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**Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40237
Docket No. MS-40173
09-3-NRAB-00003-070428
(07-3-428)**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Kendrick D. Hogg
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“This is to serve notice, as required by the rules of the National Railroad Adjustment Board, of my intention to file an ex parte submission on July 20, 2007 covering an unadjusted dispute between myself, Kendrick Donnell Hogg and the Union Pacific Railroad involving the question to receive my position as a Machine Operator for Gang #7831 along with back pay for loss of wages and financial hardship, as well as benefits that are provided with the position and company.”

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.

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Parties to said dispute were given due notice of hearing thereon.

By notice dated April 7, 2006, the Claimant was directed to attend a formal Investigation to determine the facts and the Claimant's responsibility, if any, in connection with the allegation that he had failed to follow instructions from a Foreman and had made threatening comments to his Supervisor. The Investigation was conducted, as scheduled, on April 18, 2006. By letter dated May 3, 2006, the Claimant was notified that as a result of the Investigation, he had been found guilty as charged, and that he was being dismissed from the Carrier's service. The Organization thereafter filed a claim on behalf of the Claimant, challenging the Carrier's decision to discharge him. The Carrier denied the claim. The Claimant filed an ex parte Submission in connection with this claim.

The Carrier initially contends that the Claimant was afforded all elements of Agreement due process set forth in the parties' Agreement, and the formal Investigation was free of reversible error. The Carrier asserts that no procedural defect occurred during the on-property handling of this matter. It argues that the Organization representative at the Hearing admitted that he was accepting responsibility for representing the Claimant, and the Organization and the Claimant received notice of the Investigation with sufficient time to prepare. Moreover, the Organization and the Claimant were able to question all witnesses at the Hearing. The Carrier submits that because none of the General Chairman's procedural objections are supported by the Agreement, these objections must be dismissed, as have such objections over the course of the history of industrial relations.

The Carrier contends that the record contains substantial evidence warranting the issuance of the discipline at issue. It emphasizes that because it met its burden of proof, the instant claim should be denied. The Carrier points out that once the arbitral panel has substantiated the presence of substantial evidence presented at the Hearing, the panel lacks authority to overturn the level of discipline assessed, even though it may seem harsh, unless it can be sufficiently demonstrated to be arbitrary, capricious, or an abuse of Carrier discretion.

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The Carrier insists that the discipline in this matter clearly is acceptable, and it cannot be deemed harsh or arbitrary. The discipline issued was commensurate with the serious nature of the Claimant's violation. It points out that the Claimant was found guilty of insubordination, threatening his Foreman, and leaving the property without authority, all of which are serious offenses. It asserts that because the Claimant has only 20 months of service with the Carrier, his dismissal is anything but arbitrary, capricious, or excessive.

The Carrier argues that the discipline in this matter was assessed in compliance with its UPGRADE Policy, which already has been determined to be reasonable. The Carrier contends that because the discipline was issued in accordance with this Policy, it is evident that the Carrier's actions in this case were justifiable and that there is no cause to disturb the discipline.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Claimant initially contends that he did not make any threats to his Foreman, nor did he physically abuse, assault, or put anyone from his gang in danger. The Claimant asserts that he was singled out to be made an example of because he was the youngest and only African-American member of Gang No. 7831. The Claimant argues that the Foreman called him names and used a tone of voice that made the Claimant feel degraded and unappreciated, which caused the Claimant to have a negative reaction to the Foreman's orders.

The Claimant maintains that he did follow the Foreman's orders by putting away equipment as he was told and by leaving the premises as he was told. The Claimant insists that he did not touch, harm, or threaten his Foreman in any manner. The Claimant emphasizes that this was strictly a verbal altercation, during which he asked the Foreman to "come to the street so that we could settle this man to man," in an effort to show that they could discuss and settle their disagreement without an audience. The Claimant submits that he felt disrespected, and that this situation was not handled fairly.

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The Claimant goes on to assert that on the following day, he was asked to leave the premises. The Claimant contends that he was not able to give his side of the story or file a report about what had happened the day before. The Claimant points out that his Foreman was able to state his side of the story and file a report, and the Foreman was not dismissed from work or told to leave the premises.

The Claimant argues that justice was not served in this case. The Claimant points out that during the first stage of the Hearing process, he was told that he would be charged with a Level 3 offense and would be able to return to work on an 18-month probation, but this was false. Moreover, the Organization was informed that all the members of Gang No. 7831 were afraid of him.

The Claimant emphasizes that this matter has caused financial and mental hardship on him and his family. The Claimant ultimately contends that the instant claim should be sustained in its entirety.

The Board reviewed the record and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of making threats to his Foreman in violation of a variety of Carrier Rules. The record reveals that the Claimant got into a verbal dispute with his Foreman and suggested that the two “take it across the street” and “settle it man-to-man.” The Board finds that those statements are clearly a threat and are strictly prohibited by the Carrier’s Rules against violence in the workplace.

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier’s imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The record reveals that the Claimant has only been employed by the Carrier for approximately 18 months. Given that very short seniority and the seriousness of his wrongdoing in this case, the Board cannot find that the action taken by the

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Carrier was unreasonable, arbitrary, or capricious. Therefore, the claim must be 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 21st day of December 2009.