

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 484 – Award No. 484 – Brumfield
Carrier File No. 10-15-0048
Organization File No. 10-SF13C5-144

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing August 29, 2014, when Claimant Jeffrey Brumfield (0054742) was issued a Level S Actual Suspension and Three Year Review Period. Discipline alleged Claimant was quarrelsome and discourteous by using profanity toward his foreman on July 24, 2014. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.6—Conduct.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated, with seniority, vacation, all rights unimpaired and pay for all wage loss including overtime commencing August 29, 2014, continuing forward and/or otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Jeffrey A. Brumfield, has been employed by the Carrier since 2011. On August 29, 2014, following an investigation, the Carrier assessed Claimant a Level S 36-day actual suspension with a three-year review period for his quarrelsome and discourteous behavior, and use of profanity towards his foreman, on July 24, 2014, while he was working as a trackman with gang ID TSEC1385 at the Corwith Yard. The Carrier

found that Claimant had violated Maintenance of Way Operating Rule (MOWOR) 1.6 Conduct. It provides, in relevant part:

Employees must not be:

- * * *
- 3. Insubordinate.
- * * *
- 6. Quarrelsome
or
- 7. Discourteous

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.

This case concerns an incident that occurred between Claimant and Foreman Michael Mellenthin on July 24, 2014. At the opening of the investigation, the Hearing Officer stated that Mr. Mellenthin would not attend the hearing in person, as it was his day off and he had personal matters to which he needed to attend. Therefore, the Hearing Officer stated, he would testify by telephone. The Organization representative objected, stating that Claimant had the right to face his accuser and he had no idea whether Mr. Mellenthin was being coached or whether his testimony was being manipulated.

Mr. Mellenthin stated that on the day of the incident he was the Foreman of Section 1385, and began the work day by briefing the employees on their assigned tasks. Claimant, he stated, twice refused to acknowledge his assignment and just shook his head. As the work began, Mr. Mellenthin recounted, he noticed that Claimant was not putting in his usual effort and barely spoke.

Mr. Mellenthin testified that at about 1510 Claimant approached him and stated that he was going home early, at 1530. He asked Claimant whether he had cleared it with the Roadmaster, Aaron Self, and, Mr. Mellenthin stated, Claimant replied that he "didn't give a fuck" what he or the Roadmaster said, he was leaving. He stated that it was obvious Claimant was upset, and he continued to use profanity, telling Mr. Mellenthin there was "nothing (he) could fucking do about it" and pointing his finger, almost in Mr. Mellenthin's eye.

Mr. Mellenthin described that Claimant is larger than he is, and was standing close, "kind of barreling over" him. Claimant, he stated, repeated, more loudly, that he didn't "give a fuck" and did not need anything from him or the Roadmaster. Claimant, he added, stepped toward Mr. Mellenthin, his voice getting louder and deeper, as if to intimidate him.

Mr. Mellenthin stated that he backed away and put his hands up, and speaking loudly enough that the nearby backhoe operator could hear him, told the employees working on the tracks to stop and remove themselves. Claimant, he described, continued to make comments to him, calling him "motherfucker" and other names.

Mr. Mellenthin added that he told Claimant to go and sit in the van, which he did, after initially telling Mr. Mellentin he would take the van, and Mr. Mellenthin made sure everyone else stayed off the track until further notice. He called Roadmaster Selph to inform him of the situation, Mr. Selph told him he had given Claimant permission to leave early. Mr. Mellentin maintained that he apologized to Claimant for the inconvenience and got him a ride back to their workstation.

In response to questions from the Organization representative, Mr. Mellenthin acknowledged that Claimant never struck him. He maintained that he never used profanity toward Claimant.

Roadmaster Selph testified at the investigation that he was overseeing the project on which Claimant and Mr. Mellenthin were working on that day. At about 1515, he stated, he got a call from Mr. Mellenthin, who told him Claimant was getting in his face, making hostile and profane remarks, and trying to provoke him. Mr. Mellenthin told him that he had stopped all work and removed everyone from the tracks.

Mr. Selph also testified that he was not able to interview Claimant about the incident, because he was off and then removed from service.

At the investigation, Claimant testified that the incident began when he asked Mr. Mellenthin to have someone drive him to the shanty because it was time for him to go home. Claimant stated that Mr. Mellenthin kept telling him he would have to walk across the tracks because he could not let him go, and that if he left he would write him up for being absent without authorization. Mr. Mellenthin denied making these statements.

Claimant stated that Mr. Mellenthin became upset and used profanity; he described him as an "aggressive individual." Claimant denied using any profanity or getting in Mr. Mellenthin's face. He went to the van and called Human Resources to file a complaint because he felt threatened. He stated that Mr. Mellenthin came over about five minutes later and told him that Mr. Selph said he could go home.

Claimant also testified that during this encounter Mr. Mellenthin asked him if Roadmaster Selph had given him permission to leave early that day. Claimant stated that he did not reply to Mr. Mellenthin's question. When asked if there was a reason he had not done so, he said no. Later in his testimony, he stated that he did not reply because Mr. Mellenthin had already been notified. He also testified that Mr. Mellenthin never asked him if he had notified Mr. Self that he needed to leave early.

Later in his testimony, Claimant maintained he had informed both Mr. Mellenthin and Mr. Selph that morning that he needed to leave early, and then in the afternoon he walked towards Mr. Mellenthin and asked to be dropped at the shanty. Mr. Mellenthin denied that Claimant said anything that morning about leaving early. Claimant testified that Mr. Selph called the next day to tell him he had been removed from service, but did not ask for his account of what had transpired.

Claimant's personal record shows no previous discipline.

The Carrier first states that the Board should not accept the Organization's argument that Claimant was denied a full and fair investigation because the Carrier did not produce its witness at the hearing. Conferencing in the witness, the Carrier maintains, is an acceptable way to proceed.

On the merits, the Carrier states the record shows that on the day at issue, Foreman Mellenthin began work by briefing the employees on their assigned tasks. Claimant, the Carrier maintains, refused to participate in the briefing. The Carrier asserts that later in the day Claimant approached Mr. Mellenthin and told him he would be leaving early. When Mr. Mellenthin asked if Claimant had approval from the Roadmaster, Claimant responded in such a threatening manner, including the use of profanity, that Mr. Mellenthin was concerned about a possible physical confrontation. Although Claimant denied engaging in this conduct, resolving credibility conflicts is, the Carrier states, the role of the Hearing Officer, not this Board, and Mr. Mellenthin's detailed testimony is sufficient to satisfy its burden of proof. The Carrier concludes that the penalty is appropriate, given Claimant's conduct, and the claim should be denied.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. Primarily, the Organization stresses that the only witnesses to the event were Claimant and his accuser, so the case turns on pure credibility. Even though the Carrier witness was in the town where the hearing was held, the Organization notes, the Carrier did not produce him and took his testimony over the phone. The Organization asserts that it challenged this procedure at the outset, because Claimant had the right to face his accuser in person and the Hearing Officer should have had the full opportunity to test his account that in-person testimony provides. The Organization further asserts that the Carrier showed prejudgment by failing to take any statement from Claimant at the time of the incident.

On the merits, the Organization points out that it was Claimant, not Mr. Mellenthin, who first called Human Resources to file a complaint. Mr. Mellenthin, the Organization asserts, is merely trying to cover his tracks.

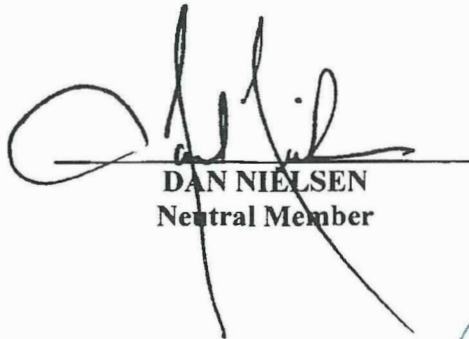
The Organization concludes that Claimant did nothing wrong and simply requested time off, which is his right and which the Roadmaster granted. For whatever reason, the Organization maintains, Mr. Mellenthin took exception and came after Claimant. The Organization contends that the Carrier failed to meet its burden of proof, and the claim should be sustained.

We have carefully reviewed the record in its entirety. First, we find no evidence of any procedural violation or irregularity which denied Claimant his right to a fair and impartial investigation. While it might have been preferable for the only Carrier witness to the events to testify in person, the use of telephonic testimony is, as the Carrier asserts, well-accepted in railroad investigations, and the Organization has provided no contrary authority, nor has it explained how it was prejudiced in its questioning of Mr. Mellenthin or what testimony it would have explored further had he been present. There is no evidence of actual prejudice to Claimant.

On the merits, it is clear, as the Organization asserts, that the resolution of this case turns on a straight credibility determination between the two witnesses, Claimant and Mr. Mellenthin. As the Carrier stresses, it is well-established that credibility determinations are the province of the Hearing Officer, unless a review of the record reveals a lack of support for those determinations or that no reasonable reader of the record could agree with them. There is no such showing here. We note that by his own testimony, Claimant acknowledged that he refused to answer Mr. Mellenthin's question as to whether the Roadmaster had given him permission to leave early, and he gave several different accounts of that exchange, including that Mr. Mellenthin had never asked the question, even though Claimant earlier stated that he had, and that he had informed Mr. Mellenthin first thing in the morning that he had the Roadmaster's permission to leave early. Given these inconsistencies and the overall tenor of Claimant's testimony, there is no basis for questioning the Hearing Officer's decision to credit Mr. Mellenthin's account of events. As the Carrier states, his testimony is sufficient to satisfy the Carrier's burden of proof. The Carrier did not exceed its discretion in determining that Claimant's conduct warranted the penalty assessed.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



ALEX STADHEIM
Carrier Member



DAVID SCOVILLE
Organization Member

Dated this 16 day of November, 2016.