

BEFORE PUBLIC LAW BOARD NO. 7602

CASE NO. 78

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

and

BNSF RAILWAY

BNSF FILE NO. 11-18-0019  
BMWE FILE NO. B-M-3028-E  
Claimant: D. Garrett

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STATEMENT OF CLAIM

The initial appeal of discipline was filed September 19, 2017, on behalf of Maintenance of Way employee Darren P. Garrett, when the Company dismissed him from service following an investigation held on July 26, 2017, for alleged violation of MOWOR 1.6 Conduct. Claim was denied by Montana Division General Manager Jon Gabriel with a letter dated November 15, 2017 (File: MON-MOW-2017-00512). We cannot accept the decision of Mr. Gabriel and are therefore appealing this claim to you for your review and consideration. This letter serves as an effective appeal under the applicable provisions of the current Agreement. A copy of this appeal is also being sent to Mr. Gabriel to inform him that his decision is unacceptable.

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The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7602 has jurisdiction over the parties and the dispute involved herein.

In the instant matter, Claimant received a letter advising him to attend a formal Investigation:

An investigation has been scheduled at 0900 hours, Wednesday, July 26, 2017 at the Hilton Garden Inn Billings, 2465 Grant Rd, Billings, MT 59102, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged threat of violence in

the work place while working as a machine operator on the Casper Subdivision on Friday July 14, 2017. The date BNSF received first knowledge of this alleged violation is July 17, 2017.

Following the investigation, Claimant received a letter advising him:

As a result of investigation held on Wednesday, July 26, 2017 at 0900 hours at Hilton Garden Inn Billings, 2465 Grant Rd, Billings, MT, 59102 you are hereby dismissed effective immediately from employment with the BNSF Railway Company for the threat of violence in the work place while working as a machine operator on the Casper Subdivision on Friday July 14, 2017.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MWOR 1.6 Conduct.

In assessing discipline, consideration was given to your discipline record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA).

Enclosed are copies of the investigation transcript and exhibits entered during the investigation. Copies of these documents have been sent to your Representative.

The Carrier maintains that there was substantial evidence in the record that Claimant engaged in workplace violence through threatening language. The Carrier conducted a fair and impartial hearing. There was substantial evidence in the record that the Claimant engaged in workplace threats. Given the nature of the misconduct, the discipline of dismissal was not an abuse of Carrier discretion.

The Organization argues procedural violations with a failure to provide information in advance of the hearing, improper conduct by the investigating officer, and a faulty notice of hearing. On the merits, the Organization continues that the only evidence against Claimant was the statement of Foreman Campbell. Claimant had complained to Carrier officers about Foreman Campbell's harassment and threats shortly before Foreman Campbell made a complaint about Claimant's workplace comments. Claimant testified that he spoke with an HR Manager and the Chief Engineer of the Division about the workplace harassment from Foreman Campbell. Neither the Chief Engineer of the HR Manager testified.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain

the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

Rule 1.6 provides:

Conduct, employees must not be

1. careless of the safety of themselves or others.
2. negligent,
3. insubordinate,
4. dishonest,
5. immoral,
6. quarrelsome or
7. discourteous.

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.

The only evidence of workplace violence that would violate Rule 1.6 was the testimony of Mr. Campbell regarding Claimant comments about rape and suicide. According to Mr. Campbell, he did not feel threatened by Claimant's comments and did not feel that they were directed towards him.

According to Mr. Campbell, he was concerned about earlier Claimant comments that he was tired and needed Red Bulls to stay awake. Foreman Campbell testified that he was worried that Claimant might not be able to operate the machinery. A review of Foreman Campbell's testimony indicates that he thought Claimant's comments off-the-wall or odd, but not threatening. He was concerned about Claimant's comments about suicide.

Mr. Campbell tried to reach his supervisor on the 12<sup>th</sup> and 13<sup>th</sup>. However, the supervisor was off due to a death in his family and not responding to texts or calls. On Friday the 14<sup>th</sup>, Mr. Campbell went to Mr. Munis to discuss the situation. Foreman Campbell described his interaction with his supervisor about Claimant's statements:



But at that time what did you discuss with Levi?

RYAN CAMPBELL: Basically the same stuff that I I already visited with Munis about as far as you know the things he was saying, the games he was playing and the medication. I wanted to know. I don't I didn't want nobody running any equipment that was on mediation that needed two Red Bulls to stay awake. I mean.

SHAWN ELLESTAD: I understand.

RYAN CAMPBELL: And he made it perfectly clear that he couldn't stay awake. I had to go to the store and actually buy him a Red Bull that he never paid me back for.

SHAWN ELLESTAD: So when you did finally talk to Levi it was on the 13th?

RYAN CAMPBELL: Yes.

SHAWN ELLESTAD: Uh Mr. Campbell and previous testimony you'd also stated that uh you were uncertain who he was directing his comments at. Is that correct?

RYAN CAMPBELL: Yes, I he just made the comments. I don't know who they were to or what.

SHAWN ELLESTAD: So you don't feel he was directing them at you?

RYAN CAMPBELL: I don't believe so, no.

Foreman Campbell eventually brought his concerns to his supervisor, Mr. Munis. Mr. Munis was concerned about the comments and the instant investigation followed.

A review of the instant matter indicates to this Board that there is not substantial evidence in the record that Claimant engaged in workplace violence or workplace threats. Even if he did make the complained-of comments, those comments were so general that they were not a workplace threat. Even if the comments were made, they were weird and maybe worth sending the employee to EAP or a fitness for duty examination. This Board agrees with Foreman Campbell that the comments were not threatening.

This Board is all too aware of the degree of caution that must be exercised with possible workplace threats or workplace violence. However, in the instant matter, Claimant did not state any credible threats. Any statements he may have made were


general in nature and, while odd, were not threatening. His comments about suicide were worrisome and could have been treated in a manner other than discipline.

Award:

Claim sustained.

Order:

“The claim is sustained in full. The Claimant shall be offered reinstatement subject to the Carrier’s return to service policies. The Carrier shall remove the discipline from the Claimant’s record, with seniority, vacation and all other rights unimpaired and make him whole for all time lost as a result of this incident. Lost overtime shall be compensated at the overtime rate. His compensation shall be reduced by any interim earnings he may have had from outside employment. The Claimant shall be reimbursed for medical benefits to the extent that he provides the Carrier and the Organization with receipts of medical expenditures that would have been covered but for the lapse in his Health and Welfare Benefits. The Parties shall then jointly determine what co-pays, premiums and other medical costs would otherwise have been covered by his insurance had he continued in the Carrier’s employ uninterrupted by dismissal. Any other claims to compensation not specifically granted in this award are hereby denied.”

  
Carrier Member

  
Organization Member

  
Neutral Member

Dated: July 9, 2019