

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

NMB Case No. 21

Claim of I. W. McCaffrey
Threats of Violence,
Insubordination,
Altercation

and

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Request in behalf of Northern California Division Conductor I. W. McCaffrey for immediate reinstatement to service, exonerated of all rules violation, including the removal from his personal record and return to service with pay for all time lost from March 19, 2004 until returned to service, with all other rights unimpaired and with no removal of outside earnings.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on March 10, 2006, at Washington, D.C. Claimant was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts.

Claimant was employed by the Carrier as a Conductor. At times relative to this dispute, he was assigned to Bakersfield, California.

Under circumstances which are not a part of the record, Claimant was held out of service to undergo a 30 day alcohol treatment program. On March 19, 2004, following his completion of the program, Claimant called Bakersfield Superintendent of Operations Ed Cobean to discuss his return to work. Mr. Cobean explained to Claimant that seniority rules require that he work in Fresno or other location his seniority would allow. Claimant wanted to move to Phoenix, Arizona and was upset that neither the Carrier nor the Organization were helping him do that. In the telephone call, Mr. Cobean also reminded Claimant that he had been notified to attend an investigation regarding his alleged violation of the Carrier's Attendance Guidelines.

Claimant's statements during the telephone call triggered the Carrier's notice to Claimant to attend a hearing to ascertain his

responsibility in connection with the alleged threat of violence, in violation of the Carrier's policy, as well as in violation of various other rules.

Mr. Cobean testified at the hearing that the telephone call degenerated into an argument in which Claimant raised his voice to Mr. Cobean. According to Mr. Cobean's testimony, during that conversation, Claimant told his supervisor "I will get you and [Claimant's Union representative]. I will find you guys and I will do something about this on my own terms", "I will not let you get away with this" and that, in conclusion, "I will take you down". Claimant also stated in the conversation that he had an attorney and intended to sue both the Organization and Carrier. When Claimant was advised by Mr. Cobean that he felt threatened, he responded that "I will take you guys out and you will not know what happened".

Claimant acknowledged in his testimony that he had called Mr. Cobean on the date specified to inquire about a notice of investigation he had received for excessive layoffs. He testified that he was afraid he was being harassed in consequence of an injury. He also asked about where he should mark up on his return from treatment and was told that, on the basis of his seniority, he would work out of Fresno for at least five years, which Claimant protested. He acknowledged stating that he was "going to get a bit ugly from here", that he had retained a lawyer and would sue both the Carrier and the Organization. He denied threatening anyone. Indeed, he admitted raising his voice only a little.

Following the hearing, the Carrier dismissed Claimant from employment for making threats of violence against Mr. Cobean in violation of General Code of Operating Rule 1.6, Employee Safety Rules S-28.6 and S-28.7 and the Carrier's Violence in the Workplace Policy No. HR-90.4, as revised.

The instant claim for Claimant's reinstatement and payment for all time lost, was presented in due course and progressed on the property in the usual manner, but without resolution; and it was submitted to this Board for disposition.

POSITIONS OF THE PARTIES: The Carrier argues that it proved cause for Claimant's dismissal by substantial credible evidence. It asserts that Claimant acted in an intimidating, threatening and discourteous manner toward Mr. Cobean, in violation of the Carrier's policy against violence and several cited rules. It maintains that Claimant spoke in a raised voice and continually interrupted and verbally abused Mr. Cobean. The Carrier contends

that Claimant had been placed on notice of the various policies and rules at issue.

The Carrier maintains that the Organization's arguments are without merit. It asserts that the discipline was not untimely, as the Organization's August 1, 2004 appeal was declined on August 10, 2004, by certified mail, a period far less than the 30 day period required by contract. The Carrier argues that mailing the letter on that date satisfied its obligation.

As to the Organization's argument that the Carrier failed to meet its burden of proof because the lack of corroboration of Mr. Cobean's testimony, the Carrier asserts that the circumstances preclude such corroboration, but that Mr. Cobean's testimony was consistent and was determined by the Carrier to be credible. As to the Carrier's failure to produce the Human Resources Representative, the Carrier maintains that her testimony was not relevant and that the Organization failed to request her to be present. As to the security officer whom the Carrier assigned to attend the hearing, the Carrier denies that he somehow represented a prejudgment of Claimant's guilt; it maintains that he was assigned as a precaution, given the nature of the charges.

The Carrier urges that the claim be denied.

The Organization argues that the Carrier failed to afford Claimant a fair and impartial hearing, failed to meet its procedural obligations under the governing Agreement and failed to prove the charges against Claimant.

As to the procedural infirmities, the Organization points out that its appeal was delivered on August 5, 2004, but that the response failed to arrive within the required 30 days. It argues that the Carrier's records are insufficient to prove the transmittal of the letter and that the Organization's efforts to track the letter produced no record that it had been sent.

As to the interference with Claimant's right to a fair and impartial hearing, the Organization complains that it was denied the right to cross-examine the HR representative and that the presence of a Special Officer demonstrates prejudgment on the part of the Carrier.

As to the merits of the charges, the Organization maintains that the record is essentially a "he said/he said" dispute. It asserts that Claimant was frustrated, believed he had been discriminated against by both his union and his employer, and simply intended to communicate that he would use every legal means

at his disposal to rectify the situation. It concedes that he was upset, but denies that he threatened Mr. Cobean.

The Organization urges that the claim be sustained.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to prove Claimant's guilt of the charges by substantial credible evidence on the record as a whole, and to establish that the penalty of dismissal was an appropriate response. It was also the Carrier's obligation to afford Claimant a fair and impartial hearing and to comply with its procedural obligations under the governing Agreement. For the reasons which follow, the Board is persuaded that the Carrier met its burdens.

The evidence persuades the Board that the Carrier mailed its response to the Organization's appeal on the 11th, within six days of receiving the appeal on the 5th, thereby satisfying its contractual obligation to respond within 30 days. The Board is also unconvinced that the Carrier denied Claimant a fair hearing by failing to call the Human Resources representative, as there is no demonstration that she had knowledge relevant to the charges. As to the Carrier's determination to assign a Special Officer to attend the hearing, the Board is not persuaded that action constituted prejudgement on the part of the Carrier. The Carrier is entitled to take reasonable precautions to maintain security in any proceeding; it did not abuse its discretion in having the Officer attend a hearing where the charges included threats of violence.

As to the merits of the dispute, the testimony of Mr. Cobean was consistent and was deemed by the Carrier to be credible. That is sufficient to satisfy the Carrier's burden, which was to demonstrate substantial credible evidence on the record as a whole of Claimant's guilt. He was clearly discourteous, abusive and - most significantly - threatening. Claimant's testimony was, by contrast, evasive, inconsistent and self-serving. His testimony failed to overcome the Carrier's evidence.

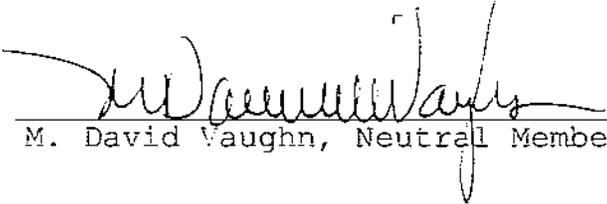
As to the appropriateness of the penalty, the Board is not persuaded that mere discourtesy, as evidenced by Claimant's interruptions and verbal abuse would, without more, warrant summary dismissal. However, the Carrier has made clear that the workplace must be free of threats and intimidation and has made employees aware that threats of violence constitute grounds for dismissal. The evidence persuades the Board that Claimant was clearly made aware of those prohibitions.

The Board is persuaded that Claimant's statements to him were, in fact, threatening. The language which Claimant is described as

having used is fully consistent with threats to do bodily harm to both carrier officials and union officials. It is not consistent with a mere communication by Claimant that he would avail himself of all legal processes. "Get you", "take you down" and "you will not know what happened" connote violence, not litigation. Under such circumstances, the Board is convinced that Claimant made threatening remarks and attempted to intimidate Mr. Cobean. While not every threat, regardless of context or content, warrants dismissal, Claimant's statements were over the line and warranted the penalty which was imposed. The Award so reflects.

AWARD: The Carrier proved Claimant's violation of the Carrier's policy against threats and violence and further proved that the penalty of dismissal was appropriate. The Organization failed to prove that the Carrier's handling of the discipline violated Claimant's right to contractual due process or to a fair and impartial hearing. The claim is denied.

Dated this 20 day of June, 2006.


M. David Vaughn, Neutral Member


Gene L. Shire
Carrier Member


R. L. Marceau
Employee Member