

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 14136
Docket No. 14059
16-2-NRAB-00002-150023

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

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

STATEMENT OF CLAIM:

- “1. That the Burlington Northern Santa Fe Railroad Company violated the terms of our controlling agreement when, on July 25, 2014, the Carrier improperly dismissed Havelock Shops Carman Steve Luft, Employee No. XXXXXX, as a result of an investigation held on July 11, 2014.
2. That accordingly, the Burlington Northern Santa Fe Railroad Company shall be required to compensate Havelock Shops Carman Steve Luft, Employee No. XXXXXX, eight (8) hours pay at the pro-rata for all workdays commencing July 25, 2014 and continuing until he is returned to active service. In addition, we also claim the following:
 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 and doctor expenses for him and his family during the time he was held out of service;
 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 was held out of service;

6. made whole for all wages, overtime he could have worked, lump sum payments, general wage increases and cost-of-living adjustments;
7. removal of all record of this unjust discipline from personal records.”

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 dismissed from the Carrier's service following a formal Investigation in connection with the following:

“ . . .your alleged loud, hostile, derogatory language creating an unprofessional and hostile work environment at approximately 0830 hours, at the East Crossing at Havelock Shops on October 21, 2013.”

Prior to discussing the merits of the case, the Board will address the contention that the Carrier should have postponed the Investigation due to the fact that when the Claimant appeared at the Investigation on July 11, 2014, he was still on a medical leave of absence. As background, soon after the incident in question, the Claimant was diagnosed with an acute stress disorder and on his personal physician's recommendation went on medical leave commencing on November 1, 2013. The record indicates that the investigation had been postponed on eight separate occasions and each time the Claimant supplied the Carrier's Medical Department with documentation from his personal physician supporting the need for another

postponement. When asked at the July 11, 2014 Investigation whether he had provided additional medical documentation for a postponement or whether he had requested a ninth postponement, the Claimant responded in the negative. The Hearing Officer also provided the Claimant a week's time to get medical documentation, however, the Claimant stated that "I don't think I can receive that." The Board finds that the Carrier's decision to proceed with the July 11, 2014 investigation was proper and did not prejudice the Claimant's right to a fair and impartial investigation.

In regard to the merits, Mechanical Foreman Gall testified that on the subject date, that while he was in his office he heard loud shouting coming from the area of the crossing. When he went out to investigate this disturbance, Mr. Gall stated that he overheard the Claimant shouting "she was stupid. . .she should not be a Carman and she is nothing but a fat pig or cow." According to the Mechanical Foreman's testimony, when he tried to ascertain why the Claimant was so angry and upset, the Claimant stated that a co-worker, the only woman on the crew, was irritating him by intentionally delaying work and that the female co-worker had spoken to the Claimant in a sarcastic manner.

When the Claimant testified at the Investigation, he acknowledged that he had spoken with Mechanical Foreman Gall and had apologized for being loud; however, the Claimant contended that his comments were aimed at a co-worker's ex-wife, and he denied that he told Mr. Gall that his comments referred to this co-worker or that he was having any problems with her. When General Foreman Gall was brought back into the investigation for further questioning, his testimony was unwavering that the Claimant had told him that he was upset with the female co-worker and that the Claimant never told him about any comments regarding a co-worker's ex-wife.

There is obviously a conflict in testimony. This Board has held in a plethora of Awards that when there is a conflict in testimony that the Carrier, as the trier of facts is in the best position to resolve such conflict, and that this Board, in its appellate capacity, should not upset such finding absent a clear showing of prejudicial conduct by the Carrier. There is no such showing in this case. The Board finds that the evidence of record is clear that the Claimant was guilty of violating both the Carrier's Safety Rules and its Workplace Harassment Policy when he made totally inappropriate and derogatory comments regarding a co-worker.

Relative to the discipline assessed in this case, the Carrier notes that its decision to dismiss the Claimant was in accordance with its Policy for Employee Performance Accountability (PEPA) as well as its Workplace Harassment Policy which provides that the type of behavior exhibited by the Claimant is cause for dismissal. In addition, the Carrier points out that this was the Claimant's third serious offense during an eight month period, one of which was for creating a hostile and intimidating work environment. The Organization argues that based on the nature of the offense and the Claimant's long years of service, the discipline assessed was arbitrary, capricious and unjust.

The Board finds that the loud, insulting comments made by the Claimant referring to a co-worker cannot be condoned in the workplace. If the Claimant had some problem with her work habits or the manner in which she addressed him, it was incumbent on him to make these facts known to his supervisor not to make vitriolic statements about her. In light of the seriousness of the offense, coupled with the fact that the Claimant has previously been disciplined for improper workplace conduct, the Board finds that the discipline of dismissal was warranted and will not be disturbed by the Board.

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 5th day of October 2016.