

PUBLIC LAW BOARD NO. 7564

Case No.: 21/Award No. 21
Carrier File No.: 10-12-0301
Organization File No.: C-12-S090-1
Claimants: Michael D. Baker
Terance D. Ray

BNSF RAILWAY COMPANY)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES DIVISION - IBT)

Statement of Claim:

The Carrier violated the Agreement when on March 9, 2012 Claimants Michael D. Baker and Terance D. Ray were issued Level S thirty (30) day actual suspensions and one (1) year review periods for violating MOWOR 1.6 Conduct.

As a consequence of the violation, the Carrier should expunge the discipline from the Claimants' personnel records and make them whole for all wages and benefits lost, including wages lost because of being withheld from service.

Facts:

By letter dated February 9, 2012 the Claimants were directed to attend a February 17, 2012 investigation "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged conduct creating an intimidating, offensive or hostile work environment at approximately 0745 hours on February 9, 2012, while assigned as Machine Operators in Denver, Colorado." The notice also noted that the Claimants were being withheld from service.

Carrier Position:

There was a fair and impartial investigation that produced the required substantial evidence. The Organization produced no evidence that the Claimants were the objects of prejudice or that the outcome of the investigation was prejudged. There was a clear violation of MOWOR 1.6 Conduct as the facts show that the Claimants were physically threatening and aggressive toward each other. Claimant Ray twice called Claimant Baker a liar and Claimant Baker moved toward Claimant Ray saying that they should take the dispute outside and settle it like men. Mr. Abeyta's intervention may have prevented additional escalation. The different versions of what occurred required a credibility

determination to be made by the Conducting Officer, with such a determination not to be disturbed by the Board. Prior awards establish the Carrier's right to discharge for behavior such as that exhibited by the Claimants. However, the Carrier has provided leniency by imposing an actual thirty (30) day suspension¹ and a one (1) year review period. Leniency is not the Board's prerogative, but only the Carrier's. The Board can only deny the claim or sustain the claim and expunge the Claimant's record.

Organization's Position:

The investigation was not fair and impartial because the Conducting Officer asked leading questions and then twisted some answers to fit his ideas. Also, the Conducting Officer and Roadmaster Fry conferred about the incident on February 9, 2012² and thereafter there was an investigation after the Claimants had been withheld from service. This shows that they were prejudged. The Carrier has not met the burden of proof. The testimony of both Claimants and Mr. Abeyta shows that Claimant Baker did not invite Claimant Ray to step outside and settle the argument like a man. Mr. Abeyta put his hand on Claimant Baker's shoulder while at the Claimant's side, but did not step in front of Claimant Baker and did not restrain him. There was a discussion—a difference of opinion—but nothing physical and no intimidating, offensive or hostile work environment. Mr. Abeyta, with 41 years, and Claimant Baker, with 39 years, testified that nothing out of the ordinary occurred. The incident did not cause talk among the other assembled employees. The Claimants and Mr. Abeyta are to be believed, while Roadmaster Fry provided inflammatory and false testimony that should be ignored in its entirety. Facts were ignored and Roadmaster Fry's opinion was used to discipline the Claimants. Even Mr. Abeyta, a Carrier witness, disagreed with Roadmaster Fry about whether Claimant Baker was restrained and the seriousness of the incident. An argument does not mean intimidation. The Carrier relied on the personnel records of the Claimants, but these records are not in evidence and thus the Organization could not review them for inaccuracies. The rule concerning violence was not entered into the record or included in the notice of investigation.

Findings:

The investigation was fair and impartial. While there was an incident that did not escalate to a physical confrontation, withholding the Claimants from service was a reasonable exercise of managerial discretion designed to ensure against a repeat of the incident or worse. The exercise of that managerial discretion is not viewed as prejudgment, even though it involved Roadmaster Fry and his superior. The questions asked by the Conducting Officer, while leading, are not viewed as so blatantly unfair as to cross the "fair and impartial" line, although Mr. Carpenter could indeed use instruction on how to frame non-leading questions and the reason that non-leading questions are preferred from the Conducting Officer.

¹ Mr. Osborn incorrectly referred to a thirty (30) day record suspension in his August 3, 2012 response to Dennis L. Craft's appeal.

² Roadmaster Fry stated that he conferred with his superior. It is not clear to the Referee if the reference was to the Conducting Officer.

When the incident itself is considered, testimony to a great degree falls into the "he said, she said" category. While there is agreement that Claimant Ray used the word "liar" in reference to Claimant Baker, there are differences in how the word was used. Roadmaster Fry was clear that Claimant Baker invited Claimant Fry outside to settle the argument, but both Claimants denied that such an "invitation" was issued. There is unspoken disagreement about whether the noise of a coffee grinder prevented some words from being heard. The Claimants mentioned the grinder but Roadmaster Fry did not. And there was disagreement between Roadmaster Fry and the Claimants and Mr. Abeyta about the seriousness and impact of the dispute. The examples noted above are set out simply to demonstrate the need to determine credibility. However, this is not the Board's determination to make. It is well settled that the Conducting or Hearing Officer is to make credibility determinations. Referee Conway wrote in Third Division Award 33219 "That credibility determinations are the province of the Carrier in these proceedings is a proposition too well established to need annotation here." Referee Conway clarified the precedent in Third Division Award 33220 by stating, "In the absence of exceptional circumstances, the Board has no authority to disturb the credibility findings of the Carrier's Hearing Officer." This Board does not find any "exceptional circumstances" that would justify disregarding the Hearing or Conducting Officer's credibility determination.

The Board accepts the determination that the non-physical altercation was triggered by Claimant Ray calling Claimant Baker a liar twice, that Claimant Baker advanced 12-15 feet toward the always-seated Claimant Ray, that both men were loud and angry, that claimant Baker "invited" Claimant Ray to settle the matter outside like men, that Mr. Abeyta helped defuse the verbal altercation and the Roadmaster Fry's initial order to halt the argument was ignored. The Carrier has provided substantial, credible evidence that a brief (possibly about two minutes) but inappropriate verbal altercation occurred and that it had the potential, but did not escalate, to become something more serious. The argument violated MOWOR 1.6 Conduct because, at a minimum, an offensive if not intimidating and/or hostile workplace was created, if only briefly,

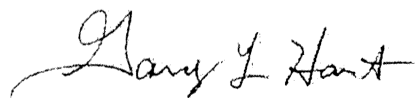
Whether or not the Carrier truly exercised leniency in not discharging a 39 year employee for a brief but serious lack of judgment and a 7 ½ year employee who, after triggering the argument, remained seated and did not indicate a desire to become physical is a matter of conjecture. What is not open to conjecture is that the Carrier has established the right to assess the above-noted discipline. Maintenance of Way work is a far cry from a debating society. The work is performed by robust individuals, with some surely high spirited, and can involve significant physical exertion. The Carrier must maintain a firm hand to ensure that the workplace is one where at all times employees can work as safely as possible and not be threatened either by the work or by fellow employees. Viewed in that context, the Board has no basis for setting aside the discipline.

Award:

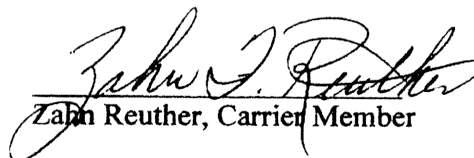
Claims denied.

Order:

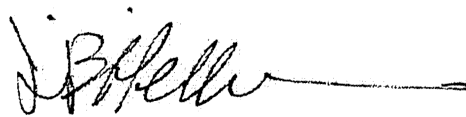
This Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimants be entered.



Gary Hart, Organization Member



Zach Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
June 28, 2013