Level 5 dismissal, especially for a long term employee with no prior discipline on his record, where his supervisor admitted that he did not feel threatened by what took place.

The Board concludes that the purpose of the 2 working day notice provision contained in Rule 19(A) - to permit an employee adequate time to arrange to be in attendance with a representative of his choosing and to present a defense to the specific charges - was satisfied in this case by granting the Organization's request for a postponement to permit it time to attend and prepare to defend against the charges. With respect to the merits, the Board is of the opinion that the Carrier did meet its burden of proving that on January 24, 2014, the Claimant was quarrelsome in his dealing with his supervisor about the issue of working overtime on the weekend due to anticipated weather conditions, made known he did not intend to work as directed, and used foul language directed to his supervisor prior to leaving his office, all in violation of Rule 1.6 (6).

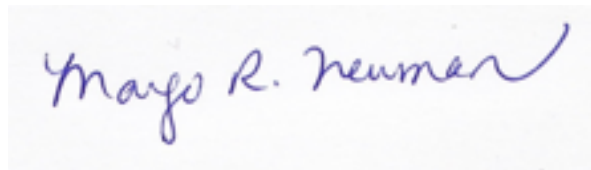
The evidence does call into question whether any contact that may have occurred between the Claimant and Reynolds was an unintentional result of them being in close proximity at the doorway to the office when the door was suddenly opened, rather than an aggressive approach by Claimant in pushing his supervisor backwards without any provocation. Claimant clearly believed that Reynolds pointing toward the outside of his office was directed against him, since he admittedly repeated for Reynolds to stop pointing at him. While Reynolds was unsure of what may occur next due to the

Claimant's agitation, and stepped back putting his hands up reflexively to protect himself, he did state that he was not concerned about serious bodily injury or harm.

Under the particular circumstances of this case, and the mitigating factors that exist including the Claimant's length of service and clean disciplinary record, the Board is of the opinion that the imposition of a dismissal was excessive and unwarranted, and that a lesser discipline would have been more appropriate to correct the Claimant's future conduct. Thus, we conclude that Claimant shall be returned to work forthwith, with full seniority and benefits, but with a time served suspension substituted in place of the dismissal. The Claimant shall receive no back pay in this case.

AWARD:

The claim is sustained, in part, in accordance with the Findings.



Margo R. Newman
Neutral Chairperson

Dated: June 28, 2016



K. N. Novak
Carrier Member



Andrew Mulford
Employee Member