

PUBLIC LAW BOARD NO. 7660  
CASE NO. 53

BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES DIVISION - IBT RAIL CONFERENCE

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 Mr. R. Davis by letter dated February 20, 2015 for alleged violation of GCOR Rule 1.6, Conduct (5) Immoral and (6) Quarrelsome and Violence and Abusive Behavior in the Workplace Policy was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File T-1545S-902/1624958 SPW).

2. As a consequence of the violation referred to in Part 1 above, the Claimant R. Davis shall now be made whole by compensating him for all wage and benefit loss suffered as a consequence of his Level 5 termination and the alleged charge(s) expunged from his personal record.”

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 9 year employee, was working as a Track Laborer on Gang 8119 on November 14, 2014, the date of the incident in question. A Notice of Investigation dated January 30, 2015 was issued on charges that he verbally harassed other employees, exposed himself to fellow employees and defecated into a spike tin. He was removed from service pending the results of the investigation. Although noting that he was subject to a Leniency Agreement that did not require a hearing, an Investigation was held on February 11, 2015. The February 20, 2015 Notice of Discipline finds Claimant guilty of the charges in violation of Rule 1.6 Conduct, (5) Immoral and (6) Quarrelsome, and the Violence and Abusive Behavior in the Workplace Policy, and assesses him a Level 5 dismissal. The instant appeal resulted.

The record reveals that Gang 8119 worked out of Los Nietos yard, and was a 4 member work group composed of Claimant, Aguilar, Hiraes and Truck Driver Vrizo, who was filling in for the regular employee on November 14, 2014. They were assigned to work in an industrial area performing track maintenance. No portable restroom facilities were provided to the gang. All four employees testified at the Investigation. Vrizo had used a restroom in a warehouse a few hundred yards from the job site and, when Claimant said he had to use the bathroom, he told him that the people were nice and would let him use their facilities. Aguilar confirmed this. Hiraes, who was operating the backhoe, said he could not hear what was said. He stated that it was common for them to use facilities elsewhere. Claimant testified that he saw Vrizo walk off the site but did not know he went to the restroom, and claimed that he did not say that they could use their restroom. Vrizo testified that Claimant stated “fuck that” and that he was not going to give the company the privilege of not providing them with a restroom, so he would not ask permission. Aguilar recalled Claimant saying that he would prove a point, since they did not get porta-potties.

All present agreed that Claimant went to the truck, dumped spikes from a bucket, took the bucket a short distance down toward the track, and in plain view in front of the others (and possibly the public), dropped his pants, exposing himself, and defecated in the bucket. Vrizo was offended, and recalled Claimant laughing and people on the other side of the track watching him clean himself. It is not disputed that, when no restroom facilities are accessible, employees do relieve themselves behind bushes, but not in plain sight out in the open.

Claimant stated that he had an emergency situation, had been taking medication giving him loose stool, and did not think he could make it to the building, where he may be denied entrance. He claimed to have asked Vrizo to drive him to a local eatery, and him jokingly replying to use a bucket. Claimant recalled a time in the past when he had asked for permission to use a washroom and been denied, resulting in an accident in his pants, which was very embarrassing, and did not want to repeat that situation. He stated that he tried to give himself the best spot in the location, and did not know if others could see him. He said that he was embarrassed and ashamed that he had to defecate that way, and denied making any comments. He admitted being an advocate for the company to provide them with bathroom facilities.

When the crew was getting ready to leave the job site, Vrizo asked the others to pick up their trash from the truck and put it in a trash bag, and Claimant refused, making a statement that he would do it on Monday (or when he was back in the yard). Claimant admitted exhibiting a little attitude. Vrizo placed his trash bag on the back console, and, apparently, it fell onto Claimant's lunch bag, and Claimant got upset, cursing at Vrizo to take his bag off his property. Claimant testified he felt like Vrizo did it on purpose, which Vrizo denied. All agreed that it escalated into a heated exchange between the two, with Claimant calling Vrizo derogatory names and needling him during the entire 30 minute

drive back to the yard. Vrizo testified that he was so upset with what Claimant was saying that he was distracted and almost hit a motorcyclist changing lanes.

The other employees in the truck testified that Claimant gave Vrizo a hard time about leaving without making sure everyone had their seatbelts on, and about picking up his trash, and that things were said on both sides that should not have been said, there was profanity, and that it got so bad they told Claimant and Vrizo that it was enough, and to stop. Vrizo was so upset when he got back to the yard, that he called to report the incident to supervisor Molina that night. He investigated the scene and interviewed all employees except Claimant. Molina explained that they all agreed that Claimant defected in the bucket in front of everyone and was involved in a verbal altercation with Vrizo in the truck.

Carrier argues that it provided Claimant with a fair and impartial hearing, and proved the charges by substantial evidence. It states that Claimant was quarrelsome with Vrizo after he was asked to pick up his trash in the truck, and used derogatory and profane language. Carrier asserts that, it is not the fact that Claimant needed to relieve himself outside, but the manner in which he chose to do so (refusing to ask permission to use an adjacent washroom, and then exposing himself to his fellow workers while defecating in a bucket in plain view) that meets the definition of an immoral act and lewd behavior. It notes that the penalty was in line with the proven violations, especially in light of the terms of Claimant's prior Leniency Agreement.

The Organization contends that the entire incident took place because Carrier refused to meet its obligation to provide reasonable facilities for its work crew, and that this specific problem has been brought up in safety and other meetings on this territory. It asserts that it is not up to the employee to go door to door in an industrial area, which could be trespassing and unsafe. The Organization notes that it is common for workers to

urinate and defecate outside when no facilities are provided. It points out that the verbal altercation involved both Claimant and Vrizo, but that only Claimant was removed from service and assessed discipline. The Organization argues that Carrier failed to consider Claimant's state of mind as a result of his prior humiliating episode and the fact that he was embarrassed at what he had to do, when assessing the penalty imposed. It requests that Claimant be returned to work and made whole or have his penalty reduced.

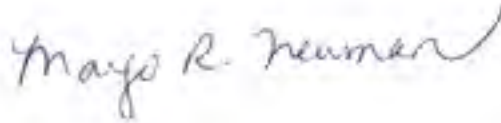
On the basis of the entire record, the Board concludes that Carrier has met its burden of proving, by substantial evidence, that Claimant violated Rule 1.6 (5) & (6) by his actions in intentionally trying to make a point about not being provided reasonable facilities by pulling down his pants and defecating in a spike bucket in plain view of his co-workers and the public. While relieving oneself outside may well be an ordinary occurrence when working in an area where washroom facilities are not convenient or proximate, there is no doubt that doing so in the manner Claimant chose on November 14, 2014 is not common. In fact, it was rude, and, when coupled with his comments, provocative. The record does not support the Organization's claim that Claimant's condition required him to defecate in public, rather than behind bushes or trees in the area to give himself, and others, privacy. There would have been no shame or embarrassment had Claimant chosen to do so. Claimant's testimony that he made no comments and attempted to pick a private location is not borne out by the evidence of others who were present.

With respect to the charge of being quarrelsome, all present in the truck confirm that Claimant refused Vrizo's reasonable request to pick up his garbage in the truck and exhibited attitude, reacting to what occurred with the garbage bag, which started a barrage of derogatory comments, insults and profanity. The fact that Vrizo was drawn into the verbal altercation during the 30 minute ride home does not excuse Claimant's comments or inappropriate actions, or make him less quarrelsome. Considering what had

occurred previously, and the fact that Vrizo was not a regular part of the crew, it was understandable that he may have taken offense by Claimant's actions and comments more than others, and been very upset with the distraction it caused to his work. Under the circumstances, the Board finds that the penalty assessed is in line with the charges under Carrier's UPGRADE Policy, and there is no evidence that would support our overruling Carrier's assessment of discipline in this case.

AWARD:

The claim is denied.



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Margo R. Newman  
Neutral Chairperson

Dated: 2/12/2018



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K. N. Novak  
Carrier Member



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Andrew Mulford  
Employee Member