

AWARD NO. 327
Case No. 327

File No. Kirk-G-S-03-19-INV/MW-BLUE-19-19-SG-154 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. G. Kirk issued by letter dated April 26, 2019, in connection with his alleged conduct unbecoming an employee in that he made inappropriate and threatening comments while in the gang truck with your co-workers and while at the job site on March 7, 2019 near Altavista, Virginia was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File Kirk-G-S-03-19-INV/MW-BLUE-19-19-SG-154 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant G. Kirk shall now have his dismissal set aside with all notations thereof removed from all Carrier records and he shall also be restored all seniority and all financial and benefit losses, such as vacation and health insurance benefits occasioned as a result of the violation, including: (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 suspension from service (this amount is not reduced by earnings from alternate employment obtained by Claimant while wrongfully suspended); (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 suspended from service, or on overtime paid to any junior employee for work Claimant could have bid on and performed had Claimant not been suspended 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.

On March 7, 2019, Claimant Gary Kirk was employed as a laborer on gang S-11. That morning, a supervisor was notified by two other employees that Claimant had allegedly made an inappropriate comment about what he would like to do to the people on the surfacing gang. They reported that, while they were in a van prior to reaching the job site, Claimant said he would bring a double barrel to work and take care of business. Later in the day, three employees supplied written statements confirming that they heard Claimant make such a statement, one of whom added that Claimant made a similar remark again while at the job site.

By notice dated March 12, 2019, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with conduct unbecoming an employee in that he made inappropriate and threatening comments while in the gang truck with his co-workers and while at the job site during the incident described above. The hearing was held April 8, 2019, after which Claimant was found to be guilty as charged, and by notice dated April 26, 2019, he was dismissed from service.

The Organization challenges the discipline assessment on both procedural and substantive grounds. It first argues that Claimant was denied his contractual right to a fair and impartial investigation process. It notes that the Carrier referred in its on-property appeal denial to Corporate Policy 322 – Workplace Violence and General Conduct Rule 900 – Employee Conduct, while those documents were not introduced at the hearing. The Organization asserts that it is improper for the Carrier to enter new materials after the hearing, and it maintains that it would be inappropriate for the Board to consider those documents during our review of the case.

With respect to the conduct of the hearing itself, the Organization objects to the Carrier's failure to make all relevant witnesses available to testify. It notes testimony which shows that at least seven other employees were in the van on the morning in question, and it asserts that the Carrier cherry picked which evidence to use against Claimant in the form of written statements from two of them and the in-person testimony of only one employee. The Organization states that it was improper to enter the hearsay statements of witnesses who were not subject to cross-examination, citing prior awards. It avers that the Board should overturn the discipline assessment on those grounds alone, without reaching the merits.

The Organization also submits that the Carrier failed to meet its burden of proof in connection with all of the charges. It contends that the Carrier did not establish that Claimant violated any of its rules or policies, noting again that no rule or policy was introduced at the hearing. With respect to the alleged inappropriate and threatening comments Claimant was alleged to have made, the Organization states that the record establishes that Claimant never threatened anyone, noting that the employee who testified in person said he did not feel personally threatened by Claimant's remarks.

The Organization states that the evidence does not establish that Claimant was guilty of conduct unbecoming an employee. It says that, while Claimant acknowledged his choice of words that day was inappropriate, his words were not directed at another employee. It notes Claimant's testimony that he was having a rough morning and was feeling frustrated at how his life was playing out, but that he does not even own a gun.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. The Organization points out that Claimant has 15 years of service with a good prior record, and it contends that such length of service indicates his performance has been satisfactory. It states that prior awards have recognized that rehabilitation is appropriate if an employee's career can be salvaged, and that the goal of discipline should be corrective rather than punitive. The Organization concludes that in light of Claimant's years of service to the Carrier, dismissal was not warranted, and that Claimant should be returned to service.

The Carrier, on the other hand, maintains that there is no reason to disturb the discipline assessed. It states that Claimant received a fair and impartial hearing, and it points to award authority which has upheld the introduction of written statements in a railroad disciplinary hearing.

The Carrier also asserts that the evidence adduced at the hearing fulfilled its burden of producing substantial evidence to establish Claimant's guilt. It states that the testimony and statements presented during the hearing conclusively proved that Claimant was guilty of making inappropriate and threatening statements on the way to and at the work site, as described above. The Carrier notes that the statements from the other employees were specific in describing Claimant's comment about bringing in a double barrel shotgun to take care of business, as well as the testimony from the supervisor who removed Claimant from service that Claimant admitted having made such a statement. It emphasizes that the employee who testified in person confirmed that Claimant made such a statement a second time while on the job site, and it notes that while he may have not felt threatened, he confirmed that other employees on the gang were concerned and upset.

The Carrier avers that Claimant's testimony that he meant no threat does not diminish the fact that his behavior was threatening to his co-workers, stating that his stating he wanted to bring a double barrel shotgun to work to take care of business was absolutely threatening. It cites award authority which observed that "Violence, threatened violence, real or otherwise, cannot be condoned and no employee is required to live with the nagging thought of whether the threat was simple idle chit-chat with no intent, or if it was serious in nature." (PLB 5850, Award 61). The Carrier states that there is no question that, in this day and age where gun violence is epidemic, a statement about bringing a gun in to work to take care of business simply cannot be tolerated. It argues that Claimant's statements clearly constituted conduct unbecoming an employee, and that there are no mitigating circumstances.

With respect to the level of discipline imposed, the Carrier states threats of workplace violence constitute a dismissal offense, and it points to prior awards which have upheld dismissal for similar conduct. It states that it is well within its rights to treat the violation as it did, and that it has no obligation to retain in its employ an individual who commits such misconduct. The Carrier states

that there are no mitigating circumstances which warrant modification of the discipline, and it asserts that dismissal is appropriate in light of the seriousness of the offense.

We have carefully reviewed the record in this case and the parties' arguments, and we find no procedural barrier to our consideration of the merits. While there is no absolute bar to the entry of written statements in a disciplinary hearing, in this case we do not find that the statements entered deprived Claimant of a fair and impartial hearing. It is noteworthy in our view that all three of the statements were consistent in their report of Claimant's statement regarding bringing a double barrel shotgun to work, and when one of the statement authors appeared at the hearing, he was consistent in his testimony that Claimant had made such a statement, both in the van and again when he was with that employee again on the job site. While Claimant testified that the remarks reported in the statements were inaccurate in their specific reference to a double barrel shotgun, he did not deny having referred to bringing a gun to work. In such circumstances, we do not believe that the absence of two of the statement authors deprived Claimant of a fair hearing

Turning to the merits, we find that the Carrier has provided sufficient evidence to establish that Claimant was guilty of conduct unbecoming an employee. 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.

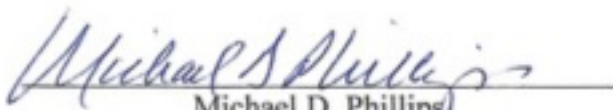
Here, we believe that the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that Claimant made comments which were reasonably construed as threats of violence in the workplace. Claimant himself admitted having made a statement about bringing a gun to work, and he admitted that "it was absolutely the wrong thing to say. Without question." We agree with his assessment of the matter. Whether or not the workplace violence policy or conduct rule was introduced at the hearing, there should be no question that threats of workplace violence constitute conduct unbecoming an employee.


Although Claimant testified that he did not intend the comment as a threat at anyone in particular,

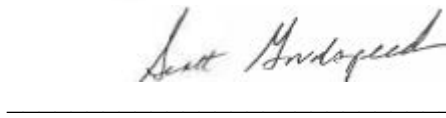
to the extent that is relevant, the Carrier was not obligated to believe that explanation or to find it credible. We note that the employee who testified in person said that Claimant again stated that “Monday would be a good day to bring that gun in,” and that Claimant specifically referred to a double barrel shotgun in his initial comments, yet Claimant denied having made either statement. We believe the conflicting testimony presented a credibility issue which the Carrier was not obligated to resolve in Claimant’s favor, and which we are not in position as an appellate body to second guess.

The next question before us concerns the level of discipline assessed. There is no doubt that there is no place for threats of violence in the workplace, and the Carrier is indeed well within its rights to assess discipline against employees who make such threats. 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