

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35372  
Docket No. MW-35516  
01-3-99-3-427**

**The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.**

**PARTIES TO DISPUTE: (**  
**(Brotherhood of Maintenance of Way Employes**  
**(Burlington Northern Santa Fe Railway (former Burlington**  
**( Northern Railroad Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline (withheld from service and subsequent dismissal) imposed upon Foreman R. D. Burkitt for alleged violation of Rules 1.6 and 1.7 of the BNSF Safety Rules and General Responsibilities For All Employes on January 5, 1998 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-98-D070-5/MWA 98-04-02AA BNR)**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. D. Burkitt shall ‘ . . . be immediately returned to service and that he be made whole for all losses (sic).’”**

**FINDINGS:**

**The Third 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.

On January 5, 1998, an incident between the Claimant and Laborer Gonzales occurred in the section gang lunchroom at Denver Yard. According to Gonzales, the Claimant came up to him and told him to get the f\*\*\* away from his coat. Gonzales reported this incident to his immediate supervisor. The Claimant was consequently directed to attend a formal Investigation at which he was charged with being discourteous. At the Investigation, the Claimant denied he used profanity toward Gonzales. Following the Investigation, the Claimant was dismissed from service effective January 30, 1998. During the handling of this claim on the property, the Carrier reinstated the Claimant on April 27, 1998, without prejudice to his claim.

While the Board acknowledges there is a conflict between the testimony of the Claimant and Gonzales as to what was said, it is not the function of this tribunal to resolve that conflict. The Hearing Officer has the responsibility of resolving such conflicts based upon his observations at the time of the Hearing. Unless it is obvious to the Board that such a determination was unreasonably made, it will not be disturbed. We have no basis in this case to upset the Hearing Officer's determination that the Claimant swore at the other employee. We find, therefore, that there was substantial evidence in the record to support the Carrier's charge against the Claimant.

We do not agree, however, with the Carrier's assessment of discipline, even with the reduction of the Claimant's dismissal to a suspension of nearly three months in length. We are cognizant that the Claimant has several entries on his record for offenses of a similar nature. Nevertheless, the seriousness of the offense in this case warrants no more than a 30 day suspension. Accordingly, we will direct that the Claimant's record be corrected to show a 30 day suspension, and that the Carrier compensate the Claimant for lost wages as a result of time lost beyond that period.

### AWARD

Claim sustained in accordance with the Findings.

**Form 1**  
**Page 3**

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**ORDER**

**This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.**

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

**Dated at Chicago, Illinois, this 20th day of March, 2001.**