

CORRECTED

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13982

Docket No. 13865

08-2-NRAB-00002-080015

The Second Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

(International Brotherhood of Electrical Workers

PARTIES TO DISPUTE: (

(BNSF Railway Company

STATEMENT OF CLAIM:

- "1. That in violation of the controlling Agreement, Rule 40 in particular, the BNSF Railway Company, as a result of an unfair and unwarranted investigation held on October 17, 2006 at Barstow, California, unjustly and arbitrarily assessed Mechanical Department Electrician Brenda K. Montoya with a Level S record suspension of thirty (30) days and probationary period of three (3) years.**
- 2. Accordingly, the BNSF Railway Company be ordered to promptly make Electrician Brenda K. Montoya whole for any and all lost wages, rights, benefits and privileges which were adversely affected as a result of her unjust assessment of discipline and that all record of this matter be expunged from Brenda K. Montoya's personal record, all in accordance with the terms of Rule 40, Paragraph I of the controlling Agreement."**

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

By letter dated August 9, 2006, Claimant Montoya was directed to attend a formal investigation on August 23, 2006, in connection with her role in an altercation on the property on July 21, 2006, that resulted in an injury to her hand. At the conclusion of that hearing, ultimately conducted on October 17, 2006, Carrier determined that she had been partially responsible for the fracas and on November 1, 2006, issued the disciplinary suspension here challenged by the Organization.

The record of Claimant's hearing reveals that on July 20, 2006, Claimant Montoya had been confronted by fellow employee J. J. Reedy and another employee, Juan Deleon, as she was collecting aluminum cans for recycling in building 18. In the presence of others, one of them called her a bitch because she had picked up what they perceived to be their property, apparently considering the area "their territory."

The next day Claimant came into the LMB lunchroom at approximately 11:00 a.m. Seated at a table were J. J. Reedy, and facing him across the table at a distance of several feet sat another employee, Ephriam Rodriguez. According to the testimony of Mr. Rodriguez, Claimant put her arm around Mr. Reedy's neck in what Rodriguez describes as a hug. Her "lunchtime routine," he says, was "a handshake or patting someone on the back." Reedy however,

"...grabbed her hand and he said, 'I want to talk to you.' And Brenda says, 'OK, what about?' And he says, 'You know what I'm talking about.' Very harsh language, 'you know what I'm talking about' and Brenda didn't know what he was talking about. And I believe Brenda said, 'Well, tell me what I did.' And he kept saying, 'Well you know what you did.' And then finally he said, 'You took some cans that belong to us.' And I believe J. J. was grabbing onto her hand and Brenda said, 'Oh, just let me go,' and he says, 'No, I'm not going to let you go until you tell me what you did. You know what you did... You know you took our cans.' And I think Brenda kept saying, 'just let my

hand go.' He said, 'No, I'm not...going to let you go.' And Brenda said, 'Well, if this is going to ruin our friendship, then you can have your cans. But I...I didn't take your cans, I didn't know they were yours.' And at that time I think she kind of forcibly took her hand away from his. And in...my observations, what I...saw, I think the whole situation was just a...it just started real quick like and people was stunned."

Rodriguez characterizes Reedy as loud and angry. "And he said, 'don't be messing with our cans, those are our cans...' and they were in the handshake, and Brenda said, 'let go, you're hurting my hand.' And he says, 'I'm not going to let you go until you tell me that you're, you know going to layoff our cans.' And she says, 'no, you're hurting my hand, please let go.' And it went on for, well, it seemed like a minute or so..."

Carrier argues that if the Board's examination of the record reveals credible evidence reasonably supporting the Rules violations charged it must uphold the discipline. Given the reliable proof of record here establishing that Claimant initiated the events leading to her injury, the Board has no alternative but to deny the Claim. Additionally, in light of the seriousness of her behavior and the ensuing injury, the minimal discipline assessed was appropriate.

The Organization offers a number of procedural objections to the Hearing Officer's management of the hearing. With respect to the merits, it argues that the discipline imposed on Ms. Montoya was arbitrary.

The Board concurs with the latter assertion. Since the discipline was not supported by credible record evidence it was arbitrary. The record demonstrates that Claimant's conduct was in no respect violative of Rule S-28.1 (Safety), Rule S-28.12 (Alert and Attentive), Rule S-28.6 (Conduct) or Rule S-28-7 (Altercations) as charged. Rather, the transcript overwhelmingly establishes that Claimant's gesture in embracing Reedy was no sudden chokehold, but friendly in its aspect, and not forcible, disrespectful, aggressive or threatening. Further, although Reedy had retired prior to Claimant's investigation and did not testify, it seems painfully apparent that his response in grabbing and squeezing her hand had nothing to do with reacting to a provocative act. It was not the product of surprise or anger at being touched but a convenient opportunity to take Claimant to task at close range, scolding and intimidating her for poaching his cans. Thus, although Reedy did not stand for direct and cross-examination, there is plentiful support for that conclusion

on this record, including Rodriguez's uncontradicted testimony that when Claimant had done the same thing in the past in a friendly manner Reedy's reaction was in kind.

In sum, this was not horseplay gone awry. Claimant was not loud, abusive or discourteous. She did not by any objective measures either threaten or jeopardize her co-worker's safety or provoke an altercation as charged. The evidence demonstrates only that she hugged a fellow employee, in a narrow, technical sense inappropriate, but an action for which a verbal reprimand would have been an appropriate response. Because the Carrier's imposition of a Level S record suspension of 30 days with a probationary period of three years was arbitrary, the Board concludes that all record of this matter must be expunged from the Claimant's personal record.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 25th day of November 2008.