

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41488
Docket No. MW-41454
12-3-NRAB-00003-110010**

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal 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 [Level S thirty (30) day record suspension and a three (3) years probation] imposed upon Mr. D. Cox by letter dated December 2, 2009 for alleged violation of MOWOR 1.6 Conduct for alleged inappropriate conduct toward Signal Supervisor J. Moore when questioned about alleged failure to be alert and attentive while assigned to Surfacing Gang TSCX0764 gang and performing services that allegedly caused damage to a shunt box at/or near Mile Post 91, Main Track 3, on the Orin Subdivision, on October 22, 2009, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-7/10-10-0093 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Cox shall now receive the remedy prescribed by the parties in Rule 40(G).”**

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.

This dispute arose from substantial damage to a switch machine on the Orin Subdivision, Main Track 3. A three-man surfacing gang was scheduled to work in this area at the time the damage occurred. It consisted of Tamper Operator D. Cox, Foreman P. Bohnenkamp, and a Ballast Regulator Operator who did not report for work that day and was not replaced.

A preliminary Investigation was made by Signal Supervisor J. Moore. He had been told by some unnamed person that the damage was caused by the tamping machine. He personally examined the damage and then spoke to Cox, the Tamper Operator in the above gang. It was that conversation, which lasted no more than ten to 15 minutes that prompted the discipline of Cox by the Carrier. The accounts of what was said are much alike, but their versions of one another's tone and attitude are much different. The following description is taken largely from the transcript of the formal Investigation which occurred on November 6, 2009, roughly three weeks after their conversation.

According to Moore, he asked someone to identify Cox and approached him. Cox was still on his tamping machine. Moore did not identify himself when he began talking. His first words were, "I need to speak to you." Cox replied "I'm not coming out of the machine unless you got a cheeseburger." Moore viewed these words as "extreme sarcasm." He told Cox, "I need you to come walk with me . . . [to] this [switch] machine" Cox came down from the tamper and the two of them walked to the damaged switch. Moore asserts that any comment he made about the damaged switch prompted a response from Cox that "I haven't done anything wrong" or words to that effect. When they arrived at the damaged switch, Moore pointed to it and stated it had been struck by a tamping machine. He told Cox that his purpose was to "learn something" so that no further equipment would be torn up. As they spoke, Cox suggested ways to avoid such an accident (e.g., "take [switch] rods out" of the area in

which the tamping is being performed). Moore responded “I’m not hearing from you what I want to hear, what I want to hear is that you’re going to do the right thing. . . .” And Cox responded, “[But] I did the right thing” Moore’s reply was a flat “No,” and he told Cox there were options available in this type of situation, such as Cox talking to the “ground man” in the gang “if you’re not sure where you’re at [while tamping].”

Moore insists that throughout this conversation Cox was “quarrelsome,” saying time and again, “I didn’t do anything wrong.” Moore obviously believed from the outset that Cox was the person responsible for the damage to the switch machine.

According to Cox, it was Moore who spoke in an “angry” and “argumentative manner.” He asserts that Moore had pre-judged him, ignored his attempts to explain away the switch machine damage, and sought an admission of guilt from him. He contends that Moore began the conversation with a “demand” for \$23,000 without explaining, until later, that this money was for the property damage Cox had allegedly caused. He insisted that he was unaware of how the switch was damaged, but that he was not responsible.

The Carrier believed Cox had violated Operating Rule 1.6, which cautions employees that they “must not” behave in a “quarrelsome” or “discourteous” manner in their dealings with supervision, and that a failure to honor this obligation will likely result in discipline. A formal Investigation was held on November 6, and the Carrier ruled on December 2, 2009, that Cox was guilty of violating Operating Rule 1.06. It assessed a Level S, 30-day record suspension coupled with a three-year probation period.

The Organization protested the discipline on the grounds that the Carrier’s burden of proof had not been met and that the Carrier failed to provide Cox a fair and impartial hearing.

This case has a narrow focus, namely, the relatively brief conversation that took place between Signal Supervisor Moore and Tamper Operator Cox after Moore had been informed about the switch machine damage, but before any disciplinary action was taken against Cox. The issue here is whether Cox’s conduct, given the surrounding circumstances, could reasonably be viewed as “quarrelsome” and “discourteous.”

The Board recognizes that Moore may have had good reason to suspect Cox was responsible for significant damage to the switch machine. We recognize too that this belief could understandably have influenced what Moore had to say and how he said it. A careful reading of Moore's testimony in the Investigation transcript shows that he was firmly convinced of Cox's guilt and that he had sought to persuade Cox to admit the damage was his responsibility. However, Cox seemed to have been equally certain that he had done nothing wrong and expressed that view forcefully. It was apparent that neither man was willing to step away from his strongly held opinion. Indeed, Moore time and again urged Cox "to confess" although not in those words. At one point, Moore even suggested that a confession would in all likelihood serve to avoid the need for discipline. And, as they spoke, it became apparent that each grew impatient with the other. Anger may have surfaced at some point. But any such anger seems to have been the result of the other persons' certitude. It is understandable that each might regard the other's behavior as "quarrelsome." Neither of them, however, was "discourteous." More important, it seems evident that neither man was "quarrelsome" in the sense that the authors of Operating Rule 1.6 could reasonably have intended. The two men disagreed strongly. The charges against Cox are not borne out by substantial evidence. Or to put the matter differently, the Carrier has not satisfied its relevant burden of proof. Accordingly, the claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of December 2012.