

Special Board of Adjustment No. 1112

Parties to Dispute

Brotherhood of Maintenance of Way)	
Employees' Division/IBT)	
)	
vs)	Case 100/Award 101
)	
Burlington Northern Santa Fe)	
Railway Company)	

Statement of Claim

Appeal of the discipline of a thirty (30) day record suspension, with accompanying, required one-on-one intensive EEO training for alleged conduct engaged in by the Claimant on the date of June 13, 2006 while he was on duty as foreman of gang TRPX0005 which was temporarily headquartered on the Carrier's Powder River Division.

Background

An investigation was held on October 27, 2006 to determine facts and place responsibility, if any, in connection with charges levied against the Claimant to this case whose name is Sergio Robles. According to the charges, the Claimant made profane and derogatory comments on the date of June 13, 2006 to employees while holding assignment as foreman on the Carrier's gang TRX0005. An investigation into these matter were held in Scottsbluff, Nebraska. According to the charges, the Claimant made such comments to or about Mandy S. Haney, a machine operator and James Strauss, an assistant foreman working on the gang at the time. After the investigation was held the Claimant was advised that he had been found guilty as charged and he was assessed a thirty (30) day suspension with requirement that he undergo training as outlined in the

Statement of Claim.

The discipline was appealed by the Claimant in accordance with Section 6 seq. of an arbitration agreement signed on July 29, 1998 between the Carrier and the Organization that created Special Board of Adjustment (SBA) 1112 under the authority of the National Mediation Board. In accordance with the provisions of that agreement this case is now properly before SBA 1112. The neutral member has been given final and binding powers to issue an Award on this case based on the criteria outlined by the parties in Section 8 of the agreement creating SBA 1112, and in accordance with Section 3 of the Railway Labor Act.

Discussion & Procedural Rulings

A procedural objection is raised in this case that the Board will address as a preliminary matter. According to the union there was a time-lines' violation of Rule 40 of the labor Agreement because a formal investigation of the incident(s) that led to this case was not held within fifteen (15) days of the same. The record shows that the alleged incident(s) were supposed to have taken place on June 13, 2006. The notice of investigation went out October 3, 2006¹ with information that an investigation would be held on October 12, 2006. The date of the notice of investigation was obviously more than fifteen (15) days from the alleged incident(s). After reviewing the full record of this

¹This is the date of the first notice. This was followed by three subsequent notices "...per mutual agreement between the officers of the company and the Brotherhood of Maintenance of Way..." stated that the original date of the investigation was being postponed because of scheduling conflicts, etc. between the parties. This is why the record of transcript is ultimately dated October 27, 2006.

case, however, the arbitrator is not persuaded that a violation of Rule 40 occurred. A call was made on a 800 hotline outlining the alleged incidents of June 13, 2006. This form states that management had not been notified of the incidents as of that date. The redacted information was obtained under contract from an outside third party which is a company by the name of "The Network, Inc." which handles the incoming 800 calls. The written report on the phone call is report # 606136293. It is not clear when a copy of this written report was finally provided to the Carrier, but what is clear is that the Carrier conducted an internal investigation with respect to the issues outlined in the 800 number call. According to the employee who made the 800 call HR called her about the call some "...three or four weeks..." after it was made. After Carrier's supervision conducted its investigation it then concluded that there were grounds for filing charges against the Claimant which is what was done on October 3, 2006.² Following this there were postponements that took place before an investigation was finally held. Clearly the intent of Rule 40 is not that the company use a shotgun approach in filing charges against employees nily-wily but that they only be filed if there is potentially sufficient information on which to base charges. In view of this the procedural objection raised by the union in this case will be dismissed.

The internal investigation by the company led it to certain conclusions about the

²Assistant road master testified at the investigation that he contacted HR after Haney indicated that she was going to call the 800 number, apparently before a call was actually made, but there is no record of any substantive information for HR to work with at that time.

complaints lodged against the Claimant to this case when the original 800 # telephone call was made. While the arbitrator may take such investigative conclusions under advisement, the onus of framing a conclusion and ruling in this case must come from the testimony by the witnesses themselves at the investigation conducted on October 27, 2006 and the credibility that the arbitrator attributes to such testimony after scrutinizing the full record of transcript. In view of these considerations the arbitrator will now proceed to the merits of this case.

The charges filed against the Claimant in this case do not coincide with all of the complaints against him outlined in the original 800# phone call about his alleged actions on the date of June 13, 2006. The Board must limit itself, in its deliberations, to the charges actually filed against the Claimant by the company on October 3, 2006. In the notice to attend an investigation the Claimant is charged with the following:

"...alleged profane comments on June 13, 2006 to James Strauss about Mandy Haney (and) your alleged misconduct and derogatory way in which you speak to employees (i.e.including Haney) while assigned as foreman of gang TRPX0005 temporarily headquartered on the Powder River Division..."

The Board must limit its deliberations to the narrow issues cited in the immediate foregoing.

According to testimony at the investigation by Thomas Brewster, the assistant road master, he talked with machine operator Mandy Haney on June 13, 2006. The latter told Brewster that the Claimant had made certain comments about her. Haney told Brewster that she thought she ought to contact the 1-800 number about what was going on.

Brewster testified that he told her to do that "...if she felt that was necessary...". He said he also spoke with the Claimant about these matters. This witness reads the 1-800 # report that was later transcribed, into the record, and he comments on whether he ever heard the Claimant state that he would disqualify machine operator Haney. He says he never heard him say that. The Claimant has no authority to disqualify Haney, in either case. According to the assistant road master Haney is an "...acceptable spike operator..." and her "...performance ha(d) improved...". The issue of stretching exercises is raised at the investigation and this witness states that it is customary procedure for one individual to stand in the middle of the circle while such exercises are performed by the group of employees involved. If asked, and if an individual feels uncomfortable standing in the middle of the circle, they may request to do their exercises on the perimeter and not be in the middle. This witness states that he was not aware that Haney told the Claimant she was uncomfortable being in the center of the exercise circle. On profanity, the road master says it is not customary language used by gang members and he tried "...not to tolerate it...". This witness states that he did speak to the Claimant about his language and told him to "...watch how he speaks...". This witness states that the Claimant was not too experienced as a foreman and he was working with some new employees but that he was "...developing confidence in his decisions...".

This witness states that when allegations were made of the type found on the 1-800 # hotline report, it was customary for HR to do a follow-up and conduct an investigation and he knows that one was done in the instant case. A copy of the report,

alluded to earlier by the arbitrator, outlining the results of this investigation is both part of the record and it has been read into the transcript. According to this the Claimant allegedly called Haney "...the dumbest m*th*er f*ck*r..." albeit this witness states that it was unclear to him if this happened and the investigation that that was conducted also did not confirm this. This witness intimates that the Claimant had told new hires to get their "...*ss over here..." when giving them instructions.

Testimony at the investigation by Mandy Haney is that she was working on the day when the problems surfaced as a spiker operator. According to her testimony the Claimant threatened to disqualify her for running the spiker too slowly when, she states, she discovered that no one else on the gang was able to operate it any better than she. She states that she felt threatened by the foreman's attitude. According to her the mechanic told her that in his opinion she was qualified to run the spiker. She states that it was also difficult for her to get her track and time from the Claimant because he would "...read it really quick..." and she could not properly understand. Further, according to her testimony she was "...not given the proper job briefing half the time...". When she told him that she did not want to do stretches in front of all of the men in the circle since she was the only female and was afraid that she might rip her pants he told her not to wear such tight pants. She states that she heard him tell a new hire once to "...get his fucking ass..." over here. According to this witness the Claimant used profanity on the job sites "...all the time...". When she asked for track and time on the day in question and the Claimant continued his habit of giving it out too fast this witness states that the assistant

foreman told her that the Claimant called her the "...dumbest mother fucker out there...". According to this witness this harassing of her by the Claimant in different ways had been going on for several months. According to this witness her job briefings were sometimes deficient and she did not exactly know what to do. After she finally called the 800 number this witness states that the harassment stopped and implied that the Claimant's attitude and demeanor changed.

Testimony by assistant foreman James Strauss is that he had no recollection of the Claimant using vulgar language or of saying anything threatening to any employees.

Testimony by the Claimant is that he never engaged in inappropriate conduct against Ms. Haney nor spoke to her in an inappropriate way. He had never threatened to disqualify her. He states that she was doing a good job as a machine operator. He did not recall ever asking Mandy Haney to lead the stretching exercises. He states that he is careful about giving clear job briefings. When asked if he had ever used profanity on the gang the Claimant responds: "...well, yeah...". When asked if he had talked with HR since the 800 call was made the Claimant responds that he did. When asked what was talked about the Claimant states: "...just...what Mandy said and stuff like that...". He later also talked with the assistant road master and told him that "...it would be handled...and it was handled...". When asked at the investigation what it was that was handled the Claimant states that it was about "...some stuff Mandy said that I had said, and told him. well, I don't care, I mean it's handled...". He also states that he told the road master that he "...don't work with her that much in the back..." anyway. He stated that he told HR that

he had used profanity on the job but intimated that it was done "...jokingly...". But he does not do that anymore. He says he "...cleaned it up...". On cross-examination the Claimant states that there has not been any problems "...since this incident...". According to a question by the union representative to the Claimant, "...all parties involved had talked and this issue was addressed and put to rest...". The Claimant agreed with that. In closing statement the union representative states that machine operator Mandy Haney was the "...one who started this ball rolling, now who's pushing this? She said her life's better...".

Findings on Merits

The merits of this case centers on credibility issues. The Claimant is accused of engaging in behavior that another employee found threatening and belittling, and with using language toward her and toward others that was inappropriate in his capacity as foreman of a track gang.

Either the Claimant did these things or his accuser, machine operator Mandy Haney, is making them up.

The assistant road master, witness Haney and the Claimant himself admitted that the Claimant used profanity in dealing with employees under him in the track gang. According to the Claimant he only used profanity, however, in a joking manner. If so, in view of testimony by witness Haney, the manner was a rather mean-spirited one. What is clear, from Haney's testimony and from testimony by the Claimant himself, is that the

use of profanity by the Claimant stopped after the 800 call was made and he "...cleaned it up...". Apparently, there was something to clean up.

But there is more to this case than simply the use of profane language by a foreman in dealing with his subordinates. There is the specific issue of how the Claimant dealt with the only woman in the gang who is the one who made the 800 call in the first place. She says he said on a number of occasions that he was going to disqualify her. He denies that he ever said any such thing. She said he insisted on a second day in a row that she be in the center for the stretching exercises even after she made it clear to him that she did not want to do so. He denies that he ever asked her to do any such thing. Haney said that the assistant foreman told her that the Claimant doubted her intelligence in vulgar and obscene terms. The Claimant denies that he did this. At the investigation the assistant foreman, for all practical purposes, appeared to have amnesia about anything this case was about in the first place.

So outside of the Claimant's use of profane language on occasions with subordinates, there are no other issues to be addressed by the Board in this case with respect to the relationship between the foreman who is Claimant, and machine operator Haney. If such is so then what "incident" is the Claimant referring to when he testified that everything between he and the Ms. Haney is now cleared up? And what exactly is the union representative talking about when he states that "...all parties involved had talked and this issue was addressed and put to rest...". What is the issue being referred to here? It is not possible to put an issue to rest if none exists. And why did the union

representative state, in his closing statement at the investigation, that Ms. Haney was of the view, apparently after the 800 # phone call had been made and an investigation conducted by HR, that her "...life's better..." now. What was wrong with it in the first place?

Since all parties to this case are in agreement that there was an "incident", or an "issue" that had been "put to rest", and that the accuser in this case now has a "better life" what can all of this be referring to except the details of the testimony outlined by the accuser in this case in the first place?

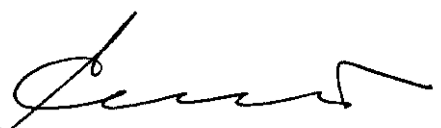
In accordance with the rule of reasonableness that tells us that parties to the defense of a case do not make irrational statements, or testify irrationally, just for the sake of doing so, the Board concludes that there is sufficient indirect evidence in this case to warrant conclusion that the accuser's testimony passes the litmus test of credibility and that of the Claimant, and certainly that of the assistant foreman, does not. The incidents or issues that were put to rest, according to the Claimant and the union, could not have been anything other than those things that Ms. Haney testified about: threatening behavior by the Claimant who talked to her about disqualifications and requirements that she lead stretching exercises when she clearly was not obliged to have done so, his refusals to clarify time and track instructions, and the obscene and belittling comments he made about her to others. There are no other incidents nor issues in this case except these.

The Claimant to this case was not disciplined for what happened after the 800 # call was made. He was disciplined for what he did before that call was made.

In view of the full record before it the Board cannot find sufficient grounds, therefore, for disturbing the discipline assessed in this case by the Carrier and it must rule accordingly.

Award

The claim is denied.



Edward L. Suntrup, Chair &
Neutral Member

Date: 2/17/07