

Special Board of Adjustment No. 1112

Parties to Dispute

Brotherhood of Maintenance of Way)	
Employees' Division/IBT)	
)	
vs)	Case 84/Award 85
)	
Burlington Northern Santa Fe)	
Railway Company)	

Statement of Claim

Appeal of discipline of dismissal assessed employee Kevin Shane on January 18, 2005.

Background

On July 23, 2004 the Claimant to this case, Kevin Shane, was advised by the Carrier to attend an investigation in order to determine facts and place responsibility, if any, in connection with allegedly threatening a fellow BNSF employee and for having a firearm in his possession while on company premises. This allegedly happened at about 3:15 PM on the date of July 22, 2004 while the Claimant held assignment as a Section man on Commuter Construction Gang TCCX 0109 at Auburn, Washington.

Mr. Shane was withheld from service pending the outcome of an investigation.

After postponements an investigation was held on the date of August 5, 2004 and continued on the date of December 22, 2004. The Claimant was advised on January 18, 2005 that he had been found guilty as charged and he was being dismissed from service of the Carrier for having violated BNSF Workplace policy HR 90.4 and BNSF

Maintenance of Way Operating Rule 1.12.

On February 25, 2005 the Claimant appealed the discipline in accordance with Section 6 seq. of an arbitration agreement signed on July 29, 1998 between the Carrier and the Organization which created Special Board of Adjustment (SBA) 1112 under the authority of the National Mediation Board. In accordance with the provisions of that agreement this case is now properly before SBA 1112. The neutral member has been granted final and binding powers to issue an Award on this case based on the criteria outlined by the parties in accordance with Section 8 of the agreement creating SBA 1112, and in accordance with Section 3 of the Railway Labor Act.

Discussion

Rule 40 of the parties' labor agreement is incorporated into this Award by reference and in toto.

The BNSF policies applicable to this case are the following which are cited here in pertinent part.

BNSF Maintenance of Way Operating Rule 1.12

While on duty or on railroad property, employees must not have firearms or deadly weapons, including knives with a blade longer than 3 inches. Employees may possess these weapons only if they are authorized to use them to perform their duties, or if they are given special permission by the designated manager.

BNSF Workplace policy HR 90.4

Threats of violence include any behavior that by its very nature could be interpreted by a reasonable person as intent to cause physical harm to another individual.

Acts of violence include any physical action, whether intentional or reckless, that harms or threatens the safety of another individual in the workplace.

.....

BNSF is committed to providing a safe, respectful workplace that is free from violence and threats of violence. For (the) purposes of this policy, workplace violence is any violent or potentially violent behavior that arises from or occurs in the workplace that affects BNSF employees, contractors, customers, or the public.

Individuals who engage in violent or threatening behavior may be withheld from service pending formal investigation, and may be subject to dismissal or other disciplinary action, arrest and/or criminal prosecution...

Testimony at the investigation by the road master of commuter construction for the BNSF in Seattle is as follows. He was the supervisor of the Claimant on July 22, 2004 at Auburn, Washington. While in his Seattle office this supervisor was in receipt of a phone call at about 3:15 PM from a machine operator who stated to him that the Claimant had a firearm on company premises in Auburn, Washington and that he had pointed it in his direction. The road master then called company security and told them to go to the location of the alleged incident. By the time the supervisor arrived in Auburn the special agent and the Auburn police were already there.

Testimony by the machine operator who had called the road master is as follows.

According to this witness he was in the parking lot of the transit building at Auburn, Washington standing by his vehicle on the date of July 22, 2004 at the end of the shift. He was taking his boots off and getting ready to leave at the end of his shift and talking to a co-worker. According to this employee he looked over at the Claimant's vehicle and noticed that the Claimant had a rifle pointed in the air. He then saw the Claimant cock the rifle, turn around, and point the rifle in his direction. Thereafter the Claimant placed the rifle in the back seat of his vehicle and "...exited the premises in a swift manner...". According to this employee, he felt an "...eminent threat (to) his personal safety...". This employee admits of "...previous on-goings about things at work..." between he and the Claimant. Thereafter this employee called the supervisor as noted above. On cross examination this witness states that the Claimant was about 15-20 yards from him when the incident took place and that he was familiar with firearms and he could hear a clicking action of the rifle and the Claimant had cocked it. The witness states that the rifle was pointed at him and he could look down its barrel. The Claimant was sitting in the front seat of his convertible when he did this. This witness states that he was shocked when the gun was pointed at him.

The Carrier's special agent who did an investigation, who is also a police officer commissioned by the state of Washington, testified next. He states that he was in another location when he got the call from the road master and he did not arrive at Auburn until about 4:30 PM. The Auburn police were already on the scene when he arrived and they were taking a statement from the machine operator. According to the incident report filed

by this agent: "...2 employees had been having words with each other for 2 days. While 1 employee was leaving company property he pointed a rifle at the other employee. Subject was arrested on 2 degree assault and jailed." In a longer report filed by this same security officer he adds that upon going to the home of the Claimant the latter admitted that he had a rifle in his car. He stated that as he was leaving the parking lot after work he did pass by the machine operator with whom he had been having "words" for several days. The Claimant also admitted that he moved his rifle from the front to the back seat of the car as he drove by the machine operator. But he further stated that "...he did not point the rifle at him...". According to this witness the Claimant stated to him that he did have the rifle in his possession on the date in question.

There was another person present when the incident occurred who had been talking with the machine operator when the Claimant passed with his car as he was leaving the parking lot. According to this witness the operator told him about the gun being pointed at him and he did note the surprise and consternation exhibited by the operator but this witness states, if the Board properly understands his testimony, that he had his back turned when the gun was allegedly pointed at the machine operator. In either case, this witness is unable to confirm the testimony by the machine operator.

Testimony by the Claimant is as follows. Although he admits that he did not have permission to have a rifle with him on July 22, 2004 he also states, on cross-examination, that that in his estimation he did not have a rifle with him while at work because he had already "...been released for the day..." from work. According to him, research also

showed that the parking lot where his car was parked, in part at least, could not be construed as company property. One owner held possession of the paved part of the lot and an adjacent building. The gravel part of the lot is owned by another owner. The Claimant repeats that he did not aim his gun at any other employee on the date in question. Further information provided at the investigation showed that the rifle in question was a right hand bolt action model.

Findings

A procedural objection raised by the Organization at the investigation is dismissed. A review of the Notice of Investigation fails to persuade the Board that the charges were not specific enough to provide the Claimant with sufficient information to develop a reasonable defense and thus avail himself of due process protections found in both the labor Agreement and the Railway Labor Act.

A review of the record in this case warrants the following conclusions. BNSF Rule 1.12 states that employees may not have firearms "...while on duty...". It is clear from all evidence of record, including testimony by the Claimant himself, that he had a rifle while on duty on the date of July 22, 2004. The rifle was in his car when the Claimant got off work. He states that he had it in his front seat. Policies generally in this industry, as well as specific policies of this Carrier which deal with violence in the work place, categorically prohibit the use or possession of deadly weapons by employees while on duty. The violation of this rule alone is sufficient grounds for denying the claim in this

case.

The Organization argues technicalities in this case which are insufficient grounds for concluding that the Board's line of reasoning in the immediate foregoing is not correct. Under oath a Carrier officer testified that the parking lot where the Claimant and other employees working at Auburn parked their cars came as part of a package with the building nearby that the Carrier leased. Therefore the parking lot was company premises under terms of the lease. Testimony by the Claimant is that the lessor had, in fact, sold some of the parking lot to some other owner during the time of the lease. Apparently this was the gravel part of the lot. Does this invalidate the argument that the leased lot was still company premises? Not on basis of the evidence presented. The arrangements between the current lessor and the new owner of part of the parking lot are unknown, nor are they clarified by the Claimant in the record. Reasonable minds could but conclude, in view of the state of the record in this case, that the Claimant not only had a firearm while on duty, but he also had one in his car which was on company premises.

Lastly, did the Claimant point the gun at another employee on the date in question shortly after 3:00 PM? That employee states that the Claimant did. A fellow employee nearby did not see this act but he did testify that the equipment operator was upset at that point in time. The equipment operator states that he was upset because he was looking down the barrel of a gun. The Claimant simply denies that he pointed his gun at anyone, but he does state that he moved it from the front seat --- where he certainly ought not to have had it in the first place --- to the back seat of his car while leaving the parking lot.

The Board is unpersuaded, given the full record, that the testimony by the Claimant is not motivated in this case by self-interest. Whether the gun was cocked or not is a side issue. If it was a right hand bolt action rifle, as the evidence establishes that it was, and since the Claimant is right handed as he admitted, and since he obviously had to turn to his right to put the gun from the front to the back seat of his car when he did go through this maneuver, it would not have been impossible for the Claimant to have cocked his gun at that point, with his right hand. Certainly, logic tells us that it would have been more difficult for him to have cocked his rifle during the maneuver in question had it been a left hand bolt action since the Claimant was starting to drive his car when all of this was taking place and he undoubtedly would have handled the steering wheel with his free hand which would have been his left hand. The Board can find no inconsistency per se between the testimony by the equipment operator who states that he heard the Claimant cock his rifle before pointing it at him, and the fact that the rifle was a right hand bolt action rifle. There are reasonable grounds in the record for concluding that the Claimant was also in violation of BNSF Workplace policy HR 90.4 which addresses "...threats of violence...".

Upon the record as a whole conclusion is warranted that the Claimant was guilty as charged. On basis of evidence of the type permissible in forums such as this the claim must be denied on merits. Arbitral rulings are based on substantial evidence. This type of evidence has been defined as such evidence "...as a reasonable mind might accept as

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adequate to support a conclusion...".¹ As moving party to this case the employer has sufficiently borne its burden of proof.² The discipline assessed by the Carrier in this case was appropriate.

Award

The claim is denied.



Edward L. Suntrup, Chair &
Neutral Member

Date: 6-6-05

¹ Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229. See also Second Division 6419, 8130; Public Law Board 5712, Award 4 inter alia.

² See Second Division 5526, 6054; Fourth Division 3379, 3482; Public Law Board 3696, Award 1 inter alia.