

**PUBLIC LAW BOARD NO. 7564**

Case No. 90/Award No. 90  
Carrier File No. 10-18-0104  
Organization File No. C-18-D070-6  
Claimant: John W. Berkebile

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BNSF RAILWAY COMPANY )  
 )  
-and- )  
 )  
BROTHERHOOD OF MAINTENANCE )  
OF WAY EMPLOYEES DIVISION )  
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**Statement of Claim:**

By letter dated January 8, 2018, Sectionman John W. Berkebile was dismissed for allegedly violating MWOR 1.6 Conduct and MWOR 1.7 Altercations. The dismissal followed an investigation into an incident that involved the Claimant and Backhoe Operator Jack Jackson. By letter dated February 15, 2018, the Organization, Randy S. Anderson, Vice General Chairman, filed a claim on Mr. Berkebile's behalf. The claim asks for:

reinstatement to service with seniority unimpaired and for all lost wages, including but not limited to all straight time hours, overtime hours, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare and dental insurance, and any and all other benefits to which entitled, but lost as a result of the Carrier's arbitrary, capricious, and excessive discipline in dismissing claimant from service. In other words, this appeal seeks to make claimant whole and expunge his record the same as if he was never affected by this discipline. A simple joint inspection of Carrier's records can determine the loss.

**Facts:**

By letter dated November 16, 2017, the Claimant was informed that:

An investigation has been scheduled at 1300 hours, Wednesday, November 22, 2017, at the BNSF Railway Depot, Conference Room, 201 North 7<sup>th</sup> Street, Lincoln, NE, 68508, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged misconduct at approximately 1230 hours on November 15, 2017 on the St. Joseph Subdivision, while assigned as Sectionman.

The letter further advised the Claimant that he was "being withheld from service pending results of the investigation."

A letter dated November 21, 2017 noted mutual agreement to postpone the investigation until 1400 hours on December 15, 2017, with the location unchanged.

**Carrier Position:**

The Carrier insists that the Claimant received a fair and impartial investigation and that the Organization has not shown that Sectionman Berkebile was the victim of prejudice. The decision to withhold the Claimant from service was not evidence of prejudgment. There is precedent within the industry for the introduction during an investigation of statements when authors of those statements are not in attendance as witnesses. Testimony and statements provide the required substantial evidence that the Claimant was the aggressor in the dispute with Backhoe Operator Jackson. The Claimant's conduct violated MWOR 1.6 and MWOR 1.7 and constituted a stand-alone violation in accordance with the Policy on Employee Performance Accountability (PEPA). There is arbitral precedent for dismissals following proven workplace violence. Should the claim be sustained, the Board should order an offset against back wages and should omit health benefits from the Award.

**Organization Position:**

The Claimant received neither a fair and impartial investigation nor due process. His guilt was prejudged when he was withheld from service. This also constituted disparate treatment because Mr. Jackson was not withheld from service. The Carrier claims that the incident was serious, yet the Claimant was allowed to finish work and was not withheld from service until the following day. There were witness statements allowed into the record as evidence but the absence of those who wrote statements deprived the Claimant and his representative of an opportunity to question the authors and thus to ascertain all pertinent facts. The Carrier defiantly did not produce all witnesses and the three who were ultimately questioned telephonically could not have been recalled had the Organization wished to do so. It is hard to know what really happened on November 15, 2017. Moreover, the conclusions of BNSF Senior Special Agent Voborny and Roadmaster Brady were based on the statements. Agent Voborny was recalled because of faulty memory about one element of her testimony, raising questions about her memory of other elements under investigation. If the claim is sustained, back wages should be paid without an offset.

**Findings:**

The Board finds the Organization's contention that the investigation was not fair and impartial and that the Claimant's due process rights were not honored to be unpersuasive for several reasons. The Carrier exercised a contractual right, set forth in Rule 40.B, to withhold Sectionman Berkebile from service. As this Board has consistently observed each time the Organization has contended "prejudgment," the Organization cannot agree to a contractual provision and thereafter have a well-founded hope of nullifying that provision with the often-raised "prejudgment" objection.

The Board understands the decision not to withhold the Claimant from service on the day of the incident as the Carrier did not have sufficient information to determine what had occurred and, more specifically, to determine who was the aggressor. When the Claimant was withheld

from service the following day, the Carrier had sufficient information to support at least a preliminary determination that Sectionman Berkebile had been the aggressor, subject to the information obtained during the investigation. The information indicated that Mr. Jackson had not responded in a way that exacerbated the confrontation. Seen in this light, the Carrier's decision not to withhold Mr. Jackson from service is not viewed as disparate treatment.

The second major thrust of the Organization's contentions revolves around the admission of witness statements during the investigation. The Board's response is best understood within the context of consideration of hearsay evidence. ". . . hearsay may be defined as a statement, other than one made by the declarant while testifying at the hearing, that is offered in evidence to prove the truth of the matter asserted."<sup>1</sup> The Carrier's response to the appeal on the Claimant's behalf, consistent with the Board's experience, shows that it is not unusual to have non-witness (hearsay) statements introduced during an investigation by both the Carrier and the Organization. But it is important to distinguish between acceptance of a hearsay statement as part of the record and the evidentiary weight that such a statement receives. Hypothetically, were the Board to consider a dismissal claim based solely on hearsay evidence, it is certainly possible, maybe even likely, that such evidence would not be viewed as meeting the "substantial evidence" burden that the Carrier bears in such cases.

But that is not the case before this Board. The conclusions of Agent Voborny and Roadmaster Brady are based on the statements of those they interviewed and cannot be considered evidence of what actually occurred, but simply as their conclusions of what occurred, which is not to suggest that the conclusions were not well founded. Mr. Jackson's statement is hearsay since he was neither at the investigation nor available by telephone. The Board does note the general similarity between Mr. Jackson's statement and the evidence provided by Section Foreman Britt and Truck Drivers Goracke and Holben. While the evidence provided by these three employees is not precisely the same in every detail, there is persuasive, significant consistency overall in the identification of the Claimant as the physical aggressor, to include his chest bumping and at least an attempted shoulder bump of Mr. Jackson. There is also persuasive consistency that shows that Mr. Jackson did no more than try to defend himself. And, since the three witnesses testified via telephone, their written statements, which they confirmed in their testimony, are not hearsay and are viewed as probative evidence.

The Claimant's response is that the witnesses have met, made up their testimony, and conspired to lie about the confrontation because the Claimant called the 800 number to report the violence of a fellow Organization member who was said to have yelled at everybody over time and to have been involved 4-5 years earlier in an unreported incident with Sectionman Berkebile. The Claimant's depiction of the incident, when weighed against the Carrier's substantial evidence, would not prevail. But the Board has factored in two additional elements that arise from the record. The evidence establishes that prior to the incident, while in a Company vehicle with other gang members waiting for a train to pass, the Claimant was angered by a telephone conversation he was having and slammed his hard hat to the floor of the vehicle, strongly suggesting that he returned to work in a foul mood. Also, at p. 90 of the investigation transcript, the Claimant estimates Mr. Jackson's weight at 110 lbs. and his own weight at 270 lbs. The Board wonders if Mr. Jackson is

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<sup>1</sup> Marvin F. Hill, Jr. and Anthony V. Sinicropi, Evidence in Arbitration (2d Ed.), The Bureau of National Affairs, Inc., 1987, p. 132.

really as slight of stature as the Claimant suggests, but accepts the fact that there is a very significant disparity in size between the two. One element when determining credibility is the plausibility of testimony or a written statement. Because it appears that there is a very significant size difference between the two men, it seems implausible that Mr. Jackson would have been the physical aggressor in a confrontation that he seemingly could not win. Weighing all of the non-hearsay evidence, the Board concludes that the Carrier has met its burden of providing substantial evidence of a violation of MWOR 1.6 and MWOR 1.7.

MWOR 1.6 Conduct, states that "Employees must not be: . . . 6. Quarrelsome." The MWOR further states that "Any act of hostility or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. . . . MWOR 1.7 Altercations states that "Employees must not enter into altercations with each other, play practical jokes, or wrestle while on duty or on railroad property." In particular, violation of MWOR 1.6 is one of the PEPA stand-alone violations that may result in dismissal. The Board finds no justification for disturbing the Carrier's conclusion that dismissal is an appropriate disciplinary response in this instance.

**Award:**

Claim denied.

**Order:**

This Board, after consideration of the dispute identified above, hereby orders that no Award favorable to the Claimant be made.

  
Zachary Voegel, Organization Member

  
Zahn Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas  
April 29, 2019