

PUBLIC LAW BOARD NO. 7660  
CASE NO. 58

BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES 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 dismissal of Claimant A. Proffitt by letter dated June 11, 2015, for alleged violation of General Code of Operating Rules (GCOR) Rule 1.6, Conduct; (6) Quarrelsome and the part that reads, ‘... 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.’ in connection with allegations that on May 5, 2015 Claimant spit on a coworker’s face was without just and sufficient cause, unwarranted and in violation of the Agreement (System File T-1548U-905/1632224 UPS).

2. As a consequence of the violation referred to in Part 1 above, the Carrier shall now expunge the discipline from Claimant A. Proffitt’s personal record. Claimant be immediately reinstated to service and compensated for any and all wages lost, straight time and overtime, beginning with the day he was removed from service and ending with his reinstatement to service. Claimant be compensated for any and all losses related to the loss of fringe benefits that can result from dismissal from service, i.e., health, dental, vision benefits for himself and his dependents, 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 is to be reimbursed for all losses related to personal property that may be taken from his family because his income has been taken from him. Such losses can be his house, car, land and any other personal items that may be garnished from him for lack of income related to his dismissal.”

### 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 5 month employee, was working on an Anchor Application Spreader on Gang 9062 on May 5, 2013, the date of the incident in question. A Notice of Investigation dated May 18, 2015 was issued on the charge that he spit on a coworker's face. He was withheld from service pending the results of the investigation. An Investigation was held on June 1, 2015. The June 11, 2015 Notice of Discipline finds Claimant guilty of the charge in violation of Rule 1.6 Conduct, (6) Quarrelsome, and assesses him a Level 5 dismissal. The instant appeal resulted.

The record reveals that Claimant and fellow employee SB, also a 5 month employee, were on the same gang on May 5, 2015, and were each operating an Anchor Application Spreader. That day, SB was operating his equipment about 25 feet in front of Claimant. Part of the job is to clear the track area by picking up ties or other pieces of wood. There is no dispute that they had some words over the radio, with Claimant pointing out to SB that he had missed a bunch of ties, which required Claimant to get off his equipment and clean them up. SB did not appreciate Claimant making comments over

the radio about him not performing his job. Towards the end of the work day, Claimant went on the radio and asked SB if he did not see the ties, because he kept missing them, which upset SB. SB got off his equipment, went to the back of his machine, and picked up a small piece of wood from the track, waving it in the air to show Claimant that he was doing his job. Claimant testified that it looked like SB was mocking him. He got on the radio to tell SB that those small pieces were fine, but that he was referring to the big ones.

SB testified that he saw Claimant on the radio to him, but could not hear what he was saying due to the noise of the engine and his ear plugs, so he approached Claimant's machine, making eye contact with him. Claimant said he put his equipment on idle and came to the front of his machine, kneeling over so he could converse with SB who was on the ground. While the versions differ, it is clear that what started as a civil conversation, escalated into yelling and shouting, with each talking over the other. SB voiced that he did not appreciate Claimant making him look back over the radio, Claimant denying that was his intent, and indicating that it seemed like SB was missing all of the ties that day. Claimant testified that SB walked about 5 feet from his machine and called him a "F...ing fat ass." Claimant responded, "oh really, I'm fat?" stating that he was not bothered by the language.

Both agree that at one point SB came up to Claimant's machine and put a boot on the step and hands on the rail. Claimant told SB to get off his machine, but he did not do so. SB stated that he was just trying to talk to Claimant. Claimant testified that SB kept coming until he was 2 feet away from his face. Claimant yelled again for SB to get off his machine. SB testified that Claimant spit on his face. Claimant denied doing that, stating that maybe some saliva ended up on SB's face from the fact that he was yelling and so close, but that he never intentionally spit at him. Claimant testified that SB got off his machine and said "you spit in my face and now you're going to lose your job," and

headed to report it to Assistant Foreman Sheppard. SB denied making the comment, and stated that he did not wipe the saliva off before going to report it, since he wanted proof that Claimant spit at him.

Sheppard testified that SB approached him and said that Claimant spit at him, and that he saw spit on his hard hat and glasses. He could not recall seeing it on his face. He contacted his Manager to report what he was told, and both employees were taken back to their meeting point in New Castle and questioned separately about what took place. Claimant testified that he was questioned by Stotts, who cut him off quickly and accused him of being aggressive. During his evidence at the Investigation, Claimant stated that it was lightly raining out when the incident occurred. The record does not indicate whether SB received any discipline.

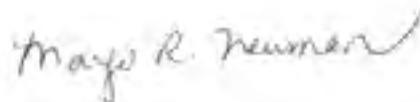
Carrier argues that it proved the charge by substantial evidence, and that spitting at a coworker meets the definition of quarrelsome behavior under Rule 1.6 (6), which merits Level 5 discipline. It notes that Claimant never mentioned the fact that it was raining prior to the Investigation, and was fabricating in an attempt to provide an alternate explanation for what Sheppard saw on SB's hard hat and glasses. The Organization contends that there are only two witnesses to what occurred, and that SB's credibility is undermined by his conflicting evidence and motivation to get Claimant in trouble for making him look bad. It asserts that SB was the aggressor, coming to Claimant's machine when he was upset, attempting to board it, disregarding two requests to get off, and getting up in Claimant's face while yelling and screaming. The Organization posits that, at best, there is an irreconcilable dispute in fact as to whether Claimant spit at SB or not, which undermines Carrier's ability to meet its burden of proof in this case. 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 there is an irreconcilable dispute of fact concerning whether Claimant intentionally spit at SB. The evidence presents a plausible scenario that whatever saliva may have been present on SB's hard hat and glasses, as attested to by Sheppard, could have been the unintentional result of Claimant's yelling in proximity to SB's face. The charge for which Claimant was terminated is being quarrelsome. There is no dispute that both participants in the verbal altercation were acting in an inappropriate manner leading to a loud verbal altercation. The entire episode would not have occurred had SB not approached Claimant's machine while upset and angry, and refused to leave when he was asked two different times. The record is silent as to whether SB's part in the incident was deemed to merit any discipline.

If the Board was satisfied that Carrier had presented substantial evidence that Claimant spit at SB, then his removal would be upheld, regardless of how SB was treated. However, the status of the record does not meet the substantial evidence standard. We direct that Claimant be permitted to return to work with his seniority, but without any compensation. The removal shall be converted to a long term suspension.

AWARD:

The claim is sustained in accordance with the Findings.



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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