

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40107
Docket No. MW-40622
09-3-NRAB-00003-080486**

The Third Division consisted of the regular members and in addition Referee M. David Vaughn 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 discipline (withheld from service beginning July 30, 2007 and subsequent dismissal by letter dated August 29, 2007) imposed upon Mr. A. Casados for alleged violation of Maintenance of Way Operating Rule 1.6 in connection with alleged misconduct and alleged altercation on BNSF property at approximately 2130 hours on July 29, 2007 at the BNSF MOW Wagner Building located at 523 West 1st Street, while assigned as a foreman on the Lakeside Maintenance Section, headquartered in Lakeside, Nebraska was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-07-D070-7/10-07-0493(MW) BNR)**
- (2) As a consequence of the violation referred to in Part (1) above, the aforesaid discipline shall now be set aside and removed from Claimant A. Casados' record and he shall be reinstated to service with all seniority rights unimpaired and compensated for all straight time and overtime wage loss resulting from such discipline.”**

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.

Prior to his dismissal, the Claimant had established and held seniority in the Maintenance of Way Department dating from April 13, 1993. At the time of this incident, the Claimant was assigned as a Track Foreman on the Lakeside Maintenance Section, headquartered in Lakeside, Nebraska.

This matter involves an incident, described below, between the Claimant and L. Bickford, a private citizen, with whom the Claimant had a personal relationship. The incident began at the BNSF Maintenance of Way Wagner Building located at 523 West 1st Street, Alliance, Nebraska. The Wagner Building is the Claimant's reporting location. The Claimant was there to pick up his reflective vest so he could launder it, but was not on duty or reporting for duty at the time of the incident.

Following the incident, and by letter dated July 30, 2007, the Carrier notified the Claimant that he was being withheld from service. He was directed to attend an Investigation on August 7 to determine his responsibility, if any, with respect to the incident.

The Hearing convened as scheduled. The Claimant was present and represented by Vice General Chairman R. Miller. Evidence presented at the Hearing included testimony from the Claimant, Railroad Police Special Agent D. Hannon, Roadmaster W. Haga and Assistant Roadmaster S. Campbell, as well as a

notarized statement from and by Bickford and a notarized "Affidavit for Custody" from and by Officer A. Bremer of the City of Alliance Police Department.

At the Hearing, Agent Hannon testified that on July 30, 2007 he was notified by the Alliance Police Department that the Claimant had been arrested as a result of an altercation and battery between the Claimant and Ms. Bickford that began on the Carrier's property at 9:30 P.M. on July 29, 2007. Agent Hannon stated that he read the police report of the incident. He stated that his preliminary investigation indicated that Ms. Bickford initiated the confrontation and that she brought a knife onto the Carrier's property, but that the Claimant obtained possession of the knife in the course of a scuffle and cut Ms. Bickford. At the Hearing, Agent Hannon acknowledged that he did not interview Ms. Bickford. Neither Ms. Bickford nor the Claimant was tested for the use of alcohol or other substances.

Roadmaster Haga, who was the Claimant's immediate Supervisor, testified as to his conversations with the Claimant and Alliance Night Section Truck Driver, J. Monday. Assistant Roadmaster Campbell testified as to her conversation with the Claimant. She stated that the Claimant said he took a knife from Ms. Bickford while both were on the property.

Agent Hannon presented an "Affidavit for Custody" from the City of Alliance Police Department. The Police Affidavit confirmed that Ms. Bickford reported that she and the Claimant had gotten into an altercation on the Carrier's property. In the Affidavit, Officer Bremer stated that he met with and interviewed Ms. Bickford on July 29, 2007, that he observed a small cut on the bottom of Ms. Bickford's neck with partially dried blood on it and that Ms. Bickford told him the cut was from the Claimant poking her with the knife. The Police Affidavit reiterated Ms. Bickford's contemporaneous statement to Officer Bremer that the Claimant had taken a knife from Ms. Bickford and had poked her in the lower neck with it.

Testimony at the Hearing further indicated that after the on-property altercation between the Claimant and Ms. Bickford, the Claimant left the Carrier's property, followed Ms. Bickford to her home and was involved in another violent confrontation there.

The Claimant testified that on the evening of July 29, 2007 there had been an altercation, that it occurred on the Carrier's property, that Ms. Bickford initiated the altercation between Ms. Bickford and him, that a weapon was involved, that the weapon was a knife, that Ms. Bickford brought the knife onto the Carrier's property and that he took the knife from Ms. Bickford. The Claimant also testified that he went to the Police after the altercation on the Carrier's property, but the Police report indicates that the Claimant had, in fact, gone to Ms. Bickford's residence and continued the argument.

No other persons were present during the incident. Neither Ms. Bickford, Truck Driver Monday nor any police officer appeared or testified at the Hearing.

The Organization submitted Ms. Bickford's subsequent written statement. In which she stated that she had been drinking, that she followed the Claimant to the Wagner Building, that she and the Claimant had an altercation, that the Claimant did not threaten her with the knife during the time it was in her possession and that the Claimant did not assault her physically at the Wagner Building.

Ms. Bickford's statement does not deny the Police Affidavit's specific statements that at some point, the Claimant possessed the knife on Carrier property, that the Claimant "poked" Ms. Bickford with the knife, that there was blood on Ms. Bickford's neck or that she told police that the cut was from the Claimant "poking" her with the knife.

The evidence adduced at the Hearing is that, on July 29, 2009, the Claimant was arrested by the City of Alliance Police Department. He was charged with Strangulation and with 2nd Degree Domestic Assault arising from the July 29, 2007 incident at BNSF's Wagner Building. Subsequent to the on-property Hearing and subsequent to the August 29, 2007 letter of dismissal, the Court dismissed the Strangulation charge after a preliminary hearing and reduced the Domestic Assault charge to one count of Disturbing the Peace, a Class 3 Misdemeanor, to which Claimant pled guilty and received a fine in the amount of \$150.00.

Following the August 7 Hearing, by way of a letter dated August 29, 2007, the Carrier notified the Claimant that he was dismissed for violation of Maintenance of Way Operating Rule 1.6 dated October 31, 2004 (Revised 07-14-05).

Rule 1.6, entitled “Conduct” states, in pertinent part:

“Employees must not be:

Careless of the safety of themselves or others
Negligent
Insubordinate
Dishonest
Immoral
Quarrelsome
Discourteous

Any act of hostility, misconduct, or willful disregard or negligence affecting the interests of the Company or its employees is sufficient cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.”

In addition, the BNSF Violence in the Workplace, Policy No. HR-90.4 states, in pertinent part:

“BNSF is committed to providing a safe, respectful workplace that is free from violence or threats of violence. For purpose of this policy, workplace violence is any violent or potentially violent behavior that arises from or occurs in the workplace that affects BNSF employees, contractors, customers, or the public.”

Rule 1.6 does not differentiate between Carrier employees and members of the public who may be victims of hostility or misconduct.

The Organization submitted a timely claim appealing the Claimant’s dismissal. The Board finds that the claim was timely filed and properly presented and handled by the Organization at all stages of appeal up to and including the Carrier’s highest designated officer.

In a November 27, 2008 letter addressed to BMW Local Chairman R. Miller, General Manager S. Sexnus stated that “By pleading guilty to a reduced

charge of disturbing the peace, which is a class III Misdemeanor, from the Strangulation assault charge, Mr. Casados has shown his behavior was the reason he was dismissed.”

The Carrier argues that after taking the knife from Ms. Bickford, the Claimant assumed the role of aggressor, that Ms. Bickford was then unarmed and that she posed no threat to the Claimant. For the reasons stated above, the Board excluded this post-hearing information in making its findings and in rendering its decision. The Carrier further argues that the Claimant’s assertion of self-defense was waived when on October 25, 2007 he entered a guilty plea in Court to the amended charge of Disturbing the Peace. For reasons stated below, the Board also excluded this information in making its findings and in rendering its decision.

The Organization argues that the Claimant was not on duty, that the Claimant was not the initial aggressor, that the individual who was allegedly poked with a knife was not an employee of the Carrier, and that the Claimant was forced to become involved in the altercation only in self-defense. Even if evidence introduced at the Hearing proved one or more of these situations to exist, none are stated in the Rules, Policies or Agreement as defenses to the Carrier’s right to discipline and to dismiss the Claimant.

The Organization argues that the Carrier failed to establish an adequate nexus between the Claimant’s employment and his subsequent guilty plea. It points out that, the plea agreement with the County Prosecutor, the guilty plea and the Box Butte County Court’s conviction on October 24, 2007 based on that plea all occurred after the conclusion of the August 7, 2007 on-property Hearing and occurred after the Carrier’s August 29, 2007 notice advising the Claimant of his dismissal. It points out that none of this Court related information was provided at the Hearing or could have been provided at that time because it had not yet occurred as of the date of the Hearing. None was part of the transcript. Thus, the Board excluded this information in making its findings and in rendering its decision.

The Organization argues that it was improper for the Carrier to proceed with the Hearing before the criminal charges filed against the Claimant by the County Prosecutor were resolved.

In the final analysis it was the burden of the Carrier to establish by substantial evidence considered in the record as a whole, that the Claimant was guilty of the charges against him and that the penalty of dismissal was not arbitrary or capricious. For the reasons which follow, the Board concludes that the Carrier met its burden in both respects.

The Board notes, in the first instance, that it may consider only evidence adduced at the Hearing. As a consequence, in arriving at its decision, the Board did not take into account the October 1, 2007 court order, the October 24, 2007 Amended Complaint, the Claimant's October 25, 2007 guilty plea, his October 25, 2007 conviction for Disturbing the Peace, the newspaper article regarding post-Court activity or other evidence that was not introduced at the Hearing on August 7, 2007.

Based on review of the Submissions of the Parties and the Hearing transcript, the Board is persuaded that on July 29, 2007, the Claimant fought with Ms. Bickford and "poked" her with a knife while on Carrier property and that Ms. Bickford was observed by Alliance Police Officer Bremer with a cut and blood on her neck. This establishes misconduct by the Claimant at the workplace, within the meaning of Maintenance of Way Operating Rule 1.6.

The Board also finds that the Claimant's conduct constituted workplace violence as that term is defined in BNSF Violence in the Workplace, Policy No. HR-90.4. The policy states, in part, that ". . . workplace violence is any violent or potentially violent behavior that arises from or occurs in the workplace that affects BNSF employees, contractors, customers, or the public." The evidence clearly reveals that the incident occurred at the workplace, that the exchange between the Claimant and Ms. Bickford was violent, that the cut on Ms. Bickford's neck was the result of violent behavior and that Ms. Bickford was a member of the public. That is sufficient to establish the Claimant's violation of the Policy.

The Board finds that while on the Carrier's property, the Claimant committed hostile acts, engaged in misconduct, was careless of the safety of another person and was quarrelsome. As a consequence, the Board finds that the Claimant also violated Maintenance of Way Operating Rule 1.6, which states, in part, that "Employees must not be . . . careless of the safety of themselves or others [or] . . .

quarrelsome . . .” and that the Carrier was entitled to discipline Claimant as a result of this conduct.

Maintenance of Way Operating Rule 1.6 further states, in part, that “Any act of hostility, misconduct . . . affecting the interests of the Company or its employees is sufficient cause for dismissal.” The Board finds further that the Claimant while on the Carrier’s property, violated the Rule and Policy that affected the interests of the Carrier in maintaining a safe and orderly environment on its property. The Board notes that Rule 1.6 does not speak to whether the employee must be off duty or on duty at the time of the alleged violation in order to trigger operation of the Rule, but the latter’s interest in a safe and orderly workplace is not dependent on whether an employee subject to the Rule is on duty or subject to duty.

The Board further notes that Rule 1.6 does not provide an exception for self-defense, nor does it speak to the issue of who was the initial aggressor. The Board assumes, for purposes of analysis, that there is an implied exception for self-defense, but it was the Claimant’s burden to establish that he was not the aggressor, acted in self-defense, used the minimum force necessary to defend himself and retreated as and when he could. The evidence, as described above, fails to establish any of those elements and establishes the Claimant’s active participation in the struggle - which continued, in fact, off property when the Claimant pursued Ms. Bickford. Even if the Board were to take into account this additional off-property conduct, it would not reduce the consequences or authority of the Carrier to discipline the Claimant for his on-property conduct.

The fact that the Claimant was at the workplace and that the altercation took place on the Carrier’s property provided the necessary nexus between the Claimant’s behavior and the Carrier’s interests. That nexus not erased by the fact that the Claimant was off duty and the other participant to the altercation was not an employee of the Carrier. The Carrier is entitled to prohibit violence and other misconduct on its property even though the Claimant was off duty and the altercation’s other participant was not an employee.

As previously indicated, Rule 1.6 states in part that “Any act of hostility, misconduct, or willful disregard or negligence affecting the interests of the Company or its employees is sufficient cause for dismissal. . . .” The Board finds

that the Claimant's action exposed the Carrier (as well as the Claimant, its employee) to potential litigation and to possible financial risk. This action adversely affected the interests of the Carrier and was sufficient cause for dismissal.

The Board finds that the Carrier met its burden of providing substantial evidence to establish that the Claimant violated both Maintenance of Way Operating Rule 1.6 as well as BNSF Violence in the Workplace, Policy No. HR-90.4. The Board also finds that the Carrier met its burden of providing substantial evidence to support its dismissal of the Claimant as an appropriate penalty.

Based on the evidence provided by the Parties at the Hearing, the Board finds that the Carrier's discipline is neither arbitrary, capricious, improper, unwarranted, based on unproven charges nor in violation of the Agreement.

The Carrier proved by substantial evidence that the Claimant violated Carrier Rule 1.6. and Policy HR 90.4 by engaging in a physical altercation on Carrier property. The penalty of dismissal is appropriate. Accordingly, the claim is denied.

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 November 2009.