

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION
IBT RAIL CONFERENCE**

and

**UNION PACIFIC RAILROAD COMPANY
(FORMER CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY)**

Case No. 284

Award No. 258

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

1. The dismissal of Foreman Dennis R. Kurseth for violation of GCOR Rules 1.6 and 1.7 in connection with verbal threats of physical harm to a fellow employee on March 13, 2007 is unjust, unwarranted, based on unproven charges and in violation of the Agreement (System File R-0719C-301/1475662D CNW).
2. As a consequence of the violation outlined in Part (1) above, the charges against Mr. Kurseth should be removed and he should be returned to service with all rights and benefits restored and compensated for all time lost. Mr. Kurseth should also be made whole for any health and welfare issues he was deprived of during this process, and credited with months of service to the Railroad Retirement Board."

FINDINGS:

By notice dated March 16, 2007, the Claimant was notified that he was being withheld from service pending a formal hearing and investigation to develop the facts and place responsibility, if any, in connection with allegations that the Claimant allegedly had verbally threatened a co-worker with physical harm. The investigation was conducted, after a postponement, on April 4, 2007. By letter dated April 13, 2007, the Claimant was notified that as a result of the hearing, he had been found guilty as charged, and that he was being dismissed from the Carrier's service. The Organization thereafter filed a claim

on the Claimant's behalf, challenging the Carrier's decision to discharge the Claimant. The Carrier denied the claim.

The Carrier initially contends that it has met its burden of proving that the Claimant was in violation of Rules 1.6 and 1.7. Substantial testimony and the Claimant's own admission demonstrate that the Claimant was quarrelsome and directed threatening remarks at another employee. The Carrier asserts that the Claimant's actions constituted a violation of Rules 1.6 and 1.7 in that his behavior demonstrated hostility and misconduct. The Carrier argues that the Claimant's verbal threat of violence constitutes cause for dismissal.

The Carrier then addresses the Organization's argument that the Carrier committed a procedural violation in connection with the scheduling and holding of the hearing. The Carrier emphasizes that the Organization has not refuted that the Claimant received a timely notice of the hearing, nor has the Organization presented any evidence that the General Chairman was not timely notified of the hearing. The Carrier points out that the only contention on the record relates the Vice Chairman, who also wrote the appeal at issue. The Carrier maintains that because this issue involves a dispute of fact, it cannot be resolved by the Board.

The Carrier insists that it did not commit any procedural violations during the handling of this claim on the property, and it certainly did not commit any violations that would unduly prejudice the Claimant. The Carrier contends that it ensured that the Claimant received all of the rights granted to him under the Agreement, particularly in that the Claimant had a hearing even after not picking up the initial Notice. The Carrier

asserts that it did not commit any procedural errors and its finding of guilt is supported by substantial evidence, so the assessment of discipline should not be disturbed.

The Carrier argues that it is well established that the role of an arbitral panel is to verify whether substantial evidence supports a finding of guilt. Once the arbitral panel has determined that the Carrier has presented substantial evidence, the panel lacks authority to overturn the discipline assessed. The Carrier asserts that even if the discipline seems harsh, it cannot be overturned unless it is found to be arbitrary, capricious, or an abuse of Carrier discretion.

The Carrier maintains that it has proven that the Claimant violated Rules 1.6 and 1.7, and it duly assessed Level 5 discipline because of the Claimant's actions. The Carrier argues that the Claimant's violations were serious, and his dismissal should be left intact.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that there were multiple violations of Rule 19 in this matter. The Organization asserts that each of these procedural violations, standing alone, is sufficient reason to sustain the instant claim without reaching the merits of the dispute.

The Organization argues that the most glaring of these Rule 19 violations is the Carrier's failure to hold the hearing within ten days of the alleged offense. The Organization maintains that there is no dispute that the alleged offense occurred on March 13, 2007, and that the Carrier had knowledge of the offense on that date. The

Organization points out that the hearing was not held until April 4, 2007, well beyond the ten-day limit for conducting the investigation. Citing a number of Board Awards, the Organization submits that it is well established that when the time limit for holding a hearing has been breached, the Board need not consider the merits and the Carrier's decision must be set aside.

As for the Carrier's defense that it failed to hold a timely hearing because the Organization requested a postponement, the Organization insists that nothing could be further from the truth. The Organization vehemently denies that it made any request for a postponement during the on-property handling of this dispute from the April 4, 2007, investigation through the December 14, 2007, conference confirmation letter.

Addressing the purported request for a postponement supposedly signed by the Vice Chairman, the Organization emphasizes that this letter is printed in a font identical to that used by the Carrier, and it is not printed on the Organization's letterhead. The Organization argues that the Vice Chairman would not change the font style or fail to use Organization letterhead for that one document. The Organization submits that this supposed postponement request is nothing more than a blatant attempt by the Carrier to overcome its failure to hold a timely investigation in accordance with Rule 19.

The Organization goes on to assert that there is an obvious reason for the fabrication of a postponement request. The Organization points out that while the Carrier attempted to place the onus on the Claimant for his failure to retrieve the notice letter, the Carrier failed to even assert timely delivery of the notice to the General Chairman. The Organization argues that the Carrier presented no evidence of an attempt to timely deliver

the notice to the General Chairman. The only evidence with regard to such delivery is a copy of an envelope indicating that the General Chairman took delivery of the March 16 notice on March 26, 2007.

The Organization insists that the Carrier clearly did not comply with the clear and unambiguous language of the Agreement when it failed to provide a timely copy of the Notice to the General Chairman. The Organization maintains that the Carrier must comply with the negotiated provisions of the Agreement. The Carrier's failure to do so in this case requires a sustaining award if for no other reason than to protect the sanctity of the Agreement.

Turning to the merits of this matter, the Organization contends that although there is no denying that the incident at issue took place, the mitigating circumstances involved here must be considered. The Organization asserts that the Claimant's medical condition at the time of the incident included a history of post-traumatic stress disorder, depression, and hepatitis C. Moreover, the Claimant was suffering from an extremely irritating skin rash at the time of the incident. The Organization points out that during the investigation, the Claimant expressed disbelief at his own actions, and he apologized for his outburst.

The Organization acknowledges that this is not the first time that the Claimant's actions have seemed less than appropriate. The Organization points out, however, that during the Claimant's thirty years of service, there is no indication of prior discipline associated with the Claimant's behavior toward other individuals. The Organization therefore argues that there can be no doubt that dismissal is unjust and unwarranted.

The Organization disputes the Carrier's characterization of the instant claim as an

appeal for leniency. The Organization maintains that it merely is requesting that discipline be applied in an even-handed manner, consistent with the well-established principle of progressive discipline. Citing a number of Board Awards, the Organization argues that the purpose of discipline is to rehabilitate, correct, and guide employees. The Organization insists that the dismissal of the Claimant, with thirty years of otherwise satisfactory service, serves no purpose other than punishment.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of making verbal threats of physical harm to a fellow employee on March 13, 2007. The record is clear that the Claimant used vulgar language and threatened the employee with physical harm and that the individual felt threatened by the Claimant.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case has worked for the Carrier for over thirty years.

Although the Claimant's actions were extremely serious and would have justified termination in almost any other case, given the lengthy seniority of this Claimant, this Board finds that the Carrier acted unreasonably, arbitrarily, and capriciously when it terminated his employment. We hereby order that the Claimant be returned to work but without back pay. In addition, the Claimant shall be required to have a physical and mental examination performed on him before he returns to work. Finally, the Claimant shall also be required to enter into an arrangement with the Employee Assistance Program so he can discuss his possible anger issues with them.

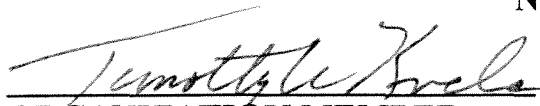
AWARD:

The claim is sustained in part and denied in part. The Claimant shall be reinstated to service but without back pay. The period of time that the Claimant was off shall be considered a lengthy disciplinary suspension.

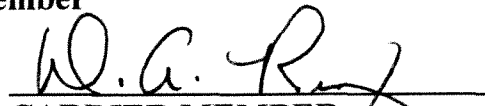
The Claimant shall be required to pass a physical and mental examination before he returns to work. In addition, the Claimant shall be required to enroll in the Employee Assistance Program for the discussion of possible anger issues.



PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER

DATED: Sept. 9, 2009


CARRIER MEMBER

DATED: Sept 9 2009