

PUBLIC LAW BOARD 7702

CASE NO. 7

BNSF RAILWAY COMPANY

CARRIER CASE NO. 11-10-0201

V.

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION / IBT

ORGANIZATION CASE NO. S-P-1477-C

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- 1) The discipline [Level S thirty (30) day record suspension and a one (1) year probation] imposed upon by Mr. G. Cox by letter dated February 2, 2010 for alleged violation of MOWOR 1.6 Conduct in connection with charges of alleged inappropriate behavior, yelling and cursing at another BNSF employee in the parking lot of the BNSF Depot in Whitefish, MT on Wednesday, November 11, 2009 while working as a Group 2 Machine Operator was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File S-P-1477-C/11-10-0201 BNR).
- 2) As a consequence of the violation referred to in Part (1) above, Claimant G. Cox shall now receive the remedy prescribed by the parties in Rule 40G.

FINDINGS:

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

Public Law Board 7702 has jurisdiction over the parties and the dispute involved herein.

Claimant G. Cox entered the service of the Carrier on July 6, 1977 and subsequently established and maintained seniority rights in the Track Sub-Department. On the dates relevant to this submission, he was assigned as a Group Two (2) Machine Operator based out of Whitefish, Montana.

On November 11, 2009, Claimant was on duty and working his normal assignment. At one point during the workday, Claimant was ordered to provide employee T. White with a new assignment. Claimant soon thereafter located Mr. White, who was sitting in a vehicle with employee D. Muir and directed him to proceed to a work location and ensure that contractor employees had proper protection and were not fouling the track. Due to comments Mr. White made to Claimant, the conversation became somewhat heated, however, calmer heads prevailed and both men went about their duties.

Timothy White's Statement: (as taken from transcript)

Timothy White: ...I come to White, I'd come up to the section house to drop off Dan, he gets out and Glen comes up to the pickup and asked me if I could check on (14:03 inaudible) was doing some contractors that were doing some work at Columbia Falls and asked if I could or check on them, and I said, "Well I just came by there, they weren't working but..." and I was getting ready to say, "but" when I go back there I will check and make sure they're not working," he was concerned that, that they, to make sure they weren't going to foul the track. And he didn't even, didn't let me finish saying I'll stop back, and check, when I go back there, he just started just went off, and said "F you then, get out of here," slammed the door on the pickup and then opened it up again, and started the whole thing over again, and then slammed the door again, and just kept yelling, "Get the F out here! Get the F out of here!" And so I drove off, and.

Glen Cox Statement: (as taken from transcript)

Well to begin with I would like to say yes I did say the F-word several times, and to answer your question, it was a more of a frustrating situation other than a confrontational where it could be misconstrued as being interpreted as a, a direct confrontation, a hostile confrontation because I have heard the same thing at me before from other employees, and I know it's just the job and the task at hand before, and you heard it, and you get over with it, and you go about do your job so that's what all that was about because I was trying to get something done, and it was a lack of communication both parts, yes to your.

This scene was witnessed by fellow employee Dan Muir. The following morning, Mr. White reported the incident to Assistant Roadmaster Chad Brooks, who in turn informed BNSF's Human Resources office in Billings, MT.

As a result of the investigation, Claimant was issued a Level S 30-day Record Suspension and one year review period for violating Maintenance of Way Operating Rule (MOWOR) 1.6 - Conduct.

The Carrier argues:

The Claimant violated the provisions of MOWOR 1.6 when he was quarrelsome, discourteous, and hostile to another employee.

The behavior of Claimant on November 11, 2009 is simply unacceptable behavior. BNSF has an obligation to its employees to provide a safe working environment that is free from harassing behavior. Claimant's actions cannot be tolerated if BNSF is to fulfill its obligation.

The record clearly supports the Company's position that the Claimant violated Maintenance of Way Operating Rule 1.6 and as a result received the appropriate punishment. Further, the Organization has failed to show that the discipline was unwarranted and in violation of the Agreement.

Maintenance of Way Operating Rule 1.6 Conduct Employees

Employees must not be:

1. Careless of 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 Organization argues:

At no time during the incident did Mr. White feel threatened or that Claimant was acting aggressively. The Carrier's own witness (Mr. Muir) later testified that the conversation between Mr. White and Claimant was mutual in nature, was nothing out of the ordinary and was best termed as "petty"

The Organization then submits that the Carrier failed to meet its required burden in this case. The Carrier was obligated to present sufficient evidence that Claimant was in violation of

Maintenance of Way Operating Rule (MOWOR) 1.6 Conduct. The evidence and testimony in the record reveals no conduct that violated the charged rule. While a heated discussion clearly occurred that day in the parking lot of the Carrier's yard in Whitefish, Montana, the Carrier failed to establish or prove that Claimant's actions were something that was inappropriate under MOWOR 1.6 Conduct. Because the Carrier did not and cannot sustain its burden in this case, this Board must fully sustain this claim.

Based on a review of the evidence and testimony presented. And, after weighing the evidence, it has been determined that there is no evidence on the record to indicate any threatening actions either verbal or otherwise had taken place.

There was, however, somewhat conflicting testimony from the witness which lacked any credible corroboration.

According to the record, what had taken place was simply shop talk found to be used in this industry as well as many other blue collar industries.

There is no definite evidence, on the record, which conclusively establishes the fact that the Claimant violated Rule 1.6.

Therefore, the Carrier has not met their burden to prove substantial evidence existed for the discipline issued.

AWARD:

The Claim is hereby sustained.

In accordance with Rule 40 G. INVESTIGATIONS AND APPEALS

The Claimant shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline.

Marc A Winters

Marc A. Winters
Neutral Member

Dated: November 27, 2015

JH

Joseph Heenan
Carrier Member

*Dissenting
opinion
attached*

KE

Kevin Evanski
Organization Member

Carrier Members' Dissent
To Award 7 of Public Law Board 7702
(Referee Winters)

This Award is a shining example of a referee with little to no railroad experience applying old-fashioned thinking about what is acceptable behavior in a "blue collar industry." Referee Winters failed to provide any substantive reasoning for his assertions and the Award is obsolete of any relevant law or evidence from the record. Prevalence of unacceptable behavior does not in turn make that behavior acceptable.

Of the four page Award, Referee Winters provided a total of four original sentences he can call his own. These four sentences also entail his analysis detailing his reasoning. First, Referee Winters states:

Based on a review of the evidence and testimony presented. And, after weighing the evidence, it has been determined that there is no evidence on the record to indicate any *threatening actions* either verbal or otherwise had taken place. [*Emphasis added*].

Maintenance of Way Operating Rule 1.6 – Conduct, clearly provides that employees must not be "Quarrelsome or Discourteous" and "Any act of hostility" can be cause for dismissal. The Rule is devoid of the term *threatening actions* and thus, *threatening actions* need not be proven nor shown to have taken place. Referee Winters simply ignores the clear language of the Rule which is the lynchpin of this case.

Second:

There was, however, somewhat conflicting testimony from the witness which lacked any credible corroboration.

Referee Winters failed to state what conflicting testimony he is referring to. This is because there was not any conflicting testimony. Principal admitted his conduct and even stated he understood how his actions could be construed as a hostile, direct confrontation which was a confirmation of the other witnesses' testimony.

Referee Winters finally opines:

According to the record, what had taken place was simply shop talk found to be used in this industry as well as many other blue collar industries.

This statement is devoid of any reasoning or law and is merely opinion about what occurs in "blue collar industries." Public Law Board 5850, Award 224, provided to this Board, clearly summarizes Carrier's position in this case:

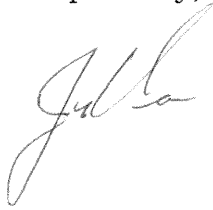
This Board has been advised that the work place is not a tea room, and this Board agrees that work place chatter is usually rough and uncensored. The Board does not, however, condone such behavior.

Again, merely because language and or actions may be commonplace, does not mean it is acceptable. Using the reasoning provided by this Board, Carrier should not have

issued discipline and told the reporting employee nothing can be done because being sworn at is merely "shop talk." It is absurd to reason Carrier would not issue discipline when there is no dispute of the misconduct occurring and there is a clear violation of Rule 1.6.

This Award disregards Rule 1.6 and misinterprets the industry as a whole. It adds little precedential value to the Railroad industry, if anything, it turns back the clock and reinforces behavior this industry is trying to rid itself of.

I respectfully, but vigorously, dissent.

A handwritten signature in cursive script, appearing to read "Joe R. Heenan".

Joe R. Heenan
Carrier Member