

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35924
Docket No. MW-35641
02-3-99-3-566**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. J. F. Williams for alleged violation of Union Pacific Rule 1.7 in connection with an incident involving Co-worker J. Vicencio on February 23, 1998 was arbitrary, capricious, disparate and in violation of the Agreement (Carrier’s File 1147495-D MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. F. Williams shall now be reinstated with all seniority restored and compensated for all wage loss suffered.”

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.

It is undisputed that the Claimant twice charged a co-worker on the day in question and pushed or punched him. The accounts of eyewitnesses and the other employee corroborate both actions. The gang Foreman had to intercede to prevent a second episode of

physical contact. The Foreman also had to order the Claimant away three or four times to ameliorate the altercation. Although present at the Investigation, the Claimant did not testify to challenge the various accounts of the incident by other employees.

It is also undisputed that the Claimant pushed the other employee very near a steep embankment of some 50 feet in height with a rock bottom.

The Organization's main defense was the principle of shared responsibility and disparate treatment. It contended that the Claimant was provoked by the other employee. Moreover, it noted that the other employee was not disciplined at all.

Our review of the Hearing transcript does not reveal support for the Organization's defenses. There is no evidence that reasonably establishes provocation by the other employee that begins to approach a level that might justify the Claimant's actions. On this record, the Hearing Officer was warranted in concluding that the Claimant's actions were wholly unmitigated.

The misconduct calls for Level 5 dismissal treatment under the Carrier's UPGRADE program. Given the nature of the misconduct and the high propensity for serious bodily harm that existed, we do not find imposition of the dismissal penalty to be an abuse of the Carrier's discretion.

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 Third Division

Dated at Chicago, Illinois, this 22nd day of January, 2002.