

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37462
Docket No. MW-38070
05-3-03-3-517

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [dismissal in all capacities on January 30, 2003, reduced on March 12, 2003 to a suspension with all time out of service to apply] imposed upon Mr. J. L. Welsh for alleged conduct unbecoming and alleged insubordination during a safety counseling session at Ann Street B&B office on November 19, 2002 and alleged unauthorized absence from assignment on November 19, 2002 was arbitrary, capricious, excessive, without merit and in violation of the Agreement (Carrier's File MW-0057D).
- (2) As a consequence of the violation referred to in Part (1) above, the aforesaid discipline shall be stricken from Mr. J. L. Welsh's record and he shall "... be compensated on a make whole basis for any and all time that he lost because of the unjust decision by the Carrier.”

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.

The Claimant is the same employee involved in Third Division Awards 37460 and 37461 where the Board upheld two 30-day suspensions given to the Claimant for failing to wear safety equipment on November 15 and 18, 2002.

This incident occurred one day after the incident leading to the second suspension. Supervisor of Structures J. F. Kaminski testified:

“On Tuesday, November 19, 2002, at 7:05 a.m., I called Mr. Welsh into my office to counsel him on the two recent incidents, noting that I am concerned about his safety, as he should be. With that, I handed him the RMSA10 form, showing him what we will be discussing, and without even looking at the form, he threw it back at me and said, ‘F**k this. I ain’t sitting here through this, and I’m not signing a f***ing thing.’ As he was leaving the office, I told him that I can’t start paying him until we finish the safety counsel, and he said, ‘Go ahead and try to send me the f**k home.’ A short while later, when we gathered in the shop for stretching exercise, I again informed Mr. Welsh that before he proceeds, we must finish the counseling. He said, ‘I’m tired of you f***ing harassing me,’ and stormed out of the building, kicking the door, and left the property. . . .”

Other witness testimony corroborates Kaminski’s version of the event. See e.g., the testimony of Maintenance Foreman T. Gamble:

“A. . . . And he [Kaminski] said, I gotta counsel you. He [the Claimant] says, no, you’re not counseling me, and Joe walked

out, very upset, walked out, went downstairs. Ten minutes later, we came downstairs, started stretching. Joe was still standing there. I hear Jerry say, Joe, I ain't gonna pay you until I counsel you; you ain't being paid. And Joe kicked the door and walked out and left.

* * *

. . . Joe [the Claimant] lost his temper . . . Joe was screaming that he's not being counseled. . . .

* * *

- Q. Do you recall in your statement you described Mr. Welsh's comment as ballistic?
- A. Yes.
- Q. What circumstances would lead you to use the word ballistic?
- A. I think Joe's language.
- Q. And what language was that?
- A. He was using profanity, saying, I'm not signing no F'ing papers."

The Claimant testified that he told Kaminski "I'm not signing this, because that ain't true . . . what I was reading was lie . . ." and further told Kaminski "I'm not signing this statement." The Claimant denied using profanity in his conversation with Kaminski, but asserts that he spoke "plain and simple, in a respectful manner . . . [t]here was no profanity, nothing." According to the Claimant, Kaminski told him that he was taken out of service and he told Kaminski "do what you gotta do." Further, according to the Claimant, although he was told that he was taken out of service, he joined the employees to exercise and Kaminski arrived and stated that there would be no exercise until the Claimant left the premises. The Claimant testified "we had words." Then, according to the Claimant:

- "A. . . . I told him, I came here ready and available for work, and I'm ready to go to work, and you don't have no right to send

me home. I didn't do nothing wrong. So, you know, I'm not leaving. I have every right to stay here and exercise with the group and go to work and earn my eight hours pay. I told him, I can't afford to lose a day's pay, I have a family to support, and I'm staying and working."

The Claimant testified that he agreed to leave, but only after other employees advised him to do so and Kaminski threatened to call the police to remove him.

The Claimant was dismissed by notification dated January 30, 2003. By letter dated March 12, 2003, the dismissal was reduced by the Carrier to a suspension with all time held out of service to apply. This claim proceeded.

Substantial evidence through the testimony of Supervisor of Structures Kaminski and Maintenance Foreman Gamble sufficiently demonstrates that the Claimant engaged in conduct unbecoming and insubordination. Maintenance Foreman Gamble's description of the Claimant's conduct including the use of profanity directed towards Kaminski as "ballistic" when Kaminski advised the Claimant of the counseling best describes the Claimant's conduct.

As we stated in Third Division Award 37461:

"With respect to the Claimant's different view of what transpired, without sufficient reason for doing so, it is not the function of the Board to re-determine the credibility of witnesses. To the extent the Claimant's version of the facts contradicts those relied upon by the Carrier in assessing the discipline, we find no basis in this record to credit the Claimant's different testimony."

The same conclusion is warranted in this case. The evidence against the Claimant is corroborated. Moreover, the Claimant's refusal to follow directions from Kaminski concerning the counseling and leaving the premises is actually admitted to by the Claimant when he testified that he told Kaminski "you don't have no right to send me home . . . I'm not leaving . . . I'm staying and working." Further, the Claimant describes his conversation with Kaminski as "plain and

simple, in a respectful manner . . . [t]here was no profanity, nothing," which is inconsistent with his testimony that "we had words."

With respect to the amount of discipline, under these circumstances, we do not find the discipline to be arbitrary or excessive. While the Claimant was initially dismissed, the Carrier returned him to work approximately one and one-half months later. The facts in this case and those in Third Division Awards 37460 and 37461 demonstrate to the Board that the Claimant is an employee who repeatedly does not follow the Carrier's Rules and conducts himself in a defiant and belligerent fashion. We are more than satisfied that the Claimant needs a very strong message that if he wishes to remain in the Carrier's employment, he has no choice and must follow the Carrier's Rules. Quite frankly, given the Claimant's short term of employment with the Carrier of barely two years (the Claimant was first employed in September 2000) had the Carrier not reduced his dismissal to a suspension, the Board would have upheld the dismissal.

The Organization's procedural arguments have been considered and do not change the result.

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 19th day of April 2005.