

NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION

Award No. 14089  
Docket No. 13998  
14-2-NRAB-00002-140029

The Second Division consisted of the regular members and in addition Referee Joseph M. Fagnani when award was rendered.

(Brotherhood Railway Carmen-Division of TCU/IAMAW  
**PARTIES TO DISPUTE:** (  
(The BNSF Railway Company

**STATEMENT OF CLAIM:**

- “1. That the BNSF Railway Company violated the terms of the current Agreement, in particular Rule 34, when on March 7, 2013, the Carrier dismissed Carman Apprentice Jermahl Bobbitt from service for alleged quarrelsome, discourteous behavior and comments towards company officers from February 26 to March 1, 2013.
2. That accordingly, the Carrier be ordered pay the Claimant eight (8) hours pay at the pro rata rate for each workday he is held out of service commencing March 7, 2013 until he is returned to service.
3. Additionally, the Carrier be ordered to make the Claimant whole as follows:
  1. returned to service with seniority rights unimpaired;
  2. made whole for all vacation rights;
  3. made whole for all health, welfare and insurance benefits;
  4. made whole for pension benefits including Railroad Retirement and unemployment insurance;
  5. made whole for any other benefits he would have earned during the time he is out of service;
  6. made whole for all wages, lump sum payments, general wage increases and cost-of-living adjustments;
  7. paid for any overtime hours that he may have lost during his suspension; and

8. all correspondence and record of the investigation be removed from his personal record and file.”

**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 was assigned as a Carman Apprentice at the Carrier's Mechanical Car facility in Memphis, Tennessee. By letter dated March 7, 2013, the Claimant was directed to report for a formal Investigation on March 15, 2013, in connection with the following:

“ . . . your alleged quarrelsome, discourteous behavior and comments and/or comments and behavior a reasonable person could perceive as threatening and harassing and/or threats of violence over the course of days from February 26 [thru] March 1. By way of example only, and not to the exclusion of other similar conduct, the investigation will involve your behavior, communications, including but not limited to text messages, and in-person communications, with company officers Sean Bussey, LaShavio Little, Bryan Antczak and/or James Viglietti on or about February 26 [-] March 1. Such behavior occurred while you held the position of Carman at the Memphis, TN Mechanical Car Facility.”

The formal Investigation was postponed at the Claimant's request and was rescheduled for April 5, 2013. The Claimant did not appear at the formal Investigation and it was held in his absence, but the Claimant's representative was

present and fully participated in the Investigation. Following the formal Investigation, the Claimant was advised by letter dated April 17, 2013 that he was dismissed from the Carrier's service.

The Organization based its case on the contention that the Carrier violated Rule 35 of the controlling Agreement when the Claimant was denied his "contractual due process in defending himself" when the Carrier did not postpone the April 5, 2013 formal Investigation and opted to proceed without the Claimant in attendance. Specifically, the Organization notes that at 7:29 A.M. on the scheduled date of the Investigation, the Claimant sent an email to General Foreman Jaramillo with the word "postpone" in the subject line and the statement "I will send you the doctor excuse" in the message portion of the email. The Organization further notes that during the handling of this case on the property, it supplied the Carrier with medical documentation that the Claimant was admitted to the hospital on April 4, 2013 and was medically unable to attend the Investigation. The Organization cites Second Division Award 11249 in support of its position that failure to provide an Investigation mandates reversal of the discipline.

Contrariwise, the Carrier posits that the Investigation had previously been postponed at the Claimant's request and that the Claimant was fully aware that the Investigation had been rescheduled for April 5, 2013. The Carrier further asserts that the email that the Claimant sent just two and one-half hours prior to the start of the Investigation did not contain any supporting documentation, nor did it give an explanation as to why the Claimant could not attend the Investigation. In addition, the Carrier points out that in the intervening period between the email and the start of the Investigation, nothing was heard from the Claimant and both the Hearing Officer and the Claimant's representative made several unsuccessful attempts to contact the Claimant. The Carrier also notes that no contact was forthcoming from the Claimant between the start of the Investigation and its conclusion, approximately five hours later. The Carrier cites several Awards which it contends support its position that under the circumstances present herein, the Carrier properly held the formal Investigation in absentia.

The Board carefully reviewed the record in an effort to determine whether the Carrier's decision to proceed with the April 5, 2013 Investigation without the Claimant present deprived the Claimant of his contractual rights under Rule 35. In

making this determination, the Board primarily focused on the circumstances that were present at the time the Investigation was scheduled to begin at 10:00 A.M. on April 5, 2013. First, the email that the Claimant sent to the Carrier just a few hours prior to the scheduled time for the Investigation was sketchy at best and certainly gave no valid explanation as to why the Claimant was unable to attend the Investigation. There were several serious efforts to try to determine the Claimant's whereabouts by both the Hearing Officer and the Claimant's representative and nothing at all, either by email or phone, was heard from the Claimant during the rather lengthy investigatory proceedings. Based on the information that was available on April 5, 2013, the Board finds that the Carrier's decision to proceed with the Investigation was reasonable and did not violate Rule 35 of the Agreement.

In making this determination the Board also took into account events that transpired following the conclusion of the formal Investigation. The Board took particular note of the fact that during the 12-day period between the date of the formal Investigation and the issuance of discipline, the Claimant did not supply the Carrier with a shred of medical documentation to support his purported inability to attend the Investigation. On April 18, 2013, i.e., the day following the issuance of discipline, the Claimant's representative sent an email to the Carrier stating that the Claimant had advised him that he was taken to the hospital by ambulance on April 4, 2013 and "was unable to talk, or formally communicate" and that he had a nurse send the email to General Foreman Jaramillo "stating that he would not be attending [the] investigation on April 5, 2013 due to hospitalization." The Board gives no credence to the Claimant's explanation for his failure to attend the Investigation and his failure to provide the Carrier with timely evidence of his purported inability to attend. The email that the Claimant either personally or arranged to have sent made no reference to hospitalization; nor can the Board understand how the Claimant could have arranged for the email to be sent when he supposedly was unable to talk or formally communicate.

The first type of medical documentation in the record was supplied by the Organization as part of its May 6, 2013 appeal more than one month after the Investigation had been concluded. Without considering the Carrier's intimations regarding the validity of the documentation, the note from the doctor simply stated that the Claimant was seen and treated in the Emergency Department on April 4, 2013, i.e., the date prior to the Investigation and that the Claimant "will be able to

return to work on April 6, 2013.” The doctor’s note does not state that the Claimant’s condition was of such a nature so as to preclude him from participating in his formal Investigation; nor was there any indication to support the Claimant’s contention regarding his inability to talk or communicate either on April 4 or on the actual date of the April 5, 2013 Investigation. Several month later, the Organization provided the Carrier with account information from the hospital showing charges for a litany of medications and emergency room visits for April 4 and 5, 2013; however, the Board does not find that this belatedly-furnished information invalidates the Carrier’s decision to proceed based on the facts and circumstances present both prior to and during the formal Investigation. In summary, the Board finds that the Carrier was justified in proceeding with the formal Investigation without the Claimant’s presence.

The Board also carefully reviewed the evidence adduced at the formal Investigation and concludes that the testimony from six supervisory employees, as well as that from the Claimant’s co-worker, is substantial and conclusive that the Claimant was quarrelsome, discourteous and hostile and displayed threatening, harassing and malicious behavior while working as a Carman Apprentice. The record also establishes that over a three-day period, the Claimant sent harassing and threatening text messages, demonstrated erratic behavior in calling the Police onto Company property, placed tape over his mouth while being interviewed, used profanity over the radios and insinuated that he was prepared to use guns, stating that he was not afraid to die and take others with him. There can be no question, therefore, that the Carrier sustained its burden of proving the Claimant guilty of the charges.

Relative to the discipline of dismissal assessed, the Carrier notes that at the time of this incident, the Claimant had less than one year of service. Furthermore, under its Policy for Employee Performance, the Claimant’s violations constituted a “Stand Alone Dismissal Offense.” The Board finds that the Claimant’s erratic and abusive behavior was well beyond any level of acceptance or tolerance and that the Carrier’s decision to dismiss the Claimant was neither arbitrary nor excessive. Accordingly, the Board will not disturb the Carrier’s determination.

**AWARD**

Claim denied.

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**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 25th day of November 2014.**