

PUBLIC LAW BOARD NO. 7660  
AWARD NO. 44

BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES

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 Mr. D. Loera, by letter dated September 18, 2014, for alleged violation of GCOR Rule 1.6 in connection with allegations that he threatened to physically assault another Union Pacific employee was without just and sufficient cause, unwarranted and in violation of the Agreement (System File T-1445S-705/1616872 SPW).

2. As a consequence of the violation referred to in Part 1 above, Claimant D. Loera must have the Level 5 discipline removed from his personal record and be reinstated to service. Claimant must be compensated for any and all wages lost including straight time and overtime beginning with the day he was removed from service and ending with his reinstatement to service. Claimant must be compensated for any and all losses related to fringe benefits that can result from dismissal from service such as health, dental and vision for him and his dependents. Claimant must also be compensated for vacation benefits, personal leave benefits and all other benefits not specifically enumerated herein that are collectively bargained for him as an employee of the Union Pacific Railroad and a member of the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters. Claimant must also be reimbursed for all losses related to personal property that he sustained as a result of this dismissal such as, but not limited to home, automobile, land and other personal items.”

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 2 year employee who had his seniority restored and had recently been returned to work by this Board in Award 1, was working as a welder helper on Gang 8435 in Indio, California on July 24, 2014, the date of the incident leading to the discipline in dispute. A Notice of Investigation dated August 4, 2014 was issued on charges that he threatened to physically assault another employee. The September 18, 2014 Notice of Discipline finds Claimant guilty of the charge in violation of Rule 1.6 Conduct (6) Quarrelsome and the Violence and Abusive Behavior in the Workplace Policy, and assesses him a Level 5 permanent dismissal. The instant appeal resulted.

Claimant was assigned as a welder helper in a gang with Foreman Long and Welder Vega. During the drive over to the worksite on July 24, 2014, Claimant felt that Long was driving too quickly and unsafely, was doing a job briefing while driving, and failed to stop at scales on the freeway, as required, and he brought these matters to Long's attention. Long recalled Claimant nitpicking about his driving and other matters, and asking him to do the fire risk for the day's work, to which Claimant responded that he did not know how to do one. When they got to the job site, they discovered that the equipment they needed was not there, and they had to go back to the yard to get it. During the truck ride back, Claimant and Long got into a verbal altercation.

Long stated that Claimant became argumentative about his not having his back earlier in the week when he approached him as his Union representative, and he asked Claimant to read the booklet about how to do a fire risk line by line, and Claimant said he couldn't read that. Long admitted being frustrated that Claimant was not willing to carry

his weight or learn, and calling him a “real fucking idiot,” and that Claimant told him he was too old to be out there working and called him several names including a dick, a pussy, grandpa, and kept badgering him. In both his written statements and during his testimony, Long stated that Claimant told him they could take care of this after work, and when he asked what he meant, Claimant said that he will “beat your fucking ass.” Long took exception to Claimant’s comments and the fact that he threatened him, and recalled Claimant making comments that Long was not going to do anything about it because he was a pussy and bitch.

Long testified that he called his MTM when he got back to the yard, reported what had occurred, including the threat, and that he could not continue to work with Claimant, and MTM Nagy contacted the Railroad Police, who dispatched Officer Pina to the yard, to take statements and escort Claimant off the property. Nagy also took statements from Long and Vega when he arrived at the yard, and called Claimant to find out his side of the story. He asked for a written statement, that he testified he never received, despite Claimant testifying that he sent him an email, but could not produce a copy of it. Nagy received an email from Pina with his opinion of the interviews, indicating that he was behind Claimant as he was leaving the property and saw him lift his arms from his waist to his shoulders while facing the truck where the others sat, which, from his 35 years experience, indicates a challenge to a street fight. Neither Long nor Vega recalled seeing any threatening gesture from Claimant after the Police arrived at the yard.

Vega’s statement to Nagy indicates that there was a verbal disagreement between Long and Claimant that started to escalate, with name calling and cursing on both sides, which he felt was childish and unprofessional, and tried to block out. Vega’s statement to Pina does not confirm that he heard a threat, but his statement to Nagy indicates that he heard Claimant say to Long “I will beat your fucking ass.” Vega testified that the reason he did not confirm this initially was because he did not want to get involved with the

mess that he knew would come out of it. At the Investigation, Vega confirmed that he heard the threat by Claimant to Long.

Claimant testified that he acted professionally and properly, pointing out clear safety violations by Long which he felt endangered his life, and that a verbal altercation took place between them. He testified that not only was Long speeding, doing a job debriefing while driving, and passed up the scales, but he was talking on his cell phone while driving and lit up a cigarette next to him and a propane tank at the job site, all of which Claimant took issue with and said he would report. He denied threatening anyone, and said that he felt that Long was lying about him because he was upset with him questioning his unsafe actions and concerned he would report him. Claimant testified that Vega had admitted not hearing any threat, but testified to the contrary because he had been working with Long for a number of years.

Claimant testified that unbeknownst to anyone in the truck, he made a video recording on his cell phone for 7 minutes between 7:30 and 8:00 a.m. during the verbal altercation between him and Long because he felt unsafe, and that no one would believe him when he pointed this out. The Organization's proffer of this recording into evidence was rejected by the Hearing Officer based upon the fact that it was recorded without Long's knowledge and illegally obtained, unauthorized, unethical, and could have been doctored. The Organization claimed that it showed that Claimant was acting professionally and Long was performing unsafe acts. Long said that he told his MTM that he passed up the scales when reporting this incident, and he received a letter of reprimand in his file about it.

The Carrier argues that Claimant received a fair and impartial hearing and all the due process rights afforded to him under the Agreement. It asserts that the Hearing Officer had a proper basis to exclude the videotape, which would not have proven anything, since it was admittedly a chosen 7 minute period during an over 4 hour

interaction, which was not relevant to whether a threat was later uttered by Claimant to Long. Carrier maintains that the statements and testimony of Long and Vega are consistent and credible, and support the finding that there was substantial evidence to show that Claimant acted in a hostile and threatening manner toward his Foreman. It contends that Claimant's quarrelsome and threatening conduct violated the cited Rules and zero tolerance Workplace Violence Policy, and supports the Carrier's conclusion that dismissal was the appropriate Level 5 response under the UPGRADE policy.

The Organization contends that Carrier violated Claimant's Rule 45 due process right to a fair and impartial hearing when the Hearing Officer failed to accept the videotape evidence, which would have corroborated Claimant's credibility and his version of what occurred, and given context to the events, and that such violation requires that the claim be sustained. With respect to the merits, the Organization opines that the record is devoid of substantial evidence that Claimant made a verbal threat or threatening physical gesture to Long. It points out that the statements given by Long and Vega to Nagy and Pina are conflicting, undermine their credibility, and show that Vega initially denied hearing any threat by Claimant, but later changed his story. The Organization asserts that Long provoked the whole incident with his inappropriate comments to Claimant, and that Claimant was being disciplined for protesting, and trying to stop, Long's safety violations.

On the basis of the entire record, the Board initially finds that Claimant was not denied a fair and impartial hearing. We conclude that the Hearing Officer's failure to accept the videotaped recording was not a fatal due process flaw that undermines the validity of the resulting discipline. The content of the videotape, by Claimant's own admission, was a few minute segment of the verbal interchange between Claimant and Long where Claimant pointed out some safety concerns with Long's actions. No one present is disputing these facts. Their entry into evidence would not have proven, nor disproven, the allegation that Claimant later made a threat of physical harm to Long.

The record contains the evidence of the two employees who were with Claimant leading up to, and during, his allegedly threatening statement to Long - "I will beat your fucking ass" - confirming that such statement was made. Despite Claimant's denials, there is no real basis upon which the Board can find that these credited statements do not support a finding of substantial evidence to sustain the charges. The question for this Board to resolve is whether the context within which the statement arose, including the inflammatory name calling and belittling statements of both participants, which clearly establish quarrelsome conduct, somehow impact whether Claimant's comment could reasonably be perceived as threatening. It is undisputed that, in response to Claimant's continual criticisms of his driving, and frustration with his refusal to read the fire risk booklet, Long initially called him a "fucking idiot." Even if the Board were to find that Long's comment instigated the verbal altercation that followed, we cannot conclude that such comments excused or provided justification for the eventual threat found to have been uttered by Claimant.

Along with the verbal threat, Officer Pina offered evidence of his opinion that the hand gesture he saw Claimant make when facing the truck and being escorted from the property was itself a threatening gesture challenging the recipient to a street fight. Neither Long nor Vega saw any such gesture, and Claimant denied that it was intended as anything other than a request to have the truck stop from leaving prior to his being able to retrieve his equipment. Without corroboration, or a perceived threat by others, it would be difficult for this Board to find this type of opinion evidence, however experientially based, to provide the independent justification for imposing a Level 5 penalty, or to indicate an intention to follow through on the threat uttered by Claimant earlier. We do note that there was no evidence that Claimant was able to stop the truck, or retrieve his belongings from it, prior to leaving the premises.

After weighing all of the evidence, the Board is of the opinion that Carrier presented substantial evidence that Claimant uttered a verbal threat to Long, and that he

did so in the context of a much heated and antagonistic altercation, even if he did not intend to also make a threatening gesture. Carrier has every right to impose a Level 5 discipline for a violation of its Violence in the Workplace Policy. We find no factors present in this case sufficient to mitigate the penalty imposed on this short term employee.

AWARD:

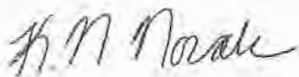
The claim is denied.

*Margo R. Newman*

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Margo R. Newman  
Neutral Chairperson

Dated: December 9, 2017



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K. N. Novak  
Carrier Member



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Andrew Mulford  
Employee Member