AWARD NO. 317
Case No. 317

File No. Burnett-MR-06-20-INV/MW-DEAR-20-67-SG-566 SOU

SPECIAL BOARD OF ADJUSTMENT NO. 1049

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
) DIVISION – IBT RAIL CONFERENCE
TO)
)
DISPUTE) NORFOLK SOUTHERN RAILWAY COMPANY
) (FORMER SOUTHERN RAILWAY COMPANY)

STATEMENT OF CLAIM:

Claim on behalf of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. M. Burnett, issued by letter dated July 24, 2020, in connection with his alleged conduct unbecoming an employe in that on June 2, 2020 it was discovered that his personal Facebook page displayed offensive, flagrantly inappropriate and inflammatory (threatening) content, in violation of Company rules and Corporate Policy was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File Burnett-MR-06-20-INV/MW-DEAR-20-67-SG-566 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant M. Burnett shall now be reinstated to service with all seniority rights restored and all entitlements to and credit for, benefits restored, including vacation and health insurance benefits and being made whole for all financial losses, including compensation for: (1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by Claimant while wrongfully removed from service); (2) any general lump-sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service; (3) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service or on overtime paid to any junior employe for work Claimant could have bid on and performed had Claimant not been removed from service; and (4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement, that this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

During the time frame relevant to this case, Claimant M. R. Burnett was employed as a welder on the R-3 gang. On June 2, 2020, Claimant allegedly made posts on Facebook, including an exchange allegedly between Claimant and another person in which Claimant, among other things, stated that he had a 10 mm hollow point with the other individual's name on it, and that he would hunt that person down and "blow your brains out of the back of your f***n head." He also allegedly made negative comments regarding the other person's national origin. Claimant was identified as a Carrier employee by a reader of the comments, and she posted the Carrier's Ethics and Compliance line number for others to use. The Norfolk Southern Ethics and Compliance Hotline then received multiple calls from individuals stating that they allegedly had seen the offensive, inappropriate and threatening content posted by Claimant on Facebook.

By notice dated June 19, 2020, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with "conduct unbecoming an employee in that on June 2, 2020, it was discovered that [his] personal Facebook page displayed offensive, flagrantly inappropriate and inflammatory (threatening) content, in violation of Company Rules and Corporate Policy." The hearing was held July 7, 2020, after which Claimant was found to be guilty as charged, and by notice dated July 24, 2020, he was dismissed from service.

The Organization challenges the discipline assessment on both procedural and substantive grounds. It first contends that the Carrier violated Rule 40 of the System Discipline Rule, in that the Carrier allegedly did not respond to the Organization's August 20, 2020 on-property appeal. It notes that the rule requires the Carrier to respond within 30 days from the date of the appeal, and it asserts that the record does not contain a disallowance of the appeal. The Organization argues that the Carrier violated the procedural elements of Rule 40, and it avers that the discipline

therefore should be overturned on that basis without consideration of the merits.

Based on our review of the record, we find no procedural barrier to our consideration of the merits. While the Organization's submission does not contain a response from the Carrier to the on-property appeal, the Carrier's submission contains a response dated September 18, 2020. We also note that there is no indication that the Organization raised such a contention on the property, either when the parties discussed the claim in conference, or at any other time. If the Carrier had indeed never responded to the Organization's appeal, we would expect that point to have been raised during the on-property handling. In the absence of any such objection, we think that at most the competing records supplied to us, one of which contains a denial and one of which does not, are insufficient to establish a rule violation on behalf of the Carrier.

With respect to the merits, the Organization maintains that the discipline assessment was unwarranted, arguing that the Carrier failed to meet its burden of proof in connection with all of the charges. It contends that the Carrier did not provide sufficient evidence to establish that Claimant made the Facebook posts which led to the investigation. The Organization points to Claimant's testimony in which he specifically denied having made the posts in question and that he had no idea how the posts had gotten there. It states that Claimant is the only person who knows if he made the posts or not, as the charging officer conceded he did not actually observe Claimant make any posts. While the posts appeared to have Claimant's profile picture next to each of them, the Organization posits that anyone can create or use a Facebook account with any name and photograph if they have the associated email address and password, and it notes Claimant's testimony that other people do have access to his account.

The Organization further contends that Claimant was never trained on the Carrier's expectations regarding social media use. It asserts that Claimant therefore cannot be held responsible for a violation of the charged rules, citing prior awards for the principle that a rule must be clear, and its application is understood, for discipline relating to such rule to be upheld. The Organization states that the Carrier has an obligation to train its employees on its expectations, and that in light of the lack of training here, Claimant cannot be held responsible for an alleged violation.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. It states that social media is an evolving method of communication and that it is not uncommon for people to not fully understand the ramifications of its use, and it cites prior awards in which employees who used social media inappropriately were reinstated. The Organization contends that, even if the charges had been proven, which it denies, dismissal was harsh and excessive, rather than corrective and progressive, for an offense of this nature. The Organization concludes that dismissal was not warranted for the type of offense alleged, and that the claim should be sustained.

The Carrier, on the other hand, maintains that there is no reason to disturb the discipline assessment, stating that there is no question that Claimant was guilty of the charges levied. Quoting the specific posts the charging officer found on Claimant's Facebook page, it asserts that the evidence establishes that Claimant posted offensive, flagrantly inappropriate and inflammatory and threatening content on Facebook, in direct violation of company rules and corporate policy. It states that the posts contain multiple threats of violence and racial disparagement, and that Claimant was identified as a Carrier employee when he made the posts. The Carrier notes comments in response to Claimant's posts which asserted he was representing the company, and it asserts that the multiple calls to the Ethics Hotline confirm that the public readily connected Claimant's inappropriate postings with the Carrier.

The Carrier states that Claimant was responsible for abiding by corporate policies both while at work and while representing himself as a Carrier employee on social media platforms. It states that, while Claimant claimed his account had been hacked, there was no evidence to support such a contention. It notes that there is no indication that Claimant tried to take down the postings or to raise an allegation of having been hacked earlier. The Carrier points out, though, that all of the postings had a profile picture which matched Claimant's picture on his Facebook page. It states that Claimant's bare denials are simply not credible.

With respect to the level of discipline imposed, the Carrier states that dismissal was not excessive, but that it was commensurate with the severity of the transgressions. It cites award authority which

has found that posting offensive materials for the world to see and identifying oneself as a Carrier employee brings disgrace to the Carrier, and which cannot be tolerated. It also notes that Claimant's discipline record reflects a prior suspension for conduct unbecoming, and it posits that there is no reason to think that anything less than dismissal would be effective to modify Claimant's behavior. The Carrier concludes that there are no mitigating circumstances which warrant modification of the discipline, and it urges that the claim should be denied.

We have carefully reviewed the record in this case and the parties' arguments, and we find that sufficient evidence was produced to substantiate the finding of guilt. The Carrier's burden in matters such as this is not proof beyond a reasonable doubt, but merely the production of substantial evidence to support the discipline assessment, which has been defined in prior awards as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Here, we believe that the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that Claimant posted offensive and threatening material on social media, and that there was an adequate nexus established between Claimant and the Carrier at the time he posted the offensive material. The posts from other participants are sufficient that a reasonable mind could conclude that Claimant had identified as a Carrier employee. We note that Claimant himself gave a less than definitive response when asked if his profile identified him as an NS employee, stating only "I don't believe so." The calls to the Carrier's Ethics and Compliance Hotline would indicate otherwise.

We also find sufficient evidence to support the conclusion that Claimant posted the materials himself. The charging officer testified that he pulled the material in question from Claimant's Facebook page, and we find nothing in the record which would indicate that his testimony was suspect. Claimant's contradictory testimony raised a credibility issue in our view, and it has been held in numerous prior awards that such credibility issues are left for the hearing officer to make, not this appellate board. We will not overturn the credibility determination made here.

Claimant's contention that he did not know what was expected of him with respect to such postings

also appears to be suspect, as well as inconsistent with his claim that he did not post the materials to begin with. We find it noteworthy that, sometime after other observers noted Claimant's affiliation with the Carrier, Claimant made a post in which he attempted to distance himself from his employment, in language which is very similar to that required by the company's policy, indicating to us that he was aware of the ramifications of his posts. Again, Claimant was equivocal in addressing whether he had posted the attempted disclaimer, stating only that he did not recall if he made it. It strains believability, in our opinion, for someone to claim that they did not know that posts of the type made here are improper.

Having found substantial evidence to support the finding of guilt, the next question before us concerns the level of discipline assessed. We have reviewed the awards cited by the Organization in which dismissals in connection with social media postings were reduced, but we do not find the circumstances set forth in them to be similar to this case. Many of those cases involve employees who accepted responsibility for their actions, a factor which is not present here. The postings here, which we do not believe are necessary to repeat other than as set forth above, are indeed offensive and threatening by any objective standard, and the Carrier is indeed well within its rights to assess discipline against employees who commit such conduct. To overturn the Carrier's assessment would require the Board to find that the Carrier acted arbitrarily or capriciously so as to constitute an abuse of discretion. On this record, we cannot find that the Carrier's actions were an abuse of discretion, so we will not substitute our judgment for the Carrier's now.

AWARD: Claim denied.

Michael D. Phillips
Chairman and Neutral Member

Adam Gilmour
Employee Member

Scott Goodspeed
Carrier Member

Dated: November 13, 2023