

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39555
Docket No. MW-40337
09-3-NRAB-00003-080103

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Group 3 Machine Operator G. Davenport for his ‘*** alleged misconduct unbecoming an employee when you made inappropriate comments to another employee, thereby creating a hostile and offensive work environment which is in violation of Maintenance of Way Operating Rules 1.6, Conduct and Maintenance of Way Operating Rule 1.7 Altercations, while working as Machine Operator on RP 16 at or near New Albany, Mississippi, milepost 564 on September 8, 2006.***’ was without just and sufficient cause and excessive and undue punishment and in violation of the Agreement [System File C-07-D070-1/10-07-0013(MW) BNR].
- (2) As a consequence of the violation referred to in Part 1 above, Claimant Group 3 Machine Operator G. Davenport shall now be reinstated to service and made whole for all time lost.”

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 had been employed by the Carrier for 12 years at the time of the events in the instant matter.

The Carrier advised the Claimant by letter dated September 11, to attend a formal Investigation on September 18, 2006. The notice stated that an Investigation would be held “. . . in connection with your alleged misconduct unbecoming an employee, when you made inappropriate comments to another employee, thereby creating a hostile and offensive work environment which is in violation of MOW Rules 1.6, Conduct and MOW Rule 1.7 Altercations while you were working as a machine operator on RP 16 . . . on September 8, 2006.” The Claimant was withheld from service pending the result of the Investigation.

The Investigation was held on September 18. On October 10, 2006, the Carrier notified the Claimant that the charges had been proven and he was dismissed from service.

The Organization claims procedural error because the Claimant did not receive a fair and impartial Investigation pursuant to the Agreement. On the merits, it maintains that the charges cannot be proved because the Claimant was not solely responsible for the incident and the employee in the altercation with the Claimant did not feel threatened. Further, the imposed discipline of dismissal was improper where the Carrier witnesses testified that the Claimant was a good employee and could work on his crew.

The Carrier contends that the Claimant received a fair and impartial Investigation consistent with the Agreement. It asserts that the charges were

proven, the imposed discipline was not in error, and the claim should be denied. It further argues that these are serious allegations and the discipline was appropriate.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence de novo. Thus, it is not our function to substitute our judgment for the Carrier's and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against the Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of its discretion.

After a review of the evidence, the Board finds that there were no procedural defects which void the discipline. The inquiry then turns to whether there is substantial evidence in the record to support the findings. The Board finds that there is substantial evidence in the record to warrant the findings.

The evidence clearly showed that the Claimant became aggravated with a co-worker on his work gang who drove a Carrier van to the nearby gas station – with the Claimant's gear in the passenger area. The Claimant drove to the gas station in another company vehicle and confronted the co-worker. The Claimant told the co-worker that he should "kick his ass." The Claimant collected his gear and departed. When the co-worker returned with the van, he told the Claimant that he had "returned in time." This somehow enraged the Claimant who, in turn, rushed the co-worker and struck him – knocking his hardhat to the ground. Other co-workers broke it up and the Claimant was sent back to the hotel to cool off. No police were summoned.

The Board is acutely aware of the importance of the Carrier's interest in maintaining an appropriate work environment by preventing workplace violence and threatening behavior and the Carrier's Rules prohibit such conduct. The record contains substantial evidence that the Claimant engaged in prohibited threatening and violent behavior when he confronted the co-worker at the gas station and later assaulted him.

The Board also finds that the imposed discipline of dismissal from service was not an abuse of the Carrier's discretion. The prohibitions against threatening and

violent behavior in the workplace exist for an obvious and important reason. The Organization argues certain mitigating factors that render dismissal an abuse of the Carrier's discretion. Had the Claimant only engaged in the threat at the gas station, there might be some type of compelling mitigation argument. However, that mitigation disappeared when the Claimant assaulted his co-worker.

The Claimant committed serious Rule violations. The Board cannot find that the Carrier abused its discretion by dismissing the Claimant from service.

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 27th day of February 2009.