

NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 5332

Parties to Dispute:	)	
	)	
INTERNATIONAL BROTHERHOOD OF	)	<u>AWARD</u>
ELECTRICAL WORKERS	)	
	)	Case No. 168
-and-	)	
	)	Claimant A. Vargas
NORFOLK SOUTHERN RAILWAY	)	
COMPANY	)	

**STATEMENT OF CLAIM:**

“Claim on behalf of Electrician Armando Vargas in Chicago, Illinois, for reinstatement with seniority rights unimpaired and made whole for all losses sustained. These begin the date removed from service, continue to the present date and include, but are not limited to, lost wages, vacation rights, health and welfare and insurance benefits, pension benefits such as Railroad Retirement and Unemployment Insurance, and any other benefits that would have been earned during the time Electrician Vargas is unjustly withheld from Carrier’s service. We also request his personal record be cleared of the matter.”

**FINDINGS:**

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

On September 3, 2016, Carrier charged Claimant Vargas with:

...conduct unbecoming an employee in connection with your threatening email sent to Elkhart Locomotive Shop Manager Jason A. Roberts, Calumet Senior General Foreman Raul Huerta, *et al.* at approximately 12:38 AM on May 3, 2017.

On January 17 2017, Carrier conducted a formal investigation into the charges lodged. On June 16, 2017, Car Shop Manager B. S. Allen wrote Claimant notifying him of his dismissal from service. When the Organization’s grievance challenging that action remained unresolved following conference, the dispute was advanced to this Board for final disposition.

According to the record before the Board, Claimant had initially hired on as a Student Electrician in December 2002. At the time of the events giving rise to this dispute he was assigned to Carrier's Locomotive Shop in Chicago. Commencing in 2009, Claimant had submitted several bids for an Electrician position at the locomotive shop in Burns Harbor, Indiana, when it became vacant, applying most recently on February 19, 2017. Each bid, however, was rejected for lack of one or more necessary job qualifications, including failure to possess a Commercial Driver's License, lack of welding qualifications or lack of training on the Carrier's ITCS system. Frustrated by the persistent rejections of his bids, he initially protested to supervision and then unsuccessfully pursued his claim through the grievance process under the CBA. He then filed a complaint with the EEOC in 2013 alleging discrimination. That action eventually culminated in a lawsuit ultimately withdrawn in 2015. Claimant's efforts to make the transfer continued for another two years, however, despite his failure to acquire or train for all of the pre-requisite qualifications the position required.

In early 2017, Claimant was subpoenaed to testify on Carrier's behalf in a lawsuit brought by another employee implicating issues unrelated to Claimant's efforts to bid to Burns Harbor. After being deposed, in April 2017 he met with Carrier's legal team in preparation for trial. Then, in what Carrier asserts was a bold attempt to leverage his testimony toward his own end in obtaining the position he desired, he composed and sent to his supervisor, numerous other Carrier officers and an attorney representing Norfolk Southern, the following e-mail:

To all concerned:

My name is Armando Vargas. The reason for this letter is in regards to the current meeting it the Verhoeve case. I met up with Tasha Howell and a couple of NS attorneys by the name of Maureen A. McGuire and Dan Hronek. On or about Tuesday, April 25, 2017, the reason for this meeting is because I was called in this case as a witness. We went over my deposition that was given on May 7, 2015 and we also discussed a couple of items in the matter, one being the mirror and the next being the brake paddle. These two items are currently key items that are going to be brought up at trial. So I wanted to make something clear so that we are all on the same page. As some of (*sic*) may know, I was previously "wrongfully denied per IBEW Bargaining Agreement" the Burns Harbor Electrician position. The most recent time was on or about February 9, 2017 and many times before then.

So with that said, I wanted everyone of us to be clear on my intentions on trial date. Which as of today, I'm not really sure was axact (*sic*) days are going to be because I haven't bee notified. Okay. So number one, I'm going to explain to the jury my situation and experience in regards to the way the Company has trected me previously and how I feel about this case, and the details of the meeting with the NS lawyers which will lead to grave repercussions. Or 2. I rightfully get sent to the Burns Harbor Electrician position and all that I will say a trial will be in regards to Mr. Verhoeve's trial, I will be satisfied and Norfolk Southern will (*sic*) satisfied.

Asterisk, if I don't get rightfully sent to the Burns Harbor Electrician position before trial date, at trial, I will explain my experience with the NS and the trial will not be favorable to the NS. And this will go past the Dearborn Division all he way up. I will make sure of that.

Best Regards, and hopefully, everything turns out well.

Armando Vargas.

The Organization argues that dismissal was excessive under the circumstances, and relies on several procedural issues in support of its plea for vacating Carrier's action. In contrast, Senior Gcneral Foreman R. Huerta testified at the formal investigation that he viewed Claimant's email as a threat to the best interests of Norfolk Southern. According to Mr. Huerta, Claimant was "willing to say that [he] will say favorable or unfavorable [things about the Carrier], but this will be determined on [whether] 'I am given the Burns Harbor position before trial date.' That is a threat. I take that as a threat.." Chicago/Elkhart Locomotive Shop Manager J. A. Roberts testified in similar fashion: "...the word grave repercussions. I don't know any other way to take that except for threatening and intimidating."


This record entirely supports the judgment of both witnesses. While the facts of record do not suggest anything approaching workplace violencc, by his own testimony, Claimant concedes that he believed his personal history with the Carrier, if revealed at trial, would damage its position in the underlying litigation. He openly concedes he was committed to doing whatever was necessary to be assigned to Burns Harbor. There is no way to sugarcoat it: this was definitionally extortion, a classic shakedown in the form of a crude attempt to obtain a position he was unqualified to perform through threats and intimidation.

Was the quantum of discipline proportionate to the offense? Upon careful consideration of the record in its entirety, the Board finds that it was. Standing alone, the nature of the offense was extremely serious, flying in the face of all conventionally accepted standards of proper work-related behavior and undercutting the necessary trust that must mark the employment relationship. In this instance, Claimant's discouraging prior service record must be viewed as offering no basis for the Board to interfere with Carrier's judgment.

A W A R D

The Claim is denied. Claimant was dismissed for just cause.

  
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Tom Owens  
Employee Member

  
\_\_\_\_\_  
James E. Conway  
Chairman and Neutral Member

  
\_\_\_\_\_  
Christopher Carr  
Carrier Member

Dated: December 31, 2018