Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
SECOND DIVISION

Award No. 14098
Docket No. 13974
14-2-NRAB-00002-140004

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 governing Agreement, Rule 35 in particular, the BNSF Railway Company arbitrarily and unjustly dismissed Electrician Norman Hansen as a result of an investigation held on October 22, 2012.

2. That in violation of the governing Agreement, Rule 34 in particular, the BNSF Railway Company failed to timely deny the initial claim submitted by the Organization.

3. That accordingly, and as a result of the cited violations of the governing Agreement that the BNSF Railway Company be ordered to return Electrician Norman Hansen to service immediately and further make Electrician Hansen whole for all lost wages, rights, benefits and privileges which have been adversely affected as a result of the dismissal from service. That accordingly, all record of this matter be removed from Electrician Norman Hansen's personal 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.

For reasons that remain open to conjecture but in an apparent effort to impress fellow bike enthusiasts, Claimant Norman Hansen, an Electrician at the Carrier's Lincoln, Nebraska, Diesel Shop, fired up his motorcycle in the early morning hours of September 22, 2012 and drove it through the shop service area at 2:45 A.M., just prior to the 3:00 A.M. lunch break. The incident triggered a formal Investigation by Carrier Officials, ultimately held on October 22, 2102. Upon review of the evidence there adduced, the Carrier dismissed Hansen from service on November 8, 2012. At the time, the Claimant had approximately 15 years of seniority with the railroad. This claim on his behalf ensued. It was handled on the property in the usual manner up to and including the highest appeal level, duly conferenced, and then advanced by the Organization to this forum for binding resolution.

Succinctly, the Carrier takes the position that the Claimant's inexplicable decision to ride his motorcycle through the Diesel Shop service area offended Rule 28.6 – Conduct, requiring that employees be sensitive to their own safety and that of others. Here, it contends, his actions constituted outrageously dangerous behavior, putting himself and his co-workers at risk. As an initial matter, the Organization argues several procedural matters related to the Carrier's charges and claim handling. On the merits, it maintains that while the Claimant's judgment may have been flawed and the incident was serious, in light of the fact that many employees had already gone to lunch when he acted out, and given his age and service record, the penalty of dismissal was overly severe.

The Organization's assertion that the charges were insufficiently precise is rejected as unpersuasive. The Carrier's notice of September 27, 2012 referenced in part:

> **". . . your alleged riding a motorcycle through the north rollup door and going east down line 5 in the shop and out the east end, then turning around and riding back west through the shop down line 5 and**

exiting through the north rollup door on September 22, 2012 at approximately 0245 hours."

We find those charges were sufficiently clear so as to enable the Claimant and his able Organization representatives to mount their defense against them.

The second procedural argument advanced by the Organization goes to the question of whether the Carrier violated Rule 34 by untimely responding to its local claim. Because the record before us demonstrates that Superintendent Hudson's response was postmarked well within the 60 days afforded by the Rule, that argument must also be rejected.

Reliable and unrebutted testimony from multiple witnesses establishes that the Claimant's "joyriding" action in the shop occurred approximately 15 minutes prior to his assigned 3:00 A.M. lunch period, not during lunch when most employees were out of the work area. As such, it unquestionably represented willful and unsafe disregard for his own safety and the safety of others, as well as disdain for the work obligations for which he was being paid.

While it is never pleasant to see the career of a long-service employee hit the rocks in this fashion, the Carrier proved its charges by substantial evidence. The arbitral precedent authority in support of the dismissal penalty for such conduct is substantial and compelling. Under the circumstances presented, and in light of the Claimant's admission of guilt, the claim must be denied.

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 17th day of December 2014.

NATIONAL RAILROAD ADJSUTMENT BOARD
SECOND DIVISION
LABOR MEMBERS' DISSENT

Docket No. 13974 - Award No. 14098
Referee James E. Conway

The Employees strenuously disagree with Referee Conway's failure to reinstate the Claimant, a BNSF shop electrical worker. We argued consistently that dismissal was *unreasonable, arbitrary, capricious*, and should have been reduced to a suspension. The facts of this case indicated the foregoing as the only reasonable, just and fair conclusion to be reached. All too typically, this was not clear to Referee Conway.

Referee Conway stated the following in his Findings:

> "While it is never pleasant to see the career of a long-service employee hit the rocks in this fashion, the Carrier proved its charges by substantial evidence. The *arbitral precedent authority* in support of the dismissal penalty for such conduct is substantial and compelling. Under the circumstances presented, and in light of the Claimant's submission of guilt, the claim must be denied" (italics added)

That statement is wholly preposterous for several reasons. First, there was really nothing for the Carrier to *prove*. Claimant readily admitted from the beginning that he did ride his motorcycle through his work facility while on duty, an act that was both immature and reckless. Thus, based on Claimant's own testimony, it was pointless to dispute the facts, and we did not. More troubling and disappointing was how Referee Conway "addressed" the issue of "arbitral precedent" by failing to follow his own. He has been in this business long enough to establish plenty of his own precedent. It's quite obvious that when reaching this results oriented decision he conveniently ignored all of it. In the instant case, especially given how Referee Conway has measured just cause for dismissal in the past, he stumbled off even the low wire, giving further credence to the emerging popular assessment of labor arbitration as a "crude art masquerading as a fine science." Why do we say this?– Please consider the following.

In Award No. 105 of Public Law Board No. 5332 (adopted in February of 2011), Referee Conway ruled exactly the opposite than he did in the instant case by returning an employee to work ***with less than 5 years of service who committed an offense even more serious than that which Claimant was found guilty of – operating a locomotive in a work area at excessive speeds***. Referee Conway found the following **(page 4)**:

> "On the basis of the above, the Board concludes that the Claimant properly was found guilty of operating his locomotive at excessive speeds. *The Organization's contention that the penalty of dismissal was unduly harsh, however, commands attention.* Claimant's Career Service Record indicated that he entered service on July 12, 2006, advancing to Electrician Journeyman on May 17, 2009. Prior to the incident at issue, his performance was entirely satisfactory except for one minor matter in late 2008, handled under the START program, involving failure to

obtain oil samples. When the record is considered together with the absence of evidence suggesting that the safety of any fellow employees was compromised by speeds of 6, 7, 8, 9, 12, 14 and 17 mph, *the Board concludes that termination was an excessive response*" (emphasis ours).

The Carrier is directed to convert the dismissal to a disciplinary suspension and restore Claimant to his prior position as soon as practicable following execution of this Award by a majority of its Members." (all emphasis ours).

In yet another instance, Award No. 111 of PLB 5332 (adopted in January of 2012), he reinstated another dismissed employee who had only seven (7) years of service and was found guilty of tardiness and falsifying his time sheet - fraud. Referee Conway found as follows:

"The Board does not normally interfere with decisions relating to level of penalties unless the discipline is determined to be unreasonable, arbitrary, or capricious. In this instance, while the Claimant was hardly blameless for generating this dispute, when the factors identified above are baked in, *we find considerable force in the contention that dismissal was unreasonably severe under the circumstances*. The Board will accordingly partially sustain the claim." (Emphasis ours).

Referee Conway has given employees, one with one-third the seniority of our Claimant and the other with just short of one-half of the seniority, and with minor and major blemishes on their records, opportunities to return to employment with time served as their punishment. There are a plethora of additional Awards by Referee Conway consistently determining that the discipline assessed was unreasonable, arbitrary, and capricious, including many affecting employees with much less service than in the instant case, and with service records reflecting prior offenses. There was nothing in this case to distinguish it from these other cases and justify this disparate, baseless and mysteriously vicious outcome.

Claimant readily admitted to riding his motorcycle through his workplace, an immature moment lacking good judgment. There was no testimony indicating that he put his fellow employees at harm. It is undisputed that at the time of the incident Claimant had approximately 15 years of service, *15 years with an* ***impeccable and unblemished record***. Arbitrators write often and at length about the consideration they give to "lengthy good service" when measuring what the appropriate measure of discipline is for an offense that could, on a standalone basis, be viewed as meriting the permanent dismissal of an employee with little tenure. This Referee's unexplained abandonment of this kind of careful consideration, which he has previously appeared to understand and apply, should make one take a second look when considering using him as an arbitrator.

Submitted this 25th Day of February, 2015

Bill Bohne 2-25-'15

Bill Bohne, Jr. – Labor Member, IBEW

CARRIER MEMBERS' RESPONSE TO LABOR MEMBER'S DISSENT

to

SECOND DIVISION AWARD 14098; Docket No. 13974

(Referee James E. Conway)

In his obvious disappointment with the outcome of this matter, the Labor Member ignores the salient factor supporting Referee Conway's decision and actually cites a prior Award of his that fully supports the instant decision, rather than casts it into doubt as the Labor Member suggests. In his Dissent, the Labor Member quotes from Referee Conway's decision in Public Law Board No. 5332, Award 105, a case involving the IBEW and the Norfolk Southern Railway. There, Referee Conway reinstated an employee with five years of service and a clean discipline record based on his finding that the employee's actions did not put anybody else in harm's way:

> **"When the record is considered together with the absence of evidence suggesting that the safety of any fellow employees was compromised by speeds of 6, 7, 8, 9, 12, 14 and 17 mph, the Board concludes that termination was an excessive response." (Emphasis added)**

Conversely, in the instant case, the Majority, with Referee Conway participating, specifically found that the Claimant's actions posed a safety risk not only to him, but also to other BNSF employees. While the Labor Member's Dissent maintains that "there was no testimony indicating that he put his fellow employees at harm," that assertion is simply incorrect. As Referee Conway stated just before the paragraph quoted by the Labor Member:

> **"Reliable and unrebutted testimony from multiple witnesses establishes that the Claimant's 'joyriding' action in the shop occurred approximately 15 minutes prior to his assigned 3:00 A.M. lunch period, not during lunch when most employees were out of the work area. As such, it unquestionably represented willful and unsafe disregard for his own safety and the safety of others, as well as disdain for the work obligations for which he was being paid." (Emphasis added)**

The other decision relied upon in the Labor Member's Dissent – Public Law Board No. 5332, Award 111 – is easily distinguishable from the instant case. Whereas Claimant Norman Hansen's conduct threatened his safety and the safety of his fellow employees, the situation presented in Award 111 had no relation to employee safety whatsoever. Once again, including the paragraph just before the language quoted by the Dissenter gives much-needed context to Referee Conway's decision:

> **"As the Organization forcefully asks, was a single instance of late reporting by a valued employee, under apparently extenuating circumstances, coupled**

> **with a ten-minute inaccuracy on pay sheets, arguably offset by overtime, grave enough to support the ultimate penalty?**
>
> **The Board does not normally interfere with decisions relating to level of penalties unless the discipline is determined to be unreasonable, arbitrary, or capricious. In this instance, while the Claimant was hardly blameless for generating this dispute, when the factors identified above are baked in, we find considerable force in the contention that dismissal was unreasonably severe under the circumstances. The Board will accordingly partially sustain the claim." (Emphasis added)**

Here, the only "factor" the Dissenter contends wasn't "baked in" to the Referee's decision was the Claimant's length of service, unlike the multitude of mitigating factors alleged in Award 111. While it is true that there are many Awards holding that length of service can be a mitigating factor for employees with clean discipline records who commit minor offenses, as the Carrier pointed out during the on-property handling and in its Submission to the Board, here the Claimant's length of service actually weighs against him – an employee who has been at the railroad for that many years clearly should have known better than to commit ". . . an act that was both immature and reckless" even according to the Labor Member's Dissent. In the on-property decision of Public Law Board No. 6987, Award 59 (2011), involving these same parties, the Board upheld the discipline assessed to an eight-year employee on the basis that, given his seniority, he should have known better:

> **"An employee with his years of service should know enough not to employ untoward and even dangerous work practices. As a result this claim must be denied."**

The Labor Member's opinion that Referee Conway ". . . conveniently ignored all of [his own precedent]" when citing the "substantial and compelling" arbitral precedent authority supporting dismissal also rings hollow. When an employee creates a situation where loss of life is possible, dismissal is always reasonable. This is especially so when the employee knowingly and intentionally engages in such reckless behavior, as the Claimant did in the instant case. Again, there is long-standing arbitral precedent supporting the Carrier's right to dismiss an unsafe employee, including Awards from Referee Conway.

In deciding a matter some 11 years earlier also involving an employee's decision to recklessly operate a vehicle and jeopardize the safety of others, Referee Conway upheld dismissal despite the employee's ten years of service. In Public Law Board No. 5622, Award 72 (2003), Referee Conway expressed a sentiment very similar to the one the Dissenter asserts is "disparate, baseless and mysteriously vicious:"

> **"Claimant's long past service warrants reflection but does not muscle past the seriousness of this matter. The evidence adduced at the investigation establishes grossly negligent behavior and clear-cut violation of Carrier's**

> **policy on the use of prohibited substances with which he admits he was well aware. His assertion of having been forced off the road by an oncoming vehicle driving on the wrong side of the road was disputed by the officer issuing the citation, who stated that Claimant's skid pattern began in the oncoming lane of traffic. That assessment was substantiated by eyewitness Cantrell, who described him as having been operating recklessly immediately before losing control of his vehicle.**
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> **It gives the Board no joy to observe a man with ten years' service lose his employment in this manner. But we must conclude that based upon a review of this record, there was nothing arbitrary or capricious about Carrier's assessment of either the facts or the severity of the penalty." (Emphasis added)**

Even employees with more than double the Claimant's years of service have had their dismissals upheld for egregious safety violations. For example, see on-property First Division Award 27586 wherein the Board held:

> **"The next inquiry is whether the Carrier abused its discretion by dismissing the Claimant from its service. The Carrier points to the nature of the misconduct and its fatal effect. The Organization cites to the length of service and the mitigating factors that accounted for the Claimant and his crew losing focus.**
>
> **Although the Claimant has more than 30 years of service with the Carrier, the egregious nature of the misconduct and its effect cannot be ignored. The obvious seriousness of the consequences of the misconduct cannot be sufficiently underscored. The dismissal of the Claimant was not an abuse of the Carrier's discretion."**

Nor does arbitral authority require the potential for loss of life or limb to reach near-certainty before it rises to the level of a dismissible offense. In Public Law Board No. 2576, Award 6 – another on-property decision between the instant parties dating back to 1979 – the claimant, a Bridge Tender with nine years of service, failed to perform required maintenance on his assigned bridge and was instead discovered watching television when supervisors visited the bridge on an inspection tour. Despite the seeming innocuousness of this passive activity, the Board upheld the Bridge Tender's dismissal because his decision to value personal entertainment over his obligation to maintain the bridge in good working order jeopardized the safety of all employees who had to cross that bridge in the performance of their duties:

> **"The Claimant admitted to having been looking at the television set while on duty. Although he contends that the maintenance functions were performed, the record is contrary.**

> **The neutral member cannot agree with the organization's arguement (sic) to no just cause for discharge, and therefore to be Arbitratary (sic) and capricious conduct by the employer.**
>
> **Finally, although termination from employment is the ultimate penalty, the potential safety hazzard (sic) from Claimant's lack of responsibility to his duties warranted such action."**

Referee Conway was correct in his finding that "the arbitral precedent authority in support of the dismissal penalty for such conduct is substantial and compelling." The only statement that is "wholly preposterous" is the Dissenter's conclusion that "this Referee's unexplained abandonment of this kind of careful consideration . . . should make one take a second look when considering using him as an arbitrator." The Carrier Members are confident that any party reviewing the authority cited in this Response will conclude – as we did – that Referee Conway's decision in the instant case is correct when viewed both in isolation and in the context of the entire landscape of arbitral Awards emanating from Section 3 tribunals. Moreover, Referee Conway's reputation and body of work – with countless Awards both for and against each side – stand on their own merit. Finally, the Carrier Members are disappointed in the Labor Member for what seems to be some sort of thinly-veiled attempt to dissuade others from selecting Referee Conway to resolve their disputes. The Carrier Members trust that any party conducting its own independent examination of Referee Conway's credentials and Awards will not be influenced by the Labor Member's flawed stratagem.

Derek A. Cargill *Michael C. Lesnik*

Derek A. Cargill **Michael C. Lesnik**

March 12, 2015