

PUBLIC LAW BOARD NO. 7585

Case No. /Award No. 98
Carrier File No.: 10-19-0238
Organization File No.: C-19-D040-18
Claimant: M. Keller

BNSF RAILWAY COMPANY)
(former Burlington Northern Railroad Company))
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION - IBT)

STATEMENT OF CLAIM:

The Organization objects to BNSF's decision to issue Claimant a Level S 30-day Actual Suspension with a 1-year review period for his improper conduct when he entered into a verbal and physical altercation with a co-worker on March 21, 2019 at or near Elk Creek, NE in violation of Maintenance of Way Operating Rule 1.6-Conduct and 1.7-Altercations.

CARRIER POSITION:

On the day in question, Claimant Keller was having difficulty operating a Ballast Regulator while a number of co-workers were watching. Foreman R. Prichard began giving him instructions in a tone of voice Claimant found irritating. He became frustrated and said on the radio "There's too many fucking people watching me." At that point, Pritchard told Claimant to take a few minutes to cool off.

Claimant went to his truck, and then Prichard approached asking what the problem was. Claimant responded that if Prichard wanted the work done faster he should do it himself. Prichard responded that Claimant had bid on the job, it was his job and he should get back to work. At this point, Claimant exited his truck, pushing Prichard aside as he went.

In the Carrier's assessment, Claimant's quarrelsome and discourteous conduct resulted in an altercation in contravention of applicable rules. It argues the discipline taken was fully warranted. It asserts it has acted with leniency, because violence in the workplace is a stand-alone offense which can result in dismissal.

ORGANIZATION POSITION:

The Organization maintains there was no physical altercation or workplace violence. Eye witnesses confirmed that the contact between Prichard and Claimant was not violent but rather was due to the tight space being occupied by two somewhat large men. As the Organization sees it, the incident was grossly exaggerated by the Carrier, and handled in an entirely improper and draconian fashion.

DECISION:

Keller testified at the Investigation that he cursed over the radio because Claimant was telling him he “did it wrong” in front of “all these people watching me.” He felt Claimant was embarrassing him in front of everybody.” TR 69 He described the incident as follows:

So I was a little irritated and uh we had words about it. I told him if he wanted it done faster, he was gonna have to do it his self, and he told me that I bid the job and I needed to do it myself. So that's what I did. I proceeded to get out of the truck and go. And he was standing in the doorway, and you know, like everybody said, there just wasn't enough room to get by, so I just I don't know what you'd call it, but I didn't push him or anything. I just nudged by him, and our bodies touched, but uh I guess that's what this is all about. TR 69-70

Claimant admitted during the Investigation that he “hollered” at Keller on the radio, after which Keller cursed on the radio. TR48. He said he told Keller that if he was getting frustrated, he needed to go take a breather. He described the following as Keller exited the truck:

Mr. Keller uh I said, he he said he was frustrated. And I said, yeah, I understand that. When you bid a job, we need, I said well, you knew it was gonna kind of be frustrating, and we talked about that a couple weeks ago. Mike's uh said uh said something, and he exited the machine. I said, well, we still got to get the job done, and that's when he exit the machine. When he, I mean, excuse me, exited the truck. When he exited the truck, he slid by me, and I lost my, I don't know if I lost my balance. He kind of punched pushed into me. I hit uh backed into the door. As Mike was exiting, he made a verbal comment and then walked up to his machine and started running the machine.

Eye witness testimony was largely consistent. C. Hall testified that he investigated the incident and found that no criminal offense had occurred. He did not voice an opinion regarding a possible rule violation because that was not his responsibility. He described the two men as “husky,” stating it “I'd be hard to co-occupy that space without touching

each other.” TR 29 J. Bartels said he was 75-200 feet away with no clear view of the truck, but saw no aggression, but possibly a light chest bump. M. Flynn stated that “Mike got in Ronny’s fact and then tried to shove past him.” TR 36. He described the incident as a “belly bump” and saw no act of hostility or misconduct. TR 38

The record in this matter demonstrates that Claimant became frustrated and cursed over the radio. This was prompted by his foreman’s tone of voice and the fact that co-workers were watching him have difficulty with his machine. We do not find that the Foreman’s tone of voice justified Claimant’s response. People get irritated at work for any number of reasons, and this fact, standing alone, does not serve as provocation for improper behavior. Cursing over the radio is not proper conduct and indicates Claimant was not fully in control of himself.

When Prichard approached, he merely asked what the problem was. Claimant responded in an aggressive manner, challenging his Foreman to do the job himself. Prichard’s response lack empathy; he reminded Claimant that this was his job and he should do it. Though not exactly oil on water, this statement was not improper. Claimant responded, not by asking his foreman to step aside, but by pushing Prichard aside as he exited the truck. This choice, to push his way out of the truck, did indeed constitute misconduct. Though we do not find that it constituted an act of violence, we do find that it was disrespectful and inappropriate to initiate unnecessary contact during a tense exchange.

We find it significant that Claimant worked fully 24 years for the Carrier without discipline. This is an extraordinary and exemplary record warranting substantial weight as a mitigating circumstance. Viewing the situation in its totality, we are also cognizant of the heavy burden on the Carrier to insure the safety of its employees. Any time tension rises between two employees to a point of physical contact, the Carrier must take the incident seriously, and cannot meet its responsibilities by brushing over the matter.

Claimant’s misconduct was indeed serious as it involved physical contact during a tense exchange. However, the penalty of a 30-day Actual Suspension evidences no consideration whatsoever for Claimant’s long-term, stellar service to the Carrier.

AWARD:

The claim is granted in part. The Level S 30-day Actual Suspension with a 1-year review period shall be replaced with a Standard Formal Reprimand with a 1-year review period. If impacted, seniority, vacation and all other rights shall be restored. Lost overtime shall be compensated at the overtime rate. Any discipline current at the time of his discipline, including any on-going review period, shall resume in applicability to the extent of its remaining duration at the time of his dismissal. Any other claims not expressly granted by this Award are hereby denied.

ORDER:

The Carrier shall comply with the terms of this Award immediately upon receipt of a fully executed copy thereof.

Dated: November 25, 2020



Patricia T. Bittel, Neutral Member

Zachary C. Voegel

Zachary Voegel, Labor Member



Samantha Rogers, Carrier Member