

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36168
Docket No. MW-35747
02-3-99-3-733**

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 (formerly The Western
(Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Roadway Equipment Operator C. E. Bozeman for his alleged improper conduct towards a non carrier employe on May 20 and 21, 1997 was without just and sufficient cause, based on unproven charges and excessive discipline (Carrier's File 1109472D WPR).
- (2) As a consequence of the violation referred to in Part (1) above, Roadway Equipment Operator C. E. Bozeman shall be reinstated to service with seniority and all other rights unimpaired, compensated for all wage loss suffered and have his record cleared of the charges.”

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 his dismissal, the Claimant had some 23 years of service with the Carrier.

The record of Investigation contains testimony of the complaining witness to the effect that the Claimant engaged in verbal abuse of him, including crude and vulgar remarks about his spouse, and made a throat cutting gesture toward the complaining witness. The Claimant later produced a fillet knife and commented about its sharpness. Finally, the record depicts the Claimant attempting a physical assault on the complainant, in the form of a "horsebite," which was deflected. After complainant warned the Claimant not to touch him again, evidence in the record shows that the Claimant again grabbed for complainant's leg and succeeded in pinching it.

The Claimant's testimony corroborated the occurrence of several of the actions attributed to him by the complainant, although the Claimant characterized them as more benign. These actions were also partially corroborated by another witness.

On the whole, our review of the record finds it to contain substantial evidence in support of the Carrier's determination that the Claimant had unjustifiably engaged in verbal abuse of and directed a veiled threat of physical harm to the complainant. In addition, substantial evidence in the record supports the Carrier's determination that the Claimant had violated the Rule prohibiting altercations by his unprovoked and unwarranted physical contact with the complainant.

Given the nature of the misconduct proven by the record, we do not find the Carrier acted unreasonably in assessing the Level 5 discipline of dismissal in accordance with its UPGRADE program.

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 20th day of August 2002.