

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 14047
Docket No. 13934
12-2-NRAB-00002-120002**

The Second Division consisted of the regular members and in addition Referee Lynette A. Ross 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 Labor Agreement, Rule 40 in particular, the BNSF Railway Company arbitrarily and unjustly dismissed from its service Mechanical Department Electrician Paul E. Stevenson as a result of an investigation conducted on November 19, 2010.**
- 2. That accordingly, and as a result of the arbitrary, unjust and excessive discipline assessed Mechanical Department Electrician Paul E. Stevenson, the BNSF Railway Company be ordered to return Electrician Stevenson to its service immediately and further, compensate Electrician Stevenson for all lost wages, rights, benefits and privileges which have been adversely affected as a result of the unjust dismissal.**
- 3. Further, all record of this matter be removed from Electrician Paul E. Stevenson’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 August 7, 2005. By letter dated June 25, 2010, the Carrier directed him to report for an Investigation on July 16, 2010:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to act in good conduct by using vulgar language at approximately 1415 hours at the start of shift briefing on June 20, 2010 at Commerce Locomotive Facility. This investigation will determine possible violation of MSRP S-28.6.1 Suitable Language and MSRP S-28.6 Conduct.”

By mutual agreement of the parties, the Investigation was conducted on November 19, 2010. By letter dated December 6, 2010, the Carrier notified the Claimant that as a result of the testimony and evidence brought forth during the Investigation he was dismissed 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, this claim is now properly before the Board for final and binding adjudication.

The Board carefully reviewed the Investigation transcript, as well as 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.

On June 20, 2010 (Father's Day) the Claimant reported for work as a second shift Electrician at the Carrier's locomotive facility in Commerce, California. At approximately 2:15 P.M., Lead Technical Director J. Powers was conducting a job briefing in the second floor lunch room prior to the start of the shift. According to testimony by Powers and two unbiased craft employees, Powers casually asked the group if they were fathers, and then asked them if they had brought their lunches. Because it was Father's Day, Powers offered to buy pizza for the group.

The Claimant essentially testified that he had been offended by Powers' overly personal questions concerning fatherhood. The Claimant conceded that Powers had posed the questions to the group, and had not singled him out for any reason. The Claimant also testified that he had been feeling poorly as a result of sciatica and bronchitis and, because he had not been in the best of moods, he did not appreciate Powers' questions. Therefore, in a momentary loss of patience, the Claimant responded with a sarcastic comment only intended for the ears of the employee seated next to him, he testified. The comment, as heard by Powers and several of the Claimant's co-workers, consisted of the following: "What are you going to ask me next, how long my dick is?" Powers and the two peer witnesses, an Electrician and a Machinist, testified that the Claimant had in fact uttered that particular comment, or one very similar, in a voice that was plainly audible to everyone in the room.

The Claimant repeatedly testified that, in his view, the statement was not vulgar, profane nor obscene. Essentially, it was "shop talk" - verbiage no worse than other comments made by employees in the workplace. Immediately after the outburst, Powers told the Claimant that the comment was not appropriate conversation and that he did not want to hear any more of that type of talk. Powers testified that given the audience, the comment might have offended anyone in the room. Powers testified that two employees had approached him afterwards and conveyed their sentiments that the comment was inappropriate and offensive.

The Organization asserts that the Carrier failed to prove the Claimant guilty of misconduct warranting his dismissal. The Organization strongly argues that the Carrier's dismissal action was arbitrary and extremely excessive. According to the Carrier, the Claimant's testimony reveals that when he made the comment, he was careful not to use any words that could be construed as obscene or vulgar. As stated

above, the Claimant had not been feeling well and was simply irritated by Powers' too-personal questions.

Moreover, the Organization points out that the Claimant did not refuse to obey any supervisory orders and, hence, he was not insubordinate. According to the Organization, the Claimant arrived at work prepared to perform his job and not be subjected to personal questions during a job briefing. Moreover, as the Claimant testified, the comment was made in private, and was not intended for everyone.

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-28.6.1, Suitable Language. The Carrier avers that the testimony by the two employees who had been present at the job briefing established that the Claimant made the comment out loud. According to the Carrier, it is important to note that the Claimant first testified that he had never uttered the specific words in question. Later, he contradicted himself by testifying that the comment, as heard by the witnesses, had been stated in private.

According to the Carrier, the Hearing Officer listened to all of the testimony and evaluated the evidence. He also observed the witnesses as they testified, and made credibility determinations based on his evaluation. Under the circumstances, the Hearing Officer's finding that the Claimant's testimony was less credible than the testimony of the other witnesses is supported by the record evidence. The Board, as an appellate body, has no basis for substituting its judgment for that of the Carrier when there is sufficient evidence to warrant upholding the charge.

Regarding the quantum of discipline assessed, the Carrier contends that dismissal was justified under the circumstances. The Claimant's comment was crude and vulgar and a highly inappropriate response to Powers' benevolent wishes for a happy Father's Day and generous offer to buy pizza for lunch. The Claimant's crude and vulgar retort was uttered without provocation. The remark was directed to a supervisor during a job briefing and in the presence of other second shift employees. The Claimant's dismissal for using vulgar language in violation of Rules S-28.6.1 and S-28.6 was proper given the nature of the offense and the provisions of the Policy for Employee Performance Accountability (PEPA).

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 record supports the Carrier's finding that the comment at issue was discourteous, quarrelsome, vulgar, and clearly in violation of the conduct Rules. The comment also disrupted a supervisory job briefing; in that regard it was especially disrespectful. The record indeed shows that the Claimant's comment was utterly unprovoked, and was found to have been offensive by at least two employees. The Board further finds that the comment transcended "shop talk," was vulgar if not profane, and that the conduct displayed by the Claimant was totally uncalled for under the circumstances.

As regards the level of discipline assessed, the Board finds that dismissal was warranted based on the nature of the proven offense and the status of the Claimant's disciplinary record at the time of the incident. The record shows that at the time of the incident, the Claimant was in the midst of two separate discipline review periods for prior Rule violations. One of the two violations involved inappropriate comments the Claimant had made approximately four months prior concerning shooting co-workers. Certainly, the Claimant was on notice that certain behavior and language was inappropriate and would not be tolerated in the workplace.

Despite the Organization's vigorous defense of the Claimant, the Board finds that the Carrier's assessment of dismissal was completely justified based on the facts and the Claimant's prior record. Consequently, the Board finds no reason for disturbing the Carrier's disciplinary action for the Claimant's proven violation of MSRP Rules S-28.6.1 and S-28.6.

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.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

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