

PUBLIC LAW BOARD NO. 7425

**PARTIES) SMART - TRANSPORTATION DIVISION
TO)
DISPUTE) BNSF RAILWAY COMPANY**

STATEMENT OF CLAIM:

Claim of Whitefish, Montana Student Engineer Brian Dewese for reinstatement to service with seniority rights unimpaired, removal of censure from his personal record and pay for all time lost including but not limited to the following: payment of vacation allowance, health and welfare costs, reimbursement of all expenses related to the pursuit of alternative employment, reimbursement for any damages incurred as the result of discharge from service including proceeds on any property, real estate or financial instruments sold to replace lost compensation, as a result of an investigation held on August 29, 2014. (Organization File No. D1840-348-14; Carrier File No. 50-15-0005D)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

By letter dated August 15, 2014 the Carrier issued a Notice of Investigation to inform the Claimant that a hearing was scheduled for August 25, 2014 to determine the facts and responsibility, if any, in connection with his alleged unbecoming conduct of an employee while at his away-from-home terminal of Hettinger, ND on August 9, 2014. The Carrier notice further advised the Claimant that he was being withheld from service pending results of the investigation.

The scheduled date for the investigation was subsequently postponed and rescheduled for and held on August 29, 2014. The Claimant was present for the hearing and assisted in a defense against the charge by a representative of the Organization.

Following the investigation the Claimant was notified by letter of September 17, 2014 that the Carrier had determined through testimony and exhibits brought forth during the investigation that he was determined to have been in violation of GCOR 1.6, Conduct, and GCOR 1.9, Respect of Railroad Company, and that he was dismissed from service effective that same date, September 17, 2014.

Aforementioned GCOR 1.6, Conduct, reads:

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.

GCOR 1.9, Respect of Railroad Company states:

Employees must behave in such a way that the railroad will not be criticized for their actions.

It is the position of the Carrier that the record unequivocally shows that on the date at issue, August 8, 2014, and into the early morning hours of August 9, 2014, the Claimant was in violation of the above cited rules, including the Claimant's own statements, concerning his conduct at an American Legion Post facility where he had gone for drinks and at the Carrier's designated lodging facility at the Claimant's away-from-home terminal of Hettinger, ND.

The Carrier directs attention to the statements of four co-workers of the Claimant that it says speak volumes involving the Claimant's conduct of being intoxicated at the American Legion hall; the Claimant having grabbed the chest of a fellow female employee, who pushed him away; the Claimant having continued to drink at the lodging facility; the Claimant trying to fight everyone; the Claimant being put in his room, but coming back out and going to the commons area to drink more beer; and the Claimant having passed out in the hotel corridor with his pants and boxers down around his ankles.

The Organization has offered several alleged procedural errors involving the Carrier's handling of the investigation that it maintains are fatal and call for the claim to be sustained without consideration of the merits of the case. The Organization contends that the company hearing officer prejudged the Claimant to be guilty as charged; the hearing officer asked leading questions of witnesses; the

hearing officer gave long-winded assertions in reading rules into the record; and, the Carrier paid absolutely no credence to the Claimant's fears of what may have occurred in the early morning hours of August 9, 2014 wherein the Claimant asserted that he had been sodomized.

In this latter regard, the Board will note that the Claimant also alleged that he could not remember what had happened, and that he must have been drugged and/or assaulted. This Claimant contention notwithstanding the record shows the Claimant went to a local medical facility when he returned to his home terminal in Forsyth and the exam determined there was no sexual assault, albeit the Claimant sought to maintain that the exam showed there was a possible drugging. As the Carrier says, no evidence of any foul play was presented, and the statements of the Claimant's co-workers in this case bear far more credibility than the Claimant's version of events.

In overall study of the record the Board finds that the hearing was fair and impartial. Further, we agree with the Carrier that if any person contributed to an exceedingly extensive hearing record, it was the Claimant's representative in repeatedly haranguing witnesses, insisting that they answer questions outside of their areas of expertise or knowledge.

There is no question that the facts of record support the conclusion that the Claimant was intoxicated and had engaged in egregious inappropriate public behavior at a company-provided public lodging facility and an American Legion hall. The Claimant's intoxicated, combative, disruptive, and lewd misconduct clearly justified the Carrier conclusion that the Claimant's conduct was unbecoming an employee in disregard of the interest of the Carrier as stated in GCOR 1.6 as well as behavior inimical to the best interests of the Carrier and for which it could be criticized as set forth in GCOR 1.9 for the reprehensible actions as engaged in by the Claimant.


In terms of discipline to be sanctioned, the Board finds the following excerpt from the Findings set forth in Award No. 37624 of the Third Division, NRAB, BMW v. BNSF, Arbitrator Elliott Goldstein, to be worthy of note as likewise concerns the instant case:

We agree with the vast body of arbitral authority in this and other industries and, specifically, the relevant Awards cited by the Carrier, that in cases where an employee's proven misconduct involves behavior that is "morally reprehensible" by prevailing standards, the employer may exercise its discretion and terminate the employment relationship as a result of the proven immoral conduct, regardless of whether the misconduct occurred during his off-duty hours.


The Carrier having met a necessary burden of proof in support of the charges of record the Board finds no reason to hold as the Organization seeks that the Carrier acted arbitrarily or capriciously in terminating the Claimant from its service. The claim will therefore be denied.

Award:

Claim Denied.



Robert E. Peterson
Chair & Neutral Member



Melissa A. Beasley-Coke
Carrier Member



J. Michael LaPresta
Organization Member

Fort Worth, TX
Dated: March 1, 2018