

Special Agent Lance Cencelewski testified that, during an interview at the motel, Claimant denied threatening to shoot anyone but admitted that he recounted the story of the shooting of the OSHA representative to Mr. Senf.

The Carrier convened an Investigation at which the above evidence was adduced. Claimant admitted in his testimony at the Investigation that he told the story about the OSHA representative. He denied making any threats. Based on the record, the Carrier found Claimant in violation of HRS 90.2 (Workplace Harassment Policy) and 90.4 (Violence in the Workplace) and MWOR 1.6 (Conduct) and dismissed him from service.

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property on an expedited basis, up to and including the highest designated official, but without resolution. The Organization invoked arbitration, and the dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burdens to prove Claimant's violations of the Rules and the appropriateness of the penalty. It asserts that the testimony presented at the investigation make it clear that Claimant told Mr. Senf that "next time we meet I'm going to bring a gun and I'm going to shoot somebody," that he told Mr. Senf about his friend who shot the OSHA representative and that he said "eventually somebody on the railroad is going to get shot out here if people keep feeling harassed." BNSF maintains that these statements demonstrated hostility, misconduct and/or willful disregard affecting the interest of the Carrier or its employees and, thereby, violated the Rules. It points out that Ms. Senf stated that he was upset and nervous during his encounter with Claimant.

BNSF contends that, when there is conflicting testimony, as in this case, it is the Conducting Officer who makes determinations concerning credibility. It asserts that the Conducting Officer found the testimony of other witnesses and exhibits to be credible and Claimant's testimony not to be so.

With respect to the penalty, the Carrier argues that the discipline imposed is appropriate and that leniency is not in the Board's discretion. It maintains that Claimant was properly assessed a dismissal in line with PEPA, with consideration given to his personal record and a previous Level S within his review period.

The Carrier urges that the claim be denied as without merit.

The Organization argues that the Carrier failed to prove the violations and failed to establish the appropriateness of the penalty. It contends that the Carrier has acted with contempt and discrimination toward Claimant, noting that the investigation only produced very questionable testimony by the Carrier's lead witness, a supervisor whose words were taken as absolute fact. It asserts, in addition, that the Carrier failed to comply with Rule 13 and Appendix No. 11 of the Agreement between the parties.

The Organization further argues that Mr. Senf admitted disregarding the instructions given him by the Conducting Officer and was so desperate to protect his exaggerations of the circumstances which occurred that he could not keep track of what he said what he did not say. It maintains, as well, that Mr. Senf's body language during cross-examination - openly nervous and uncomfortably agitated when confronted with qualifying/clarifying questions - left little doubt that he was fabricating most, if not all, of his bizarre story.

Finally, the Organization argues that Claimant's dismissal - which has already resulted in a substantial financial penalty, loss of his medical benefits and his inability to work his craft - is a complete injustice. It contends that Claimant's dismissal is nothing more than "heaping" discipline on this random employee by a Carrier Officer in an effort to protect, or possibly enhance, his own image/ego, which quickly got out of hand and had to be supported by fabricated evidence.

The Organization urges that the Claim be sustained, that Claimant be reinstated to service with his seniority unimpaired and that he be made whole for all fringe benefits and payment for all time lost.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to establish Claimant's guilt of the charges against him by substantial evidence considered on the record as a whole and to establish the appropriateness of the penalty. For the reasons which follow, the Board concludes that the Carrier met its burdens.

Rule 1.6 prohibits any act of hostility by an employee and may well be cause for dismissal. Similarly, HR 90.4 requires the Carrier to provide a "safe, respectful workplace that is free from violence or threats of violence." Threats of violence, according to HR 90.4, include "any behavior that by its very nature could be interpreted by a reasonable person as demonstrating intent to cause physical harm to another individual." Individuals who engage in threatening behavior may be withheld from service pending formal investigation and may be subject to dismissal.

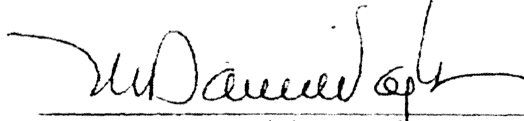
Claimant acknowledged a portion of Mr. Senf's testimony, i.e., that he recounted the story from a friend about the shooting of an OSHA representative by an employee who felt harassed. In the context of the meeting, that story included an element of threat. Clearly, the testimony offered at the Investigation as to what Claimant said beyond that was in conflict, with the Claimant denying that he ever told Mr. Senf that the "next time we meet I'm going to bring a gun and I'm going to shoot somebody." However, the Conducting Officer, not this Board, makes credibility determinations. There is nothing in the record requiring the Conducting Officer to have disbelieved Mr. Senf. And, based on the statements which Claimant acknowledged making, the Board finds that it was reasonable to conclude that Mr. Senf's testimony was true.

The Organization contends that Mr. Senf, at the Investigation, disregarded instructions from the Conducting Officer, could not keep track of what he said and what he did not say and that his "body language" left little doubt that he was fabricating his story. The Organization offered no - or few - specifics with respect to any of its contentions. As a result, the Board is left to review the transcript to attempt to identify what instructions from the Conducting Officer he disregarded and how he exaggerated and/or fabricated his story. The Board finds no examples warranting overturning the discipline. Obviously, the Board cannot observe body language and forms no conclusion with respect to the allegation. As to the penalty, the Organization offered no specific evidence to support its assertion that Mr. Senf's testimony was an attempt to protect, or enhance, his "image/ego," that the attempt got out of hand or that it was supported by fabricated evidence.


Given the nature and circumstances of Claimant's violation, the Board concludes that the charges were supported by substantial evidence and that the penalty of dismissal was within the range of reasonableness. The Award so reflects.

AWARD: The Carrier met its burdens to prove Claimant guilty of the charges and to prove his dismissal to have been an appropriate penalty. The claim is denied.

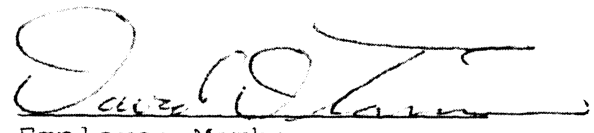
Dated this 2nd day of May, 2014.



M. David Vaughn,
Neutral Member



Carrier Member
Ms. Samantha Rogers



Employee Member
Mr. David Tanner