

PUBLIC LAW BOARD NO. 7254

**PARTIES) UNITED TRANSPORTATION UNION
TO)
DISPUTE) BNSF RAILWAY COMPANY**

STATEMENT OF CLAIM:

Claim and appeal in behalf of Minot, ND Yardperson K. L. Beeter for pay for all time lost, complete record clearance, with seniority unimpaired, account dismissed on May 11, 2007 and returned to service on leniency basis on September 7, 2007, for alleged violation of GCOR Rule 1.6, (alleged immoral and discourteous during voicemail message for Minot Terminal Manager Charles Brooks at 0354 on April 5, 2007). (UTU File: DISP BEETER 4/5/07; Carrier File: 53-07-0453D)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

At 0354 hours on April 5, 2007 Claimant left a voicemail message for Minot, North Dakota Terminal Manager Charles Brooks that included, without question, remarks that were most disrespectful and inappropriate. The Claimant addressed or referred to Mr. Brooks as "Charlie Brown" while asking Mr. Brooks to call him back with the telephone number of another employee. The Claimant then proceeded to engage in conversation with another person while his voice message to Mr. Brooks was still being recorded. In this latter regard, the Claimant is heard to several times laughingly refer to Mr. Brooks as Charlie Brown, and, among other things, to have said: "I'm going to burn his ass" and "I'm not done with this (expletives deleted) dude."

Following a company investigative hearing into the incident, Claimant was notified by letter of May 11, 2007 that he was dismissed from employment with the Carrier for violation of Rule 1.6, Conduct, of the General Code of Operating Rules, for having been immoral and discourteous during a voicemail message for Mr. Brooks.

Before moving to the merits of the dispute, the Board will first address why it does not find procedural argument advanced by the Organization sufficient to hold that Claimant had been denied contractual due process rights.

First, as concerns Organization argument that the Carrier failed to provide Claimant's representative with a document introduced as an exhibit at the investigation within forty-eight (48) hours of the hearing so as to allow for preparation of a defense as is prescribed in the applicable Discipline Rule. The document in question was Claimant's "Crew History" record, something available and accessible, as the Carrier offers, at any time by an employee or a representative. This Crew History record was introduced with respect to Claimant having offered that he had made numerous calls about laying off prior to his voicemail to Mr. Brooks. It thus does not appear that this particular document was necessary or crucial to the preparation of a defense against the charges of record.

Second, in regard to the Discipline Rule prescribing a complete copy of the transcript of hearing be provided to Claimant and his representative within thirty (30) days of the close of the hearing. Here, the Organization says that both Claimant and his representative were provided a partial copy of the transcript sixty-eight (68) days after the close of the hearing. It is referred to as partial because the transcript did not include two hearing exhibits, namely, Exhibit "A" (the notice of hearing) and Exhibit "B" (Claimant's Crew History record). Although the exhibits should have been attached to the transcript, the content of both exhibits had been read into the record at the time they were presented into evidence at the hearing. While a serious procedural defect not to provide timely copy of the transcript, the Board does not find such happenstance in this instance sufficient to set discipline aside in the absence of a showing that the Carrier has habitually failed to timely provide copies of transcripts. Further, the record does not show that the delay in providing the transcript affected timely appeal of discipline.

Turning to the merits of the dispute, although Mr. Brooks testified to his having considered the aforementioned remarks of Claimant to be of a threatening nature, when questioned as to whether Claimant had ever been disrespectful to him in any way in the past, Mr. Brooks said: "No, not at all. That's why this tape was kind of shocking to me."

The Claimant does not deny his having made the voicemail call to Mr. Brooks, but maintains the message he wanted left was that up the point where he identified himself and gave his employee number. Claimant said he was not aware that his further remarks about Mr. Brooks while he was having a private conversation with another individual were being recorded. Claimant said that he had a flip phone and thought he had shut the phone off as he put it into his pocket. At the same time, Claimant acknowledged that his remarks about Mr. Brooks were inappropriate.

As concerns having addressed Mr. Brooks as Charlie Brown in the voicemail, Claimant said he had not meant to do so; it was an accidental thing; a slip of the tongue; and, it just came on to him when somebody said something in the background as he was making the call to Mr. Brooks.

During appeal of the claim, the Carrier, by letter of September 7, 2007, proffered a reinstatement to service on a leniency basis, with actual dismissal from May 15, 2007 until September 7, 2007 without pay, and with three years Level "S" probation commencing from the date of reinstatement.


Although Claimant did not execute the letter of reinstatement, he was returned to service by the Carrier, with the understanding that Claimant retained the right to pursue a claim for time lost prior to the date of reinstatement, i.e., May 11, 2007 thru September 7, 2007.


There is no question that the remarks made by Claimant about Mr. Brooks were disrespectful, profane, and discourteous. However, in view of the remarks, other than that of having addressed Mr. Brooks as Charlie Brown, coming from a private conversation with another person at a time when Claimant was of a belief that his voicemail to Mr. Brooks had stopped, the Board finds the extent of discipline as administered to be harsh and unreasonable. We say this especially in a belief that there was no real or intended threat of violence against a supervisory official, and in view of Mr. Brooks' testimony that Claimant had not in the past been disrespectful of him. It is also noteworthy that Claimant was excessively laughing when he made the several remarks about Mr. Brooks. Moreover, the Board finds it significant that Carrier's notice of discipline referred to Claimant's remarks as having been "immoral and discourteous." The remarks were not cited in the discipline notice as having been threatening.

In the circumstances, the Board finds that discipline be modified to a thirty (30) calendar day suspension and that Claimant be made whole for the balance of time he was held out of service, with a deduction for outside income earned during this period of time.

AWARD: Claim sustained to the extent set forth in the above Findings.


Robert E. Peterson
Chair & Neutral Member


Roger A. Boldra
Carrier Member


Jay L. Schollmeyer
Organization Member

Fort Worth, TX
Dated: 11-17-09