

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 14048
Docket No. 13935
12-2-NRAB-00002-120003

The Second Division consisted of the regular members and in addition Referee Lynette A. Ross when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(BNSF Railway Company)

STATEMENT OF CLAIM:

- “1. That in violation of the governing Agreement, Rule 40 in particular, the BNSF Railway Company arbitrarily and unjustly assessed Electrician William Orton an actual 30 day suspension from work as a result of an investigation held on July 26, 2010.
2. That accordingly, and as a result of the arbitrary and unjust discipline assessed Electrician Orton, the Carrier be ordered to make Electrician Orton whole for all lost wages, rights, benefits and privileges which were adversely affected as a result of his removal from service and the 30 day actual suspension from service.
3. That accordingly, the three year Review Period be rescinded.
4. That accordingly, the Carrier be ordered to remove all record of this matter from Electrician Orton’s personal record.”

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.

The Claimant established service with the Carrier on July 9, 2007. By letter dated July 16, 2010, the Carrier directed him to report for an Investigation on July 28, 2010:

“. . . to ascertain the facts and determine your responsibility, if any, involving your alleged altercation with Electrician Lawrence Scheibe at or about 3:30 PM on July 16, 2010, in the Topeka Shop Building #12 Lunchroom, in possible violation of the following Mechanical Safety Rules and Policies:

S-28.7 Altercations.

Employees must not enter into altercations with each other, play practical jokes, or wrestle while on duty or railroad property.

S-28.6 Conduct: Specifically 6. Quarrelsome

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.)”

By mutual agreement of the parties, the Investigation was conducted on July 26, 2010. By letter dated August 10, 2010, the Carrier notified the Claimant that as a result of the testimony and evidence brought forth during the Investigation he was assessed discipline of a 30-day actual suspension coupled with a three year review

period, commencing on August 10, 2010, for having violated the above-quoted BNSF Mechanical Safety Rules and Procedures (MSRP).

The Organization promptly appealed the Carrier's disciplinary action and the parties ultimately conducted an on-property conference regarding the matter. Unable to reach a mutual resolution of the dispute, the claim is now properly before the Board for final and binding adjudication.

The Board carefully reviewed the Investigation transcript and all documents submitted by the parties during their on-property handling. Initially, the Board notes that the claim is procedurally sound in all respects. Therefore, there is no procedural bar to the Board's adjudication of the claim on its merits.

The Claimant and Electrician L. L. Scheibe were assigned as second shift Electricians at the Carrier's Topeka, Kansas, facility. On July 16, 2010, at approximately 3:30 P.M., Claimant Scheibe, and other second shift employees were in the lunch room, preparing for work. Their preparations included performing stretching exercises before commencing work. As the Claimant began his stretching, Scheibe brushed up against him, apparently, without apologizing or excusing himself to Orton. The Claimant and Scheibe then traded verbal barbs before the altercation turned physical.

At the Investigation, Electrician L. V. Friesen, an unbiased witness, provided detailed testimony based on his observation of the altercation from his vantage point in the lunch room. According to Friesen, as the Claimant prepared to stand up to stretch, Electrician Scheibe brushed against him. Scheibe returned to his seat, and Friesen overheard the Claimant say "excuse me" twice, directing the comments toward Scheibe. Friesen testified that Scheibe responded by twice telling the Claimant he was "in no f***ing mood." Friesen testified that he then witnessed both employees in a "toe-to-toe" or "chest-to-chest" posture. Friesen testified that he saw Scheibe shove the Claimant in the chest, causing the Claimant to stagger backwards six to eight feet before landing on his backside.

Electrician Scheibe does not deny the act of shoving the Claimant to the floor. The Investigation transcript reveals that Scheibe testified as follows:

“Okay. Like a lot of what transpired is the same as Will [Orton] said. I was, we had gotten up to do our stretches, I walked to the candy machine, got a candy bar, was coming back, and Will had moved and we brushed and he said, excuse you, and I said, no, excuse you, and he said I don’t think so, so I turned around and walked back towards him. Got face to face with him, he puffed up his chest and bumped into me and I pushed him and said, I’m pretty sure I said don’t f* with me at that time right before I pushed him.”**

The Organization asserts that the Carrier failed to prove the Claimant guilty of misconduct warranting discipline that was arbitrary and unjust. According to the Organization, as the above testimony shows, the Claimant was pushed by Electrician Scheibe and the evidence shows that the Claimant did not retaliate. The Claimant repeatedly testified that the only remark he had made to Scheibe was “excuse you,” which he said twice, and that the Claimant was not the aggressor.

The Organization further argues that the Carrier’s disciplinary notice states that when assessing the discipline, consideration was given to the Claimant’s personnel record. According to the Organization, the Claimant’s personnel record was not introduced at the Investigation. Therefore, because it technically was outside the realm of the Carrier consideration, the discipline was wrongfully assessed and must be expunged by the Board.

In response, the Carrier asserts that substantial probative evidence was introduced at the Investigation to prove that the Claimant violated MSRP Rule S-28.6, Conduct and MSRP Rule S-28.7 Altercations. The Carrier avers that the discipline was justified in light of tangible evidence showing that the Claimant was responsible for instigating the incident with Electrician Scheibe. In turn, Scheibe succumbed to the provocation and physically assaulted the Claimant. Regarding the quantum of discipline assessed, the Carrier argues that the 30-day actual suspension and placement under a three year review was, without question, proper under the circumstances.

The Board finds that the Carrier’s determination as to the Claimant’s guilt of the charge and violation of the cited MSRP Rules are supported by substantial evidence. The evidentiary record supports the Carrier’s finding that the Claimant

unnecessarily instigated and precipitated an incident with Electrician Scheibe. The evidence demonstrates that the Claimant's twice-uttered comment of "excuse you" was sarcastic and incendiary. The record confirms that the Claimant recognized he had had a "history" with Scheibe. Thus, there is evidence that the Claimant intended to rile Scheibe by his comments. The Claimant's workplace conduct was improper, and clearly violated Rule S-28.7 Altercations and S-28.6 Conduct, the Board concludes.

With regard to the level of discipline imposed, the Board finds that the Carrier's assessment of a 30-day actual suspension and three-year review period was warranted. Accordingly, it will not be disturbed. Under the circumstances, the Board agrees that the Carrier afforded the Claimant a great deal of leniency. As the Carrier points out, Electrician Scheibe was dismissed for his role in the altercation. According to the Carrier, the Claimant was assessed less stringent discipline commensurate with his role as the instigator. Had the Claimant physically assaulted Scheibe, the Claimant likewise would have been dismissed, the Carrier emphasizes.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

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

Dated at Chicago, Illinois, this 22nd day of October 2012.