

PUBLIC LAW BOARD 7660

PARTIES) UNION PACIFIC RAILROAD COMPANY
)
TO) VS.
)
DISPUTE) BROTHERHOOD OF MAINTENANCE
) **OF WAYEMPLOYES**

Public Law Board consisted of the regular members and, in addition, Referee Meeta A. Bass when this Award was rendered.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) imposed upon Mr. H. Swanson, by letter dated December 8, 2020, in connection with allegations that he failed to comply with Rule 1.6: Conduct – Quarrelsome; Policy- Wrk VLNC: Workplace Violence Policy; The How Matters Policy and 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.' (Employes' Exhibit 'A-1') was excessive, arbitrary, disparate; imposed without the Carrier having met its burden of proof; and in violation of the Agreement (System File B-2148U-202/1750665 UPS)

2. As a consequence of the violation referred to in Part 1 above, Claimant H. Swanson shall now be reinstated to service and now be made whole by compensating him for all wage and benefit loss suffered by him for his removal from service, any and all expenses incurred or lost as a result and the alleged charge(s) be expunged from his personal record. Claimant must also be made whole for any and all loss of Railroad Retirement month credit and any other loss."

FINDINGS:

The Board, upon the whole record and all the evidence, finds that:

The Carrier or Carriers and the Employee or Employees involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor

Act, as approved on June 21, 1934. The Board has jurisdiction over the dispute involved herein. Parties to said dispute were given due notice of hearing thereon.

At all relevant times, the Claimant held the position of System Material Foreman. On October 23, 2021, after a job briefing, a contractor asked to begin the task earlier due to an approaching weather storm. In response, the Claimant uttered "F- - - You." The Claimant defended his actions by stating that he jokingly made the remarks. The contractors acknowledged the use of inappropriate language during the briefing but only mentioned it when a manager inquired about the incident following the incident of October 24th.

On October 24, 2021, the Claimant observed a tie fouling the road and went to retrieve tie tongs to remove the tie, but none were available. A contractor operated a boom truck on the same route when he observed the tie blocking his path. The Claimant observed the contractor exiting the vehicle and attempting to move the tie manually. The Claimant, observing this, cautioned that such action was improper and could result in expulsion from the premises, per the manager's policy. Despite the warning, the contractor persisted towards the ties without acknowledging the caution. Thinking the contractor had not heard the caution, the Claimant placed his hand on the contractor's chest to emphasize the caution. The contractor then instructed the Claimant to step away from him, and then the contractor kicked the tie to clear the path.

In a subsequent written statement, the contractor acknowledged this interaction, describing how the Claimant had halted him and reiterated the warning. The contractor wrote he did not feel threatened and later discussed the incident with his partner, who reported it along with the incident of October 23.

The Carrier issued a Notice of Investigation letter originally dated November 9, 2020, and corrected on November 10, 2020 stating: "...to develop the facts and to determine your responsibility, if any, in connection with the below charged ... On October 23, 2020, at the location of the Proviso Yard, while employed as a System Material Foreman, CDL, you allegedly responded to a contractor with profanity when asked to begin work early. Then on 10/24/2020, you allegedly used physical force to prevent a contractor from moving a scrap tie. This is a possible violation of the following rule(s) and/or policy..."

Following postponements, the investigation hearing occurred on November 18, 2020. Following the investigation hearing, the Claimant received a discipline notice dated December 8, 2020, finding a violation of Rule 1.6 Conduct-Quarrelsome and Rule 1.6, 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, and Policy Work VLNC: Workplace Violence Policy, The How Matters Policy. This rule and policy are incorporated herein as if fully rewritten. The Carrier dismissed the Claimant.

The Organization appealed the Carrier's decision by letter dated January 27, 2021, and the Carrier denied the same on March 28, 2021. The Organization advanced the appeal by letter dated April 5, 2021, and the Carrier denied the same by letter dated June 3, 2021. A formal conference was held with no resolution of the claim on October 14, 2021. The Organization submitted a post-conference letter on November 23, 2021, requesting the Carrier re-evaluate their position or the matter would be progressed to the National Railroad Adjustment Board. There was no change in the Carrier's position. This matter is before this Board for a final resolution of the claim.

The Board has reviewed the record developed by the parties during their handling of the claim on the property and considered evidence related to the following to make its determination of this claim:

- 1) Did the Claimant receive a full and fair investigation with due notice of charges, opportunity to defend, and representation?**
- 2) If so, did the Carrier establish by substantial evidence the Claimant was culpable of the charged misconduct or dereliction of duty?**
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory, or unreasonably harsh in the facts and circumstances of the case?**

The Carrier contends the Claimant was afforded a fair and impartial hearing. The Claimant was represented by his representative and was allowed to prepare his case, introduce evidence on his behalf, and confront and cross-examine witnesses. Carrier asserts the Claimant admitted to the alleged behavior. The Carrier also contends that Carrier presented substantial evidence to support the seriousness of the offense and the violation of the rule and policy. Per the Carrier's MAPS Policy, violations of

Rules 1.6 and the Violence and Abusive Behavior in the Workplace policy warrant a disciplinary assessment of dismissal upon the first violation.

The Organization contends the Claimant was denied a fair and impartial hearing. The Organization argues the Carrier violated the Agreement when the Carrier failed to provide all witnesses at the investigation hearing; the contractors did not testify. The Organization also contends the Carrier failed to meet its burden of proof. Alternatively, the Organization argues the punishment was severe considering the circumstances. The Organization asserts the Claimant had twenty-four (24) years of service with the Carrier at the time of dismissal. The Organization maintains the evidence established the Claimant was only joking when he uttered the profanity, and his actions in touching the contractor were only to prevent injury. The Organization further points out the evidence established the on-site manager believed the proper disciplinary response was disqualification, not dismissal.

The Board finds no significant procedural errors are present in the record. The Board also finds the record lacks substantial evidence supporting the charges that the Claimant violated the above-cited rules. The statements provided by the contractor and the Claimant are consistent and establish the Claimant employed gestures to alert the contractor to avoid potential harm and/or violation of property rules. The evidence does not establish any violence or threats committed by the Claimant against the contractor.

The Board recognizes that using profanity can serve as a means to express emotions such as anger, frustration, or disdain, potentially fostering an environment of hostility and confrontation, although not in every instance. While insufficient evidence supports Carrier's claim that the profanity uttered in this situation led to a hostile workplace, it is commonly anticipated that supervisors, managers, and foremen exhibit professionalism, adept communication, and courtesy when interacting with their subordinates and contractors. Resorting to profanity could be interpreted as a deviation from these anticipated professional standards. However, in cases where the language is being evaluated after the incident, and no complaints have arisen from those who heard it, it is hard to categorize it as contributing to quarrelsome interactions. The Board finds the Carrier has failed to meet its burden of proof that the Grievant's behavior was inclined or disposed toward an angry verbal confrontation with others in the workplace.

AWARD

Claim sustained. This Award is in accordance with Rule 48 (h), which states if the charge against the employee is not sustained, the record of the employee will be cleared and if suspended or dismissed, the employee will be returned to former position and compensated for net wage loss, if any, which may have been incurred by the employee.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

Meeta A. Bass

**Meeta A. Bass
Neutral Chairperson
Dated: Sept. 28, 2023**

Chris Bogenreif

**Chris Bogenreif
Carrier Member
Dated: September 29, 2023**

John Schlismann

**John Schlismann
Organization Member
Dated: September 28, 2023**