

PUBLIC LAW BOARD NO. 7394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY
(Former St. Louis—San Francisco Railway Co.)

Case No. 66; Award No. 66 (Ruch)
Carrier File No. 12-15-0131
Organization File No. 2433-FR91A2-153
NMB Subject Code 119

STATEMENT OF CLAIM:

Claim of the Atchison Topeka & Santa Fe Frisco System Federation of the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters, Region II that: "...The suspension shall be set aside and the Claimant shall be made whole for all financial and benefit losses as a result of violation. Any benefits lost, including vacation and health insurance benefits (including coverage under the railroad industry National Plan), shall be restored commencing June 23, 2015, continuing forward and/or otherwise made whole. Restitution for financial losses as a result of violation shall include compensation for: 1.) straight time pay for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to claimant at the time of suspension from service (this amount is not reduced by any outside earnings obtained by the claimant while wrongfully suspended); 2.) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service. 3.) overtime pay for lost overtime opportunities based on overtime for any position claimant could have held (sic) during the time the claimant was suspended, or on overtime paid to any junior employee for work the claimant could have bid on and performed had the claimant not been suspended."

FINDINGS:

Public Law Board No. 7394, 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, Nathan Ruch, has been employed by the Carrier since 1996. On July 21, 2015, following an investigation, the Carrier assessed Claimant a Level S 29-day actual suspension, with a three-year review period, for his misconduct, violence and hostile behavior when he threatened to physically harm two individuals on June 21, 2015 while working on TSCX 0082. The Carrier also ordered Claimant to contact its Employee Assistance Program and comply with any recommendations made by its manager.

Equipment Operator Michael Burk testified at the investigation that on the day of the incident he returned to his hotel in Moriarty, New Mexico, pulling into the parking lot at about the same time as Claimant. They walked up the stairs and entered a hallway, along with Mr. Burks' co-worker Woody Haynes. Mr. Burk testified that Claimant was unlocking the door to his room, then looked down the hallway and said, "I'm going to kill you." Only he and Mr. Haynes were in the hallway at the time. Mr. Burk stated that he had no indication that Claimant was joking, and he considered it threatening and very concerning. He added that he had not had any previous issues with Claimant, although they had only worked together for about a week.

Mr. Burk explained that he and Mr. Haynes discussed the incident and decided to report the matter to the Gang Foreman. Mr. Burk provided a written statement at the time of the incident which essentially mirrored his hearing testimony.

Grapple Truck Operator Woodrow (Woody) Haynes testified at the investigation that at the time of the incident he and Mr. Burk were carrying bags into the motel from their vehicles and were in the hallway. He observed Claimant put his key into his door, and Claimant then stated, "I'll f . . . ing kill you." He too stated that there was nothing to indicate that Claimant was joking in any way. He added that Claimant made the statement directly to him and Mr. Burk, and he also felt threatened and concerned. He stated that he barely knew Claimant and had not spoken to him before this incident. Mr. Haynes also gave a statement at the time of the incident, which was consistent with his hearing testimony.

Claimant confirmed at the investigation that he had entered the motel and was standing at his door, with his key out, preparing to enter his room. He saw two men standing at the end of the hallway. He testified that he did not know who they were, and had never worked with them. Claimant maintained that he did not make any statements threatening to kill anyone. He added that he had no reason to be angry at either of his co-workers.

Claimant acknowledged that he might have been venting personal issues going on in his head, and he could have spoken to himself out loud. He was not talking on a cell phone. He stated that he could have said something that sounded like what his co-workers testified they overheard, but he did not threaten to kill them and never directed

any remarks to them. He added that he had no reason to believe that the two employees would lie or make false accusations against him, and believed they acted in good faith based upon how they interpreted the situation.

Claimant's personal record shows a number of previous operating offenses.

The Carrier asserts that the facts of this case are simple and straightforward and support the Carrier's decision to issue the discipline at issue. The Organization, the Carrier states, attempts to characterize Claimant's unprovoked outburst as a simple misunderstanding rather than a violent threat against his co-workers. The Carrier stresses that Claimant stated, "I will kill you," to his co-workers when they were in an empty hallway. While the Organization attempts to make the case that Claimant was merely talking to himself, that alone would be cause for concern but, the Carrier notes, both co-workers, testified that they felt threatened and alarmed for their safety while working with Claimant.

The Carrier states that the record testimony is sufficient to meet its burden of proving, by substantial evidence, that Claimant committed the acts of which he is accused, thereby violating the cited Carrier Rules. As for the penalty, the Carrier points out that this was Claimant's second serious Rule violation within a 36-month review period and he was subject to dismissal. Instead, the Carrier states, it granted him leniency by issuing an actual suspension and requiring him to seek professional assistance through the Employee Assistance Program. The Carrier concludes that there is nothing to demonstrate that the penalty was excessive or unwarranted, and urges that the claim be denied.

The Organization does not dispute that Claimant was in the hallway with his two co-workers at the time of the incident, but disputes that his remarks were directed at them. Rather, the Organization states, Claimant was simply thinking out loud about personal business. No one, the Organization continues, has ever accused Claimant of making such threats. The Organization contends that the Carrier has failed to take into account Claimant's 19 years of service and has failed to meet its burden of proof.

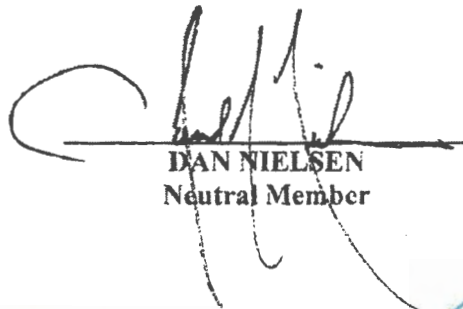
As for the penalty, the Organization asserts that it is excessive and unwarranted, even if the Carrier has proven Claimant guilty. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. The facts of this case are reasonably straightforward. Claimant, standing outside his hotel room with his key in his hand, made some remarks and then entered the room. Two co-workers he did not even know were in the hallway, and they testified consistently that Claimant stated he would kill them. Both testified that they felt sufficiently threatened and concerned that they reported the matter to management. While Claimant denied having stated that he would kill anyone, credibility resolutions are the province of the Hearing Officer, not this Board, and the two witnesses' testimony is sufficient to meet the Carrier's burden of proving, by substantial evidence, that Claimant made the threats as alleged. The Carrier obviously

believed that Claimant perhaps had personal issues which required treatment. Given the universal sensitivity to workplace violence issues, we cannot say that the Carrier's decision that these threats warranted not only treatment but a substantial suspension, represents an unfair, arbitrary or discriminatory exercise of its discretion to determine penalties.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



MICHELLE MCBRIDE
Carrier Member



DAVID SCOVILLE
Organization Member

Dated this 6th day of September, 2017.