

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 7048

BNSF RAILWAY

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 7048
NMB Case No. 28
Carrier File No. 13-08-0013
Organization File No. J-08-04D
Claimant: Mark A. Hayes

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing November 15, 2007 when Claimant, M.A. Hayes (7354525) was dismissed by the Carrier, involving an alleged violation of Maintenance of Way Operating Rule 1.6-Conduct. The supposed incident occurred on November 1, 2007. The Claimant was alleged to have been confrontational and quarrelsome, with conduct inappropriate to a member of his gang, while working as the gang 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 15, 2007, continuing forward and/or otherwise made whole.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant, Mark A. Hayes was dismissed by the Carrier for violating Maintenance of Way Operating Rule 1.6 – Conduct after he was alleged to have had a confrontational and quarrelsome interaction with a member of his work gang arising from the co-worker's request for assistance in accessing his payroll records. According to the Carrier, the Claimant responded in a harsh, loud manner that was witnessed by other employees, and such tone was discourteous and quarrelsome in violation of MOW Rule 1.6-Conduct.

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.

OPINION AND ANALYSIS

Although the tone of the verbal interaction on November 1, 2007 was not as benign as described by the Claimant, neither did the Carrier establish that the Claimant was unduly aggressive or that he used profanity or otherwise escalated the confrontation that arose when the Claimant refused immediately to assist a co-worker in obtaining payroll

information. According to the testimony of eyewitnesses, the Claimant's conduct was undoubtedly less offensive than portrayed by the Carrier in imposing discipline. Neither, however, was the Claimant's conduct as benign as he contends. Notwithstanding this observation, the evidentiary record does not establish persuasively that the Claimant engaged in profanity or other aggressive verbal behavior that was intimidating or disruptive of the Carrier's mission in denying his co-worker's request for assistance in obtaining payroll information.

The Claimant contends (Tr. at 79), that he did not refuse to give Mr. Burns a print-out of his time, but simply asked whether Mr. Burns could obtain the print out himself. When advised by Mr. Burns that he did not know how to obtain his payroll information, the Claimant contends that the incident ended. The Claimant's description of this aspect of the incident is inconsistent with the descriptions offered by other employees, which suggest that the Claimant was verbally aggressive beyond the bounds of collegial interaction and banter.

Although the Claimant's assertion that he felt threatened by his co-worker, Mr. Burns, when he said that he would "get with" the Claimant if his payroll information was "messed up" may be plausible, this testimony does not fully ring true. The Claimant's contention that he felt threatened by Mr. Burns' statements is apparently disingenuous

in view of the other testimony in the evidentiary record. Even if the Claimant's apprehension were justified, the Claimant's refusal to provide a print out, credibly described by Mr. Burns, did not constitute the kind of verbal aggression or intimidation contemplated by Maintenance of Way Rule 1.6 to the extent that substantial discipline should have been imposed at a level that jeopardized the Claimant's continued employment by BNSF.

Notwithstanding the Claimant's assertion, testimony at the investigative hearing established that the Claimant was at least discourteous to his co-worker. Nevertheless, the Claimant did not use profanity or escalate the situation in a threatening manner. Consequently, the Carrier's decision to impose substantial discipline cannot be sustained.

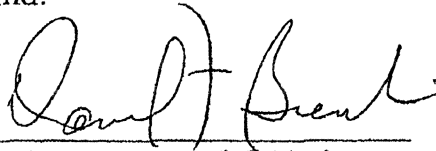
The evidentiary record did establish persuasively that the Claimant was undoubtedly obnoxious during this interaction and thus may be a prime candidate for anger management training through the Carrier's Employee Assistance Program. However, the actions described in the evidentiary record of this case do not justify the conclusion that a lengthy suspension should have been imposed on the Claimant for this conduct or that such a suspension should result in the Claimant's dismissal from all service.

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.

Based on the evidence submitted the actions of the Claimant, Mark Hayes, on November 1, 2007 did not constitute a basis for dismissal from all service. 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.

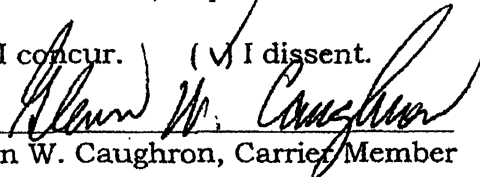
We so find.



Daniel F. Brent, Impartial Chair

Dated: 12/24/2009

() I concur. (☒) I dissent.



Glenn W. Caughron, Carrier Member

Dated:

4/16/2010

(☒) I concur. () I dissent.



David Tanner, Organization Member

Dated:

4/17/10