

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35404
Docket No. MW-34948
01-3-98-3-690

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis 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 fifteen (15) day suspension assessed Section Foreman L.L. Hoffert for his alleged altercation with fellow employes on October 2, 1996 at Devils Lake, North Dakota and failure to comply with instructions from his supervisor was without just and sufficient cause and in violation of the Agreement (System File T-D-1256-B/MWB 97-03-1 OAB BNR).
- (2) Section Foreman L.L. Hoffert shall now be allowed ‘ . . . eight (8) hours straight time and all overtime worked by the Devils Lake Section in his absence each work day and overtime on each rest day during the period beginning on October 4, 1996 and ending 7:30 A.M. on October 25, 1996. Also, any benefits he may have been deprived of during that period of time. Also, that Mr. Hoffert’s personal record be cleared of any reference of this investigation or discipline assessed.***“

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.

At the time of the dispute giving rise to this claim, the Claimant was working as a Section Foreman at Devils Lake, North Dakota. On October 3, 1996, the Claimant was removed from service and was advised that he would receive a notice of formal Investigation. The Claimant was subsequently notified to attend an Investigation in connection with an alleged altercation that had taken place on October 2. He was also charged with failing to comply with the instructions of supervision. The Investigation was conducted on October 24, 1996. The Claimant was thereafter informed that he was found guilty of the charges and he was issued a 15 day suspension.

The record shows that on the morning of October 2, 1996, the Claimant was informed of a potential problem with a wide gage turnout to the mainline track at the east switch. The Claimant inspected the switch and found the track to be in excess of the standard gage.

The Claimant radioed two track inspectors, P. L. Schall and W. R. Lunak, and ordered them to report to the switch area. During that conversation, according to the testimony of Schall and Lunak, the Claimant shouted at the Track Inspectors that if they did not get to Devils Lake immediately they would lose their jobs and he would call the Division Superintendent to the scene.

When Schall and Lunak arrived at Devils Lake, the Claimant, who concededly was aware of the track defect at the site, asked the Track Inspectors to determine the source of the problem. The Track Inspectors testified that, when they indicated that the track had a wide gage, the Claimant called them a couple of "dumb f****ing Track Inspectors who don't know what they are looking for." The Claimant, who is well over six feet tall and about 240 pounds, then put his arm on Schall's shoulder and said, "How would you like it if I knocked that smile off your head?" Both felt intimidated, harassed and threatened by the Claimant's behavior.

Roadmaster C. G. Kemmet testified that the Claimant had been involved in an altercation with another employee only two months earlier. After an Investigation of the matter, the Claimant was specifically instructed not to enter into any further altercations, arguments or confrontations of any kind with fellow employees, supervisors or customers. The record further shows that the Claimant had been counseled on several occasions about similar misconduct in the past, although no formal discipline had been issued.

The Claimant denied entering into an altercation with Track Inspectors Schall and Lunak and insisted that he did not direct any profanity or abusive language toward them. However, he admitted that because he already knew about the wide gage problem, he only ordered the two Track Inspectors to report to him because he was “getting tired of covering up for had track inspecting” and wanted to bring the matter to their attention. The Claimant further conceded that his conduct may have been “discourteous” and that “nobody likes to be treated like that.”

The Carrier argues that it has proven the charges against the Claimant and that the penalty meted out was fully warranted given the seriousness of the misconduct. The Organization, on the other hand, contends that the Carrier failed to prove that an altercation occurred or that the Claimant failed to comply with the instructions of his Supervisor. The Organization reminds the Board that the burden of proof in a discipline case rests squarely upon the Carrier. This principle was established to ensure that an employee would not be disciplined unless probative evidence was presented during the Investigation supporting the charges specified. In this case, the Organization submits, the record is devoid of the required quantum of evidence to support a finding of wrongdoing.

In addition, the Organization asserts that there were procedural defects in the handling of this claim. Specifically, it submits that the Carrier’s charge letter was vague and did not cite any specific alleged Rule violations. At the Hearing, however, the Carrier contended for the first time that the Claimant had violated various Rules, including those pertaining to employee conduct and safety. The Organization argues that, as the record developed, it became clear that none of the Rules for which discipline was imposed pertained to the incident at hand.

Looking first at the procedural objections lodged by the Organization, the Board finds them to be without merit. A review of the charges reveals that they were sufficient

to allow the Claimant and the Organization to mount a full defense. It is well-established that specific Rules need not be set out in the notice of charges so long as the employee has a reasonably clear indication of the incident or matter under Investigation. Second Division Awards 7955, 8500 and Third Division Award 26276.

We further disagree with the Organization when it argues that the Carrier failed to prove any of the Rule violations cited. The Board's role is to act as a reviewing body and to consider the question of whether or not substantial evidence exists on the record to support the Carrier's determination that discipline was appropriate. If such evidence exists, then the penalty imposed by the Carrier is within its discretion and may not be overturned absent a finding that there has been an abuse of that discretion which causes an arbitrary or capricious result. See Third Division Award 26276.

Here, after careful review of the record, the Board finds that there is substantial evidence to support the Hearing Officer's conclusion that the Claimant did in fact engage in the misconduct alleged and that the testimony of the Carrier witnesses was more credible than the Claimant's self-serving denials. The Claimant insisted that he did not direct abusive language or intimidating conduct toward the two Track Inspectors, but the record clearly suggests otherwise. Under these circumstances, we have no basis for substituting our judgment for that of the Hearing Officer or for overturning the Carrier's determination that the events transpired as essentially described by the Carrier witnesses who testified on the property.

Moreover, contrary to the Organization's contentions, we perceive no prejudicial procedural flaws on the record and find no grounds upon which we should overturn the penalty imposed. The altercation precipitated by the Claimant was viewed seriously by the Carrier, and rightly so. The Carrier has the obligation to protect its employees and to provide a workplace safe from threats of violence, harassment and intimidation. The Claimant had been counseled about the inappropriateness of such behavior on prior occasions and had been explicitly told to refrain from entering into further altercations. The penalty of a 15-day suspension can hardly be viewed as excessive, unreasonable or an abuse of the Carrier's discretion under these facts.

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 Third Division

Dated at Chicago, Illinois, this 26th day of April, 2001.