

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	)	
	)	Case No. 27
and	)	
	)	Award No. 27
UNION PACIFIC RAILROAD COMPANY	)	
	)	

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: May 1, 2009

STATEMENT OF CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The dismissal of Shelly J. Culloty for violation of GCOR Rule 1.6 (Conduct) in connection with providing dishonest testimony during an investigation on April 11, 2008 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (Carrier’s File 1506375 SPW).
2. As a consequence of Part 1 above, we request that Ms. Culloty be immediately reinstated to the service of the Carrier to her former position with seniority and all other rights restored unimpaired and that the letter of dismissal also be expunged from her personal record. In addition, Claimant Culloty shall also be compensated for net wage loss, both straight time and overtime and benefit loss suffered by her since her wrongful and unwarranted removal from service and subsequent dismissal.”

FINDINGS:

Public Law Board No. 7258 upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On April 22, 2008, 2008 Claimant was instructed to report for formal investigation on May 1, 2008 concerning an allegation that she gave dishonest testimony in a prior investigation in possible violation of GCOR Rule 1.6. The hearing was convened as scheduled on May 1 and held to its conclusion. By letter dated May 20, 2008 Claimant was notified that a substantial degree of evidence was presented to warrant sustaining the charges and as a result Claimant was assessed a Level 5 discipline and dismissed from service. Claimant’s dismissal was appealed by

the Organization on July 7, 2008 and denied by Carrier on August 27, 2008. The denial was appealed by the Organization on September 30, 2008 and denied by the Carrier on November 21, 2008. The claim was discussed between the parties in conference on February 3, 2009 without reaching resolution of the dispute.

It is undisputed that Claimant in this case testified as a corroborating witness in Case No. 24 previously heard by this Board. In that case Claimant testified, *inter alia*, that "Mr. Young came in, I believe it was a day or two later, to do one-on-one's and he was very angry and he stood by his vehicle and he told our gang that if R. D. reported any injury- and also threatened that if there were grievances through the Union for a tunnel fire that he had called out the wrong people, that- that all of our gangs would be abolished- our gang- our whole gang would be abolished and we would have no other place but Texas to look for employment, something of that sort..." and "I believe Mr. Young threatened our gang so it wouldn't be turned in. Yes, I do. He threatened R. D., he threatened everybody. And the whole crew was begging R. D. not to turn it in." Later in that hearing the Claimant was asked "Ms. Culloty, you said the whole gang was present at the - at the time?" to which she replied "Yes, it was." and further asked "And at the time that Mr. Young said 'do not turn in any kind of injury report on this or you'll all be in Texas' is that what you said? Maybe I misunderstood." to which she answered "He said that if there- if R. D. claimed an injury and if we tur- submitted a claim for overtime to a fire, that we would all be abolished- our gang would be abolished and we would have no place to look for employment other than Texas." Later, Claimant was asked by the General Chairman "If you could refer to those notes, could you tell us the approximate time that Mr. Young threatened the entire gang with being cut off and having to work in Texas if this accident was turned in?" to which she answered "Yes I can. It was 7/31/2006."

The Director of Bridge Maintenance, J. S. Mancusso was the charging officer in the instant matter and testified that the above-quoted testimony was the basis for his charge of dishonest testimony.

Claimant testified, when asked by the hearing officer in this matter, that her testimony in the April 11, 2008 hearing that "I believe Mr. Young threatened our gang so it wouldn't be turned in. Yes, I do. He threatened R. D., he threatened everybody. And the whole crew was begging R. D. not to turn it in." was a true statement. Moreover, Claimant testified that the other members of her gang who she heard testify contrary to her testimony were being dishonest and were in fear for their jobs and that she stands behind her testimony given in the prior hearing and that it was completely honest.

Claimant further testified in this hearing in regard to Mr. Young that "Yeah, he-he came out, like I said, to the job site and wore his glasses the whole time and was very angry. And I was threatened there and then I believe when the gang was all huddled around the truck, that he had threatened that if uh- if this was turned in-the fire-bridge fire and R..D.'s injury. So he made it very well understood. Everybody on the gang understood that had these things been turned in, that this would happen to us. And I was begged, begged not to turn in the grievance or the-the fire, by an individual on the gang." The remainder of the gang on that day, besides herself,

Claimant recalled, consisted of F. Borrueal, N. Chairez, D. Longo, M. Peyen and R. D. Abel.

The Director of Bridge Maintenance ("DBM" or "Director") testified that after being notified by the hearing officer in the prior investigation that Claimant's testimony was in conflict with the testimony of the Manager of Bridge Maintenance (MBM) and that there was an allegation that the manager had improperly threatened the gang, he interviewed four of the five other members of the crew. The DBM testified that Claimant's co-workers were each asked three questions: 1) Did the MBM at any time threaten the gang with abolishment if Mr. Abel turned in an accident? 2) Did you ever tell Mr. Abel not to turn in an accident? 3) Did you hear anyone tell Mr. Abel not to turn in an accident? The negative responses the DBM heard to each of the questions from each of Claimant's co-workers prompted him, he testified, to charge Claimant with giving dishonest testimony.

Those same four co-workers each testified in the instant investigation as follows:

D. F. Longo was asked:

Q.) "At any time during July, August or that area, do you know of any time when Mr. Young threatened the gang to be abolished and move to Texas?"

A.) No."

...

Q.) "...did you or anyone else in your presence try to get Mr. Abel not to turn in the accident report?"

A.) No."

...

Q.) "...Did you ever hear Mr. Young threaten to abolish the gang?"

A.) No."

...

Q.) "Has - has Mr. Young ever threatened you with your job? Has he ever told you, I'll abolish you or fire you for any reason?"

A.) I don't recall

Q.) Okay.

A.) -him doing that.”

Mr. F. M. Borrue! testified:

Q.) “Okay. At any time in this basic time frame we’re talking about, July, August, because I don’t have an exact date, were you or your gang threatened with being abolished and sent to Texas?

A.) No sir”

...

Q.) “Were uh- was your gang threatened about Mr. Abel turning in an accident report?

A.) No sir.”

...

Q.) “Okay. At any time has Mr. Young threatened your gang in any way?

A.) No sir. Before, no.”

...

Q.) “And again, you have no knowledge of any threaten of anybody on your gang in your presence?

A.) No sir. My presence, no.”

Mr. N. H. Chairez had little recollection of the events of July 31, 2006, but testified:

Q.) “Okay. And do you remember he asking you some questions about if Mr. Young had threatened your gang at any time during that time frame of July/August of 2006?

A.) Yes I do.

Q.) And your answer to that was what?

A.) Was just no I do not.”

Mr. M. A. Payen testified:

Q.) “...did Mr. Young threaten the gang in any way? Did he threaten to abolish the gang or anything like that?

A.) No. Not that I can remember.”

....

Q.) “Did you or anyone else on the gang , to your knowledge, ask Mr. Abel not to turn in an accident report?

A.) No.”

...

Q.) “You say you never been threatened. Mr. Young has never threatened you with your job or threatened you to abolish you or any - is that correct?

A.) That’s correct.”

The Organization contends that here, the Carrier bears the burden of proving by clear and convincing evidence that Claimant was dishonest in the testimony she gave and that there was no testimony given in this investigation that leads to the conclusion that Claimant gave false testimony. We disagree.

There is no question that there was diametrically opposed testimony given at the April 11, 2008 investigation concerning Case No. 24 previously considered by this Board. Claimant’s testimony, specifically the testimony that the DBM testified that this charge is based on, is quoted above. The record reveals that the MBM at that investigation gave testimony that was in direct conflict with Claimant’s testimony. Upon being apprised of the conflicting testimony, the MBM’s Director looked into the matter and after interviewing four of five of Claimant’s co-workers, charged Claimant with giving dishonest testimony and scheduled a hearing to investigate.

Three of the four co-workers that the Director had previously interviewed appeared at the investigation and directly and concisely testified that the MBM never threatened to abolish the gang. The fourth did testify, but could not recall the day in question. Claimant testified that “I believe Mr. Young threatened our gang so it wouldn’t be turned in. Yes, I do. He threatened R. D., he threatened everybody. And the whole crew was begging R. D. not to turn it in.” Her testimony was corroborated by witness R. D. Abel.

We thus have a situation where the hearing officer was required to make a credibility determination. The hearing officer reasonably, based on the transcript of the hearing, credited the testimony of those who testified that their manager had not threatened the gang.

As an appellate body, we have not seen the witnesses testify and are unable to assess the demeanor or credibility of the witnesses. The hearing officer observes the testimony and receives the evidence first hand. In this instance, the hearing officer weighed the conflicting testimony,

the evidence and the inferences. He found the testimony corroborating the MBM's testimony more credible than Claimant's and her corroborating witness'. For that reason, we defer to the credibility determinations made on the property to credit the testimony of Borrue, Long and Payen over that of the Claimant and her corroborating witness. Hence, we find that the determination that the Claimant gave dishonest testimony is supported by substantial evidence.

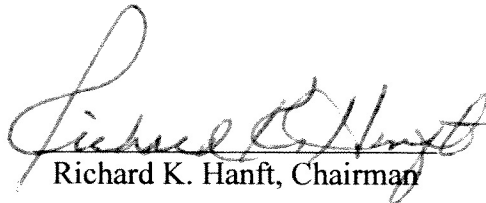
While the Organization argues that the alleged threats were made during a one-on-one interview between the Claimant and the MBM, the specific accusation that was made and that the DBM found dishonest involved a threat made to the entire gang.

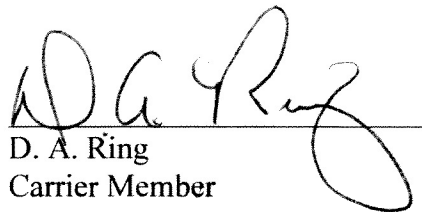
Further, the Organization objects to the fact that the MBM was not called by the Carrier to testify in this matter and avers that because he was a necessary witness, Claimant was denied a fair and impartial hearing because Claimant was unable to confront her accuser or cross-examine him. As the Carrier points out, if the Organization felt it necessary to question the MBM, they should have, or could have, either made a request that he testify or asked for a recess to compel him to testify at the Organization's expense. (See Third Division Award 33982 [Rubin]).

Finally, the Organization asserts that because the MBM did not testify the Claimant's testimony was not refuted and must be accepted as fact. We find that Claimant's testimony was refuted by her three co-workers who all testified that the MBM never threatened to abolish the gang and that R. D. Abel was never asked not to turn in an accident report by anyone on that gang.

AWARD

Claim denied.


Richard K. Hanft, Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member
Sept 9, 2009

Dated at Chicago, Illinois, August 27, 2009

Sept 9, 2009