

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 7048

BNSF RAILWAY

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 7048 Case No. 27
NMB Case No. 106
Carrier File No. 13-08-0012
Organization File No. J-08-03D
Claimant: Mark A. Hayes

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing November 9, 2007 when Claimant, M.A. Hayes (7354525) was dismissed by the Carrier, involving a Second Level S incident. The Carrier alleged violation of Maintenance of Way Operating Rule 1.6-Conduct, and 1.9-Respect of Railroad Company. The supposed incident occurred on October 31, 2007 at Schultz BarBQ Restaurant in Rosenberg, Texas, wherein Mr. Hayes allegedly displayed rude and discourteous behavior and conduct while working as a BNSF Foreman; and
2. As a consequence of the violation referred to in part 1 the Carrier shall return the Claimant to service, remove the incident from his record, reinstate all rights, and pay all wages loss commencing November 9, 2007, continuing forward and/or otherwise made whole

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant was dismissed from his position as a Track Supervisor on December 11, 2007 after he was involved in a second Level S incident. The precipitating event occurred on October 31, 2007 at Schultz BarBQ Restaurant in Rosenberg, Texas in an incident that the Carrier alleges constituted rude and discourteous behavior toward a member of the public while the Claimant was working as a BNSF Foreman.

The Carrier contends that the Claimant used foul and abusive language in response to a request by a female cashier that he sign a check as he was paying for his dinner at the Schultz BarBQ Restaurant, where he and his work group were eating at the Carrier's expense. The Carrier introduced several eyewitnesses' reports declaring that the Claimant was rude to the female cashier. Because this was the Claimant's second Level S violation, the Carrier contends that dismissal is the appropriate penalty for his misconduct on October 31, 2007.

The Organization grieved the dismissal as being without just cause. The Organization contends that nothing in the Claimant's interaction with the cashier regarding the excessive amount of the dinner check that she insisted he sign was so egregious as to justify terminating

his employment. The Organization further contends that the Claimant was deprived of due process, as certain co-workers alleged to have witnessed his misconduct were not produced at the investigatory hearing and the Carrier resisted admitting results of a polygraph examination that the Claimant had obtained at his own expense.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was submitted initially to the National Railroad Adjustment Board and subsequently to Public Law Board 7048 for adjudication.

FINDINGS AND DECISION

Public Law Board No. 7048 (the Board) finds that the parties herein are Carrier and Employee Organization within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and subject matter involved.

The Claimant was employed as a Track Foreman. According to the testimony adduced at the investigatory hearing, the misconduct that precipitated his discharge came to light when the Roadmaster was investigating a previous event in which the grievant had allegedly also been rude to a the manager of a motel where the Claimant was housed

as a BNSF employee. While interviewing members of the Claimant's work crew, the Roadmaster discovered that the Claimant was perceived to have been rude to a female cashier at the Schultz BarBQ the night before the interview.

According to the testimony, the Claimant became engaged in a dispute concerning the number of employees included in the \$26.00 meal ticket he was asked to sign so that his meal could be charged to BNSF. Apparently, the Claimant was charged for his meal and the meal of the employee directly ahead of him on line. Although this aspect of the dispute was ultimately resolved after the Claimant left the cashier area and obtained the signature of the other employee, eye witnesses told the investigating Roadmaster, James Wages, that the Claimant had become loud and hostile toward the cashier and, as he walked away, said "Shit. I don't know who the hell these people think ..."

The Organization contends that the Carrier has blown the incident out of proportion, especially as none of the restaurant employees complained directly to Roadmaster Wages when he came to pay for the meals after the crew had finished eating on the evening in question. There is merit to this contention.

The Claimant testified regarding his concern that a \$26 fee for a dinner buffet was excessive, and must have represented the charges for more than one meal. The Claimant's concern in this regard was reasonable. The Claimant described how he asked his co-workers, specifically Steve Robinson, whether he had signed his dinner check. Mr. Robinson stated that he had not signed a dinner bill, whereupon the Claimant obtained Mr. Robinson's signature on the bill, and thereafter signed the check himself and submitted it to the cashier. The practice of multiple employees signing a single check covering more than one meal is common. In the interim, the cashier took offense at the Claimant's refusal to sign the check until he investigated further and established an explanation for why the apparent charge for his meal alone was \$26.

Credible testimony adduced at the investigative hearing by subordinates of the Claimant described his interaction with the female cashier as loud. Statements by the cashier described the Claimant's demeanor as rude. These statements, however, were not subjected to cross-examination at the hearing, as the cashier elected not to appear and offer testimony. The Carrier's investigator reasonably concluded on the basis of the co-workers' statements and the cashier's description of the interaction that the Claimant was more heated in his conversation than the Claimant portrayed when describing his demeanor at the investigative hearing. The fact that the Claimant's subordinates may

have described the incident at the behest of the Roadmaster, who was investigating a prior incident involving the Claimant, does not explain why the female cashier submitted a written statement expressing her distress at the manner in which the Claimant treated her.

The Claimant was clearly identifiable as a BNSF employee and, as such, should have maintained a calm and pleasant demeanor even while investigating a potential overcharge. It is not so much what the Claimant said or did, but the manner in which he went about explaining his concerns that precipitated the imposition of discipline in the instant case. In his testimony, the Claimant candidly acknowledged that he took umbrage at the arbitrary manner in which the cashier was treating him. This acknowledgment buttresses the credibility of the statements by his co-workers that he was unduly loud and blunt, if not unduly rude, thus bringing the Carrier into some disrepute. However, the nature and quality of the claimant's excited utterances do not constitute just cause to terminate his employment.

Even if the Claimant's unfortunate comment as he was walking away from the cashier, which included the word "shit" were fully credited, the Claimant did not engage in a profanity-laced tirade toward the cashier, nor did he try to threaten or intimidate her. The Claimant was just unduly vocal in trying to determine the basis for what he perceived to be a significant overcharge to the detriment of the Carrier.

The Carrier was unable to secure the testimony of the cashier at the investigatory hearing, as she declined to participate. Neither did the Carrier introduce testimony from other witnesses who could establish that the grievant was discourteous and argumentative beyond being unduly loud for a short period of time.

Maintenance of Way Rule 1.6 prohibits employees from being quarrelsome or discourteous as well as engaging in "any act of hostility, misconduct or willful disregard or negligence affecting the interest of the Company or its employees." The level of hostility credibly established by the Carrier's witnesses does not rise to the level of hostility, misconduct or willful disregard affecting the interest of the Company to the extent that the misconduct justifies terminating the Claimant's employment. The Claimant may have been a less than perfect representative of BNSF on the day in question, but he did not engage in vile invective or otherwise verbally attack the cashier.

That the degree of disruption caused by the Claimant did not justify his dismissal can be inferred from the fact that neither the Schultz BarBQ Restaurant manager nor the cashier mentioned the interaction to the Roadmaster when he came in to pay the entire bill, although the Roadmaster was clearly a supervisor of the Claimant and of the other BNSF employees. Road Master James Wages testified that he:

...Just instructed Schultz's BarBQ that evening when I called and okayed to have the guys go in and eat, I instructed them to have every employee sign a ticket and put their employee I.D. number on it. Q: And then you paid for, with one, one lump sum total? A: One lump sum total on my credit card.

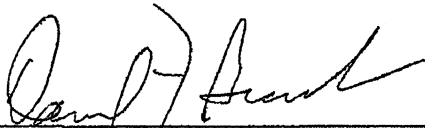
Moreover, the record does not establish persuasively by a preponderance of the evidence that the Claimant engaged in a heated verbal altercation or verbal attack on the cashier or that he used a string of vile invective. The Claimant may have been louder than he should have been and he may have been rude, but discipline resulting in discharge cannot be justified on the basis of this incident, notwithstanding that the Claimant may have had a history of intemperate remarks in the past.

The Carrier's reluctance to admit the Claimant's attempt to introduce a polygraph examination was consistent with sound arbitral principles that do not recognize the validity of polygraph examinations. Consequently, no negative inference can be drawn from the Carrier's failure to include the polygraph examination submitted by the Organization on the Claimant's behalf.

The Claimant has apparently previously been disciplined for intemperate remarks. There were oblique references to another incident in the transcript of the investigatory hearing, but the details of this incident were not established in the record of the instant case.

Nevertheless, he must learn to control his vocal volume and verbally aggressive demeanor, as future incidents of a similar nature may jeopardize his employment. However, the incident described by the Carrier on October 31, 2007 did not constitute the kind of employee misconduct that justifies dismissing a long-term employee. Consequently, the discipline imposed shall be reduced to an actual suspension from the date of his discharge to the date of his reinstatement, which shall be contingent upon successful completion of an anger management therapy program designated by the Carrier and paid for under the Carrier's Employee Assistance Program. Upon successful completion of this program, the Claimant shall be reinstated to his former position forthwith with uninterrupted seniority, but without back pay. In addition, the Claimant shall be subject to a one year probation period as a Last Chance Agreement commencing on the date of his reinstatement during which a repetition of similar intemperate verbal interaction with the public or with co-workers shall be deemed cause for immediate discharge. This penalty shall be construed as the penalty for the misconduct underlying Awards 26, 27, and 28.

We so find.



Daniel F. Brent, Impartial Chair

Dated: 11/30/2009

() I concur. (☒) I dissent.

Glenn W. Caughron
Glenn W. Caughron, Carrier Member

Dated: 4/16/2010

(☒) I concur. () I dissent.

David O. Tanner
David Tanner, Organization Member

Dated: 4/12/10