

PUBLIC LAW BOARD NO. 7564

Case No.: 38/Award No.: 38
Carrier File No.: 10-13-0404
Organization File No.: C-13-D040-20
Claimant: Lance D. Rakes

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

Statement of Claim:

1. The discipline (Standard Formal Reprimand) issued to Mr. Lance D. rakes by letter dated April 10, 2013, for alleged violation of MOWOR 1.6 Conduct on February 13, 2013, for alleged misconduct involving a BNSF Contractor.
2. As a consequence of the violation referred to in Part (1) above, Claimant Lance D. Rakes shall now receive the remedy prescribed by the parties in Rule 40(G).

Facts:

By letter dated February 14, 2013 the Claimant was directed to attend an investigation on February 25, 2013 "for the purpose of ascertaining the facts and determining your responsibility, if any, in conjunction with your alleged misconduct involving a BNSF Contractor on February 13, 2013." Thereafter the investigation was postponed until March 13, 2013.

Carrier Position:

The Claimant received a fair and impartial hearing and any arguments concerning procedural errors are moot since the Claimant was not prejudiced as the result of errors made, if any. There is substantial evidence to prove the charges, as the Conducting Officer resolved credibility issues in a way that establishes the Claimant's violation of MOWOR 1.6 Conduct. There is strong decisional support for the principle that Conducting Officers' credibility determinations must be accepted by the Board. Because the Organization cannot refute the facts, in essence it asks the Board for leniency. However, leniency is the prerogative of the Carrier and not within the Board's discretion. Should the claim be sustained, since the Claimant lost no earnings he is due only the removal of the discipline from his record.

Organization Position:

The Claimant received neither a fair and impartial hearing nor due process because the Carrier has not proven the allegation with substantial evidence. A conversation primarily between the Claimant and Foreman Hanke occurred at the Minden Station, with the Claimant speaking in his normal, loud voice. Mr. Gillman claimed he felt threatened, yet he entered the conversation after the Claimant told Foreman Hanke that the Contractor had switch keys to enable him to enter BNSF buildings. The Contractor became defensive when the Claimant asked questions about this and said that he would ask the Organization about the keys, as Mr. Gillman did not want his authority questioned. The Claimant denied using profanity and other witnesses testified that they heard none. The Claimant did use the word "scab" simply as a reference to a non-union contractor working on the property. The Claimant meant no harm by use of the term. There was no reason for Mr. Gillman to have felt threatened when the Claimant remained in a chair approximately 35' away. In fact, there is no evidence that the Claimant ever threatened Mr. Gillman. The Claimant was concerned about protecting BNSF property because Mr. Gillman was an unknown individual with a switch key. The photographs were taken as a precaution.

Findings:

This case, which may be characterized as a "he said, she said" case, provides a perfect example of why it is best to have the conducting Officer be the one who issues discipline, if that is to be the outcome of the investigation. The Board accepts the principle that the credibility determinations of the Conducting Officer are to be accepted by the Board in all but very rare circumstances. The problem that arises in cases such as this one, where the Conducting Officer's name and the name on the notice of discipline are different, is that the Board does not know who made the credibility determinations. Was it the Conducting Officer, who then decided on discipline so that the Director of Administration simply performed a ministerial function by signing the notice? Or, did the Conducting Officer turn over the investigation transcript and attendant documents to the Director of Administration, who then made his own credibility determinations and decided on discipline, even though he was not present at the investigation? Because the Board cannot be certain who made the credibility determinations, it must make its own.

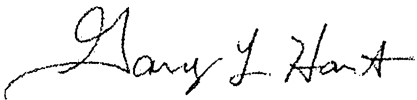
The Board notes that credibility determinations are not made simply by counting the witnesses on each side of the question. Rather, credibility determinations are made by considering, among other things, the logic and inherent truthfulness of the testimony and the motivation of the witnesses to speak or shade the truth. This is particularly so when the Board did not observe the investigation, although "body language" can be a notoriously misleading indication of credible or non-credible testimony. The Board further notes that the incident that occurred at 10:30 – 10:45 AM away from the Minden Station with a Contractor other than Mr. Gillman has not been considered because the scant testimony about this incident does not come close to providing substantial evidence of a violation of MOWOR 1.6 Conduct.

The Board is not convinced that the Claimant's behavior in Minden Station signified an intent to physically confront Mr. Gillman, even if he was alarmed. The Claimant remained seated approximately 20'-25' from the Contractor during the short discussion. However, the Claimant's use of language is a different story. The Organization contends that Mr. Gillman was unknown to the Claimant prior to February 13, 2013. There is no testimony to indicate that the two knew each other prior to that date. Thus there would have been no reason for the Contractor to begin the day with hard feelings or a grudge against the Claimant. Also, as a major contractor for BNSF, surely Mr. Gillman did not want to be known as an individual who would report troublesome incidents for which there was no basis in fact. Conversely, the Board can understand why BNSF employees who testified might be motivated to support one of their own, particularly where a non-union contractor was involved. The testimony of the Claimant that he did not use profanity is seen as self-serving and the testimony of the other BNSF employees is unconvincing.

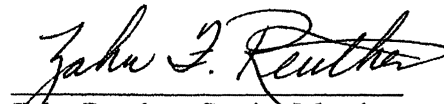
Furthermore, contrary to the assertions of BNSF employee witnesses, scab is hardly a neutral term. In the context of labor history, the term scab has been used primarily to refer to individuals, even union members, willing to cross a picket line and work while the union was on strike. Thus, scab is a derisive term used to show disrespect, at a minimum, toward the individual to whom it is directed or who the term references. That is exactly the context in which the claimant used the term when he said something, supposedly to Foreman Hanke, about "scabbing out their work" (Transcript, p. 69). Even if the Claimant was looking out after Carrier security interests, he used inappropriate, derogatory language directed to or about Mr. Gillman. At a minimum, the use of profanity and the use of the word scab, which the Board finds established by substantial evidence, was quarrelsome and discourteous, even in an industry where "shop talk" is by no means unheard of.

Award: Claim denied.

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



Gary Hart, Organization Member


Zahn Reuther, Carrier Member

I. B. Helburn Neutral Referee

Austin, Texas
April 23, 2015