

PUBLIC LAW BOARD NO. 7564

Case No. 103/Award No. 103
Carrier File No. 10-19-0132
Organization File No. C-19-D040-11
Claimant: Christopher J. Herrmann

BNSF RAILWAY COMPANY)
)
 -and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES DIVISION)

Statement of Claim:

By letter dated February 2, 2019 Frog Welder Christopher J. Herrmann was assessed a Level S 30 Day Record Suspension and a one year review period for allegedly violating MWOR 1.6 Conduct and MWOR 1.7 Altercations. The March 24, 2019 claim from the Organization, Jim L. Varner, Vice General Chairman, stated that the discipline was unfounded and should “be removed as it is excessive, and without merit.”

Facts:

By letter dated December 12, 2018 the Claimant was informed that “An investigation has been scheduled at 0900 hours, December 19, 2018, at the Gibson Yard Conference Room, 4302 Gibson Road, Omaha, NE, 68107, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged improper conduct which allegedly occurred during a physical and/or verbal altercation with a fellow employee on December 5, 2018 at or near East Siding Switch at Island Park, IA while working for the BNSF Railway. By mutual agreement, the investigation was postponed until January 7, 2019, time and location unchanged.

Carrier Position:

The Carrier insists that the investigation was fair and impartial and that any alleged procedural shortcomings were not shown to have prejudiced the Claimant. Nor was the Claimant prejudged. Not only did Carrier witnesses confirm that an altercation with loud voices, use of profanity and physical contact occurred but also the Claimant’s admission of a rules violation provided the required substantial evidence. The Claimant violated rules designed to provide a safe workplace for himself and others. He could have been dismissed for the violation of MWOR 1.6 Conduct, but the Carrier showed leniency, which is its prerogative but not the Board’s, by assessing only a Record Suspension. The Board should not disturb the discipline.

Organization Position:

The Organization asserts that the Claimant did not receive a fair and impartial investigation or appropriate due process. Moreover, he was prejudged. The Special Agent's embellished testimony was not supported by other witnesses. The incident was over quickly with no lingering problems. Voices were raised because of the noise of snowblowers and trucks. Profanity is common in this workplace. The Claimant had the right to question an unsafe act. He and Mr. Scott McCoid slipped and fell due to the slippery ballast line. Not only has the Carrier failed to prove the allegations, but also the discipline was punitive rather than corrective. It should be removed from the Claimant's records.

Findings:

The discipline and claim arose from a short-lived altercation on December 5, 2018. The 160-page investigation transcript can be succinctly summarized to provide relevant information. The claimant was one of four (4) employees working to clear switches following nine (9) inches of snow and some rain in the vicinity of the East Siding Switch at Island Park, IA. Snow had been removed from two switches without incident. Motor Vehicle Operator Scott McCoid cracked the third switch without alerting the Claimant, whose back was to Mr. McCoid. Because two of the four employees were within the switch, the Claimant believed that Mr. McCoid had committed an unsafe act. At the Claimant's urging, he and Frog Grinder Dustin Parde returned to their truck and prepared to leave. According to the Claimant, he heard Mr. McCoid yell something, so he returned to confront Mr. McCoid, admitting that "I did raise my voice to Mr. McCoid" and that, among other things, he said "don't you throw that fucking switch again with guys inside that switch". The utterance came while the Claimant had a finger pointed at Mr. McCoid in the vicinity of the latter's face. Mr. McCoid responded by grabbing the Claimant by the collar. They seemingly slipped on the slick ballast and went to the ground with the larger Mr. McCoid on top of the Claimant. Mr. Parde and Foreman Joshua Price told Mr. McCoid to let go of the Claimant and let him up, the men got up and the incident was essentially over. Mr. McCoid reported the altercation to Roadmaster Cayetano Chavez Garcia. The next morning the four were interviewed by BNSF Special Agent Russell Smith. The Board has relied on the testimony adduced at the investigation rather than Agent Smith's summary because aspects of the summary are not supported by testimony.

The Board has considered the Organization's oft-made allegations that the investigation was not fair and impartial, that the Claimant was deprived of due process and that he was prejudged and finds that these are assertions without evidentiary support. The Board observes that the cold, wet weather did not help to soothe tempers, but the wintery conditions do not excuse the altercation. It may be that voices were raised at least in part because of the snow blower and truck engine noise, but it is impossible to conceive of the exchange that took place being conducted in street-level tones even without snow blower and truck engine noise. And, while the Board accepts the Organization's assertion that profanity is common in the railroad industry, there is a significant difference between profanity used impersonally and profanity that becomes personal when directed at somebody within hearing distance. The personal nature of profanity is heightened when the words are spoken in a raised voice during an invasion of another's personal space, punctuated

by a finger in one's face. The Board does not excuse the Claimant's use of profanity because "it goes on all the time." Nor can the altercation be excused because the Claimant's anger may have been at least partially justified, because the evidence indicates that neither the Claimant nor Mr. McCoid intended bodily harm and that the two quickly put the incident behind them so that there were no lingering hard feelings or disruptive ill effects.

In the final analysis, when the Claimant was at the truck with Mr. Parde preparing to leave, he had a choice. He could have driven away from the site and avoided an altercation. Instead, he moved into Mr. McCoid's personal space and confronted him with a raised voice and profanity. Obviously, the Claimant made the wrong choice. MWOR 1.6 Conduct states that "Employees must not be quarrelsome." Quarrelsome encompasses more than physical action. MWOR 1.7 Altercations states that "Employees must not enter into altercations with each other . . ." Altercations also need not be physical. Substantial evidence establishes that the Claimant violated both rules. While the Claimant's lapse of judgment was only momentary, momentary lapses of judgment have led to far worse altercations. The Board finds that the discipline was in accordance with PEPA and was an appropriate response.

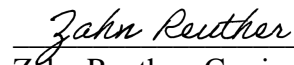
Award:

Claim denied.

Order:

The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be entered.


Zachary C. Voegel, Organization Member


Zahn Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas
Date: July 30, 2020