

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39001
Docket No. MW-39353
08-3-NRAB-00003-060206
(06-3-206)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference

PARTIES TO DISPUTE: (

(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1) The discipline (withheld from service under letter dated March 18, 2005 and dismissal under letter dated April 21, 2005) imposed upon Mr. D. Smock for alleged violation of Violence in the Workplace, Policy No: HR-90.4 and MOW Operating Rule 1.6 in connection with an alleged and perceived threatening comments against Supervisor R. Brennan made through a hotline call made on March 14, 2005 and a voice mail left on February 9, 2005 while working various welding positions in Gillette and Douglas, Wyoming was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File C-05-D070-7/10-05-0208 (MW) BNR].
- 2) As a consequence of the violation referred to in Part (1) above, the discipline imposed upon Mr. D. Smock shall now be set aside and he shall be reinstated to service with all rights unimpaired and compensated for all lost wages.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

By notice dated March 18, 2005, the Claimant was withheld from service and directed to attend a formal Investigation and Hearing on charges that the Claimant allegedly violated the Carrier's Violence in the Workplace Policy and MOW Operating Rule 1.06 in connection with alleged threatening comments against Supervisor R. Brennan made in a March 14, 2005, hotline call and a February 9, 2005, voicemail message. After a postponement, the Investigation was conducted on March 29, 2005. By notice dated April 21, 2005, the Claimant was informed that as a result of the Investigation, he had been found guilty as charged and 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 him. The Carrier denied the claim.

The Carrier initially contends that the record clearly supports a finding that the Claimant violated both the Violence in the Workplace Policy and Operating Rule 1.6. The Carrier asserts that the disciplinary penalty therefore was appropriate.

The Carrier argues that it is a long-standing principle that violence, or threats of violence, in the workplace are inappropriate and impermissible, particularly when a deadly weapon is involved. The Carrier maintains that the Claimant admitted to making an 800 call to the Carrier on March 14, 2005, during

which he stated that Roadmaster Brennan was "lucky that he did not get shot," and that the Claimant would not "have a problem at all with sticking a gun in Brennan's face." The Carrier points out that the Claimant's stated reason for making these statements was that he was very angry that Brennan had illegally entered his home. The Carrier contends, however, that the record conclusively demonstrates that Brennan had not entered the Claimant's home.

The Carrier then emphasizes that this March 14 call, supposedly the result of "emotional outrage," was not made until more than three full weeks later, which suggests that it was a premeditated threat. Moreover, this was not a one-time occurrence. The Carrier points to Assistant Roadmaster Lockwood's testimony that the Claimant made similar statements on several occasions during the early part of March. The Carrier additionally argues that these comments caused Brennan and his wife to feel fear, and other employees also were concerned. The Carrier contends that this concern extended to the local municipality as well, with the Gillette Police Department treating seriously a report of the Claimant's statements and assigning a patrol to Brennan's residence for a period of two weeks.

The Carrier maintains that the record clearly shows that the Claimant repeatedly threatened to shoot and kill Roadmaster Brennan, a blatant violation of the Violence in the Workplace Policy and Operating Rule 1.6. The Carrier insists that the Claimant was properly disciplined. The Carrier contends that the weight of arbitral authority upholds its right to dismiss an employee who engages in such violent and dangerous conduct. Moreover, numerous Board Awards have determined that it is not the function of an adjustment board to substitute its judgment for that of the Carrier or to grant leniency.

The Carrier asserts that it did not act in an arbitrary or whimsical manner in dismissing the Claimant from service. Threatening a fellow employee warrants nothing less than dismissal. The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Carrier failed to meet its heavy burden of proving the stigmatizing charges leveled against the Claimant. The Organization asserts that shortly after arriving in the Gillette, Wyoming, territory,

Roadmaster Brennan had provoked a number of issues between himself and the employees that he supervised.

The Organization argues that on February 7, 2005, the Claimant was late for work, apparently for the first time. When the Claimant then needed to be absent on February 8 and February 9, 2005, and then became very ill and was unavoidably absent on February 15 and 16, 2005, Brennan appeared, unannounced, at the Claimant's doorstep with a charge letter in hand. The Organization points out that the Claimant had called in to report his absences and/or request floating vacation days, which he had earned. The Organization contends that the Claimant realized that he had been singled out for disparate treatment, and the Claimant was most disturbed by Brennan's opening of the Claimant's screen door when the Claimant was ill and in a deep sleep.

The Organization insists that Brennan violated the Claimant's property rights by entering the Claimant's property, coming to his front door, and opening his screen door, doing so uninvited and unannounced. The Claimant, believing such actions were a provocative and heavy-handed approach toward a veteran employee, reported Roadmaster Brennan's dubious actions via the Carrier's "hotmail." The Organization asserts that the Claimant's statement that Brennan was "lucky he had not been shot" was badly misinterpreted and improperly linked to his earlier voicemail message.

Pointing to Wyoming's cowboy culture, the Organization maintains that the Claimant's statements were taken out of context. The Claimant's statements were a natural expression that he would hypothetically defend his home and property rights. The Organization argues that the Claimant is no wordsmith, and machismo may have colored his speech, but the Claimant also make it unequivocally clear that he never intended to harm Brennan. The Organization further asserts that the Claimant's voicemail message that Brennan "won't be here long" was completely innocuous, particularly in light of the fact that the Claimant had seen seven other Roadmasters come and go during his 14 years with the Carrier. The Organization additionally contends that a fair reading of the Claimant's "hotmail" statement makes it equally clear that the Claimant's motive was to change, and make safer,

the delivery of written Carrier correspondence to an employee's home, and not to personally threaten Brennan with violence.

The Organization points out that the Carrier subsequently did determine that Brennan was the problem, noting that the Carrier demoted Brennan during the on-property handling of this claim. The Organization argues that it was the Carrier, through Roadmaster Brennan's precipitously heavy-handed tactics, that snowballed a nit-picking issue about call-ins to report absences into a veteran employee's dismissal from service; the Organization asserts that the Claimant only wanted to make circumstances better for everyone.

The Organization insists that the record does not support the charges or show that the Claimant violated a reasonable application of the Carrier's policies. The Organization argues that the Carrier's decision to dismiss the Claimant was arbitrary, capricious, and on the basis of unproven charges.

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 the Board.

The Board 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 violating Carrier Violence in the Workplace Policy No. HR-90.4 and the Maintenance of Way Operating Rule 1.6 when he made an 800 telephone call to the Carrier on March 14, 2005, and threatened his supervisor. The Claimant stated that the supervisor "was lucky he did not get shot" and that the Claimant did not have "a problem at all with sticking a gun in [his] face." There is no question that those statements made to the Carrier about one of its supervisors violated the Carrier's policies prohibiting employees from being quarrelsome and also prohibiting them from making threats of violence. The Claimant admitted that he made those statements, but stated that he was angry and was suffering from some type of emotional outrage. The Board does not find that that explanation absolves the Claimant of his guilt in this matter.

Once the 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. The Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

As stated above, the record establishes that the Claimant acted in violation of the Carrier rules when he threatened to shoot and kill the Roadmaster. Numerous Awards on various boards have upheld the Carrier's right to discharge employees when they threaten violence in the workplace, particularly when they threaten to kill a supervisor.

The Board cannot find that the action taken by the Carrier when it decided to terminate the Claimant was unreasonable, arbitrary, or capricious. Therefore, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of March 2008.