

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES DIVISION—IBT)
)
v.)
)
BNSF RAILWAY COMPANY)

Carrier File No. 10-12-0622
Organization File No. C-12-D070-17

Claimant — Dennis R. Hiatt

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The discipline (dismissal) imposed upon Mr. Dennis R. Hiatt by letter dated August 17, 2012, for alleged violation of MOWOR 1.12 Weapons in connection with charges of possession of a firearm in a company vehicle on July 30, 2012, at or near MP 10.4 on the Beatrice Subdivision. The Carrier's first date of knowledge with regard to this rule violation was July 31, 2012.
2. As a consequence of the violation referred to in Part (1) above, Claimant Dennis R. Hiatt shall now receive the remedy prescribed by the parties in Rule 40(G).

BACKGROUND:

The Claimant, a Section Foreman on a mobile gang at the time of his discharge, entered service with the Carrier on May 8, 1978. The facts of what gave rise to the Carrier's decision to discipline the Claimant are not in dispute. On the morning of July 30, 2012, Claimant's gang was working in and around Crete, Nebraska, and the gang had stayed the preceding night at a Super-8 Motel in Crete. The Claimant and one of the gang members, Cliff Terwey, went to get into the truck

they were using, a vehicle owned by the Carrier. As Mr. Terwey seated himself on the passenger side of the cab, Claimant was rummaging in the back of the truck. Mr. Terwey turned to see Claimant taking a pistol out of a gun case. Claimant handed the pistol to Terwey and told him to be careful because the gun was loaded. Claimant asked Terwey not to tell Michael Haberer, a machine operator who was working with them. At the end of their shift, Terwey told Claimant that he could put the gun in the trunk of his (Terwey's) car, so that it would not be in the truck with them. The next morning, July 31, as Hiatt, Terwey and Haberer went to get into the truck, Claimant took the gun from the rear of the truck cab and put it into Terwey's trunk. Haberer asked Terwey if it was a gun that Claimant was taking from the truck and Terwey acknowledged that it was. Claimant simply put the gun in the trunk of the car, and Terwey then put it into an empty cooler that was in the trunk.¹

At the end of their shift that day, Hiatt told Terwey that he wanted to get the gun out of his trunk. Terwey was occupied putting license plate stickers on his car, but he heard Claimant ask Haberer if he wanted to see the gun. The Claimant did not put the gun back into Terwey's trunk but left the motel and the area. Terwey and Haberer talked a few minutes about the gun. Terwey testified at the Investigation that he was shocked to see the pistol because he had never seen anyone have a gun in a company vehicle.

Terwey then reported the incident by telephone to Joseph Marr, a Special Agent with the BNSF Police Team in Lincoln, Nebraska. After speaking with Terwey and Haberer, Marr assigned the matter for further investigation to Senior Patrolman Scott Danley and Division Engineer Paul Farley, Claimant's supervisor. Danley and Farley went to Crete on August 1, 2012. When interviewed, Hiatt told the two men that he had purchased the gun in Kearney, Nebraska, over the weekend, en route to Crete for the following week's work. He was driving a Carrier vehicle. It was his intention to take the firearm back to his residence in McCook, Nebraska, when he returned home at the end of the work week in Crete. When he arrived in Crete, he put the gun in his lunchbox and asked Terwey if he could put it in the trunk of Terwey's car. The Claimant was fully cooperative and forthcoming about what he had done, and stated at the Investigation that he had made a stupid mistake. Danley confiscated the gun.

Maintenance of Way Operating Rule (MOWOR) 1.12, Weapons, states: "While on duty or on railroad property, employees must not have firearms or other deadly weapons, including knives with a blade longer than 3 inches. However, railroad police are authorized to have firearms in the course of their work." BNSF's Policy for Employee Performance Accountability (PEPA) sets forth

¹ The formal charge against the Claimant is for possession of a firearm in a company vehicle on July 30, 2012. Additional details relative to later dates are for purposes of describing the complete series of events that occurred, since there is a second, related Claim before this Board (PLB-07602-000014), which involves subsequent events that allegedly occurred on August 1, 2012.

the Carrier's expectations regarding employee conduct and the consequences of misconduct. There are three categories of discipline: Standard Violations, which are subject to a normal disciplinary progression; Serious Violations, which result in a 30-day record suspension for a first offense; and Stand Alone Dismissible Violations. Appendix B of the PEPA lists "violations which may result in immediate dismissal," including theft, dishonest, conduct leading to a felony conviction, and #5, "Violence in the workplace or instigation of a serious altercation. This includes possession of weapons and the threat of using weapons."

Following the Investigation, which took place on August 9, 2012, the Carrier concluded that the Claimant had violated MOWOR 1.12, Weapons, and that dismissal was appropriate under the PEPA. The Claimant was notified of the Carrier's decision by letter dated August 17, 2012.

The Carrier's position is that it had cause for termination of Mr. Hiatt's employment. There is no dispute that the Claimant violated BNSF's no-weapons rule (MOWOR 1.12), and possession of a weapon—at work, on Carrier property, or in a Carrier vehicle—is a Stand Alone Dismissible Violation under the PEPA. The Investigation was properly conducted and there were no procedural irregularities that would justify rescinding the Carrier's decision. According to the Organization, the circumstances did not warrant dismissal, which was excessive, unjustified, and arbitrary. The Claimant was fully cooperative all along and continued to work after the incident. Moreover, the duration of his employment with the Carrier should operate as a mitigating factor. Additionally, there were significant irregularities in the Investigation: (1) the hearing was not unbiased and impartial, and (2) an individual other than the Hearing Officer issued the discipline, someone who was not present and could not, as a result, make fair evaluations of the evidence, especially witness credibility. Finally, the letter of dismissal states that the Carrier based its decision on the Claimant's personnel record, but that record was not introduced at the Investigation.

FINDINGS AND OPINION:

The Board, upon the whole record and all the evidence, finds that the carrier 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 Public Law Board has jurisdiction over the dispute involved herein.

The basic facts of what happened *are* undisputed in this case: on July 30, 2012, the Claimant took a handgun from the Carrier vehicle he had been driving and showed it to one of his co-workers. The next day he showed the same gun to another co-worker.² MOWOR 1.12 is very clear

² The Organization complained that evidence regarding July 31, 2012, when Claimant showed the gun to Michael Haberer should not have been permitted at the Investigation because the written charge was limited to what happened on July 30, 2012. The events of July 31 are irrelevant in terms of what happened on July 30, but they are

that employees may not be in possession of firearms while on duty or on railroad property, which includes company-owned vehicles. Moreover, the PEPA expressly includes "possession of firearms" as one of the violations of Carrier rules that may result in immediate dismissal. (PEPA Appendix B, #5)

Violence, and even the potential for violence, in the workplace is a serious matter, and an employer's decisions regarding violations of its violence prevention rules are generally deferred to in arbitration except under the most egregious circumstances. This case does not present such circumstances. The Claimant's long service makes him sympathetic, but it does not excuse his deliberate violation of MOWOR 1.12. Even long-term employees must comply with basic safety rules. Claimant not only transported a handgun in a Carrier vehicle, he took it out to show to another employee—who aimed it at the Claimant in jest before being informed that the gun was loaded. Had Mr. Terwey pulled the trigger before Claimant told him the gun was loaded, the outcome could have been tragic. Moreover, Claimant repeated his actions the very next day, taking the gun out to show to another of his co-workers. One could understand perhaps that a gun enthusiast traveling away from home for a week of work might stop and make a purchase at an out-of-town specialty gun shop he passed en route without stopping to think that he was driving a company vehicle. But this is not that case. The Claimant did not just purchase a gun and absentmindedly transport it in a BNSF vehicle. He also purchased ammunition and loaded the gun, turning it into a deadly weapon. He could have left the gun in the back of the Carrier truck and no one would have noticed. Or he could have discreetly removed it to his motel room for the duration of his stay. But instead he elected to show the loaded gun to his co-workers on two different occasions. Claimant's actions demonstrate a serious lack of regard for one of the Carrier's most important safety rules. The Carrier is entitled to implement a zero tolerance policy toward the possession and exhibition of loaded firearms in the workplace. Claimant violated MOWOR 1.12. He had notice in the PEPA that possession of weapons was cause for immediate termination. Ordinarily, this would be sufficient to sustain the discharge.

However, the Organization has raised procedural objections to the conduct of the Investigation that the Board must address. The Organization contends that the Investigation was not fair and impartial; that allegation is not substantiated by the facts. Nor does the fact that someone other than the Hearing Officer issued the letter of dismissal warrant overturning the disciplinary action. There is no indication that the Hearing Officer was not involved in the making the decision that was communicated by someone else in the decision making process. Moreover, the facts are not in dispute in this case, so that the Hearing Officer's role in evaluating the evidence and testimony plays a lesser role that it might otherwise. Finally, the Organization criticizes the letter of dismissal for stating "In assessing discipline, consideration was given to your personnel record and the

relevant in terms of corroborating the Claimant's state of mind, initially demonstrated on July 30—a very casual attitude toward having a firearm on Carrier property and while he was at work.

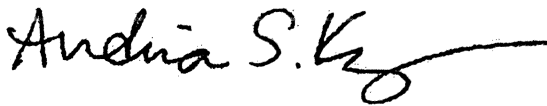
discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA)" without either submitting Claimant's personnel record at the Investigation or explaining how the Carrier made the decision that dismissal was "in accordance with" the PEPA. The Organization has a fair point: surely employees who are being disciplined, especially in cases of dismissal, are entitled to a substantive explanation of the Carrier's decision making, not a hollow recitation of rote language in a form letter. However, in this case, the PEPA is clear that possession of firearms is cause for immediate termination without regard to an individual's prior disciplinary record, and the omission was minimal. All things considered, the Investigation and processing of the Claim met normal standards for fairness.

AWARD

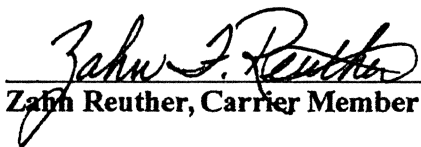
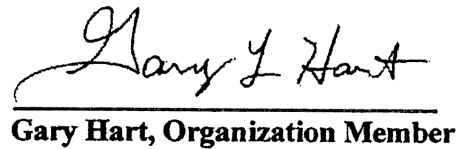
Claim denied.

ORDER

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



Andria S. Knapp, Neutral Member


Zahn Reuther, Carrier Member
Gary Hart, Organization Member

February 12, 2014
Date