

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 14046
Docket No. 13933
12-2-NRAB-00002-120001**

The Second Division consisted of the regular members and in addition Referee Lynette A. Ross when award was rendered.

PARTIES TO DISPUTE: (
(International Brotherhood of Electrical Workers
(BNSF Railway Company

STATEMENT OF CLAIM:

- “1. That in violation of the governing Agreement, Rule 40 in particular, the BNSF Railway Company arbitrarily and unjustly dismissed Electrician Larry Scheibe as a result of an investigation held on July 26, 2010.**
- 2. That accordingly, and as a result of that arbitrary, unjust and excessive discipline assessed Electrician Larry Scheibe, the Carrier be ordered to return Electrician Scheibe to service immediately and further to make Electrician Scheibe whole for all lost wages, rights benefits and privileges which have been adversely affected as a result of the dismissal from service.**
- 3. That accordingly, all record of this matter be removed from Electrician Larry Scheibe's personal file.”**

FINDINGS:

The Second 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 established service with the Carrier on June 28, 2004. By letter dated July 16, the Carrier directed him to report for an Investigation on July 28, 2010:

“ . . . to ascertain the facts and determine your responsibility, if any, involving your alleged altercation with Electrician William Orton at or about 3:30 PM on July 16, 2010, in the Topeka Shop Building #12 Lunchroom, in possible violation of the following Mechanical Safety Rules and Policies:

S-28.7 Altercations.

Employees must not enter into altercations with each other, play practical jokes, or wrestle while on duty or railroad property.

S-28.6 Conduct: Specifically 6. Quarrelsome

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

By mutual agreement of the parties, the Investigation was conducted on July 26, 2010. By letter dated August 10, 2010, the Carrier notified the Claimant that as a result of the testimony and evidence brought forth during the Investigation he was dismissed for having violated the above-quoted BNSF Mechanical Safety Rules and Procedures (MSRP).

The Organization promptly appealed the Carrier's disciplinary action and the parties ultimately conducted an on-property conference regarding the matter. Unable to reach a mutual resolution of the dispute, this claim is now properly before the Board for final and binding adjudication.

The Board carefully reviewed the Investigation transcript and all documents submitted by the parties during their on-property handling. Initially, the Board notes that the claim is procedurally sound in all respects. Therefore, there is no procedural bar to the Board's adjudication of the claim on its merits.

The Claimant and Electrician W. P. Orton were assigned as second shift Electricians at the Carrier's Topeka, Kansas, facility. On July 16, 2010, at approximately 3:30 P.M., the Claimant, Orton, and other second shift employees were in the lunch room, preparing for work. Their preparations included performing stretching exercises before commencing work. As Orton began his stretching, the Claimant brushed up against him, apparently, without apologizing or excusing himself. The Claimant and Orton then traded verbal barbs before the altercation turned physical.

At the Investigation, Electrician L. V. Friesen, an unbiased witness, provided detailed testimony based on his observation of the altercation from his vantage point in the lunch room. According to Friesen, as Electrician Orton prepared to stand up to stretch, the Claimant brushed against him. The Claimant returned to his seat, and Friesen overheard Orton say "excuse me" twice, directing the comments toward the Claimant. Friesen testified that the Claimant responded by twice telling Orton he was "in no f***ing mood." Friesen testified that he then witnessed both employees in a "toe-to-toe" or "chest-to-chest" posture. Friesen testified that he saw the Claimant shove Orton in the chest, causing him to stagger backwards six to eight feet before landing on his backside.

The Claimant does not deny the act of shoving Electrician Orton to the floor. In this regard, the Claimant testified:

"Okay. Like a lot of what transpired is the same as Will [Orton] said. I was, we had gotten up to do our stretches, I walked to the candy machine, got a candy bar, was coming back, and Will had moved and we brushed and he said, excuse you, and I said, no, excuse you, and he said I don't think so, so I turned around and walked back towards him. Got face to face with him, he puffed up his chest and bumped into me

and I pushed him and said, I'm pretty sure I said don't f*** with me at that time right before I pushed him."

The Organization asserts that the Carrier failed to prove the Claimant guilty of misconduct warranting his dismissal. According to the Organization, as the above testimony shows, the Claimant freely admitted to his part in the altercation with Electrician Orton, and did not seek to conceal any facts. The Organization strongly argues that the Carrier's dismissal action was arbitrary, unwarranted and excessive when compared to the 30-day actual suspension assessed Orton.

In response, the Carrier asserts that the Claimant's admission of guilt eliminates the need for further proof. Notwithstanding, the testimony of Electrician Friesen and other witnesses, as well, constitutes the necessary evidence in proof of the Claimant's violation of MSRP Rule S-28.6- Conduct, and MSRP Rule S-28.7- Altercations. The Carrier avers that the discipline was justified in light of the incontrovertible evidence showing that the Claimant took a verbal altercation with a co-worker to the next level by shoving the co-worker to the floor. The Carrier argues that the Claimant's act of physical violence was not carried out in self-defense. Rather, it was a dismissible offense under both MSRP Rule S-28.6 and the Policy for Employee Performance Accountability (PEPA).

The Board finds that the Carrier's determination as to the Claimant's guilt of the charge and violation of the cited MSRP Rules are supported by substantial evidence. The record supports the Carrier's finding that the Claimant pushed Electrician Orton to the floor in an act of unnecessary violence. Although the Claimant testified that Orton had bumped into him, such testimony was not corroborated by the testimony of the other witnesses. The record indicates that when the situation devolved to the point where the Claimant and Orton were facing each other in a threatening toe-to-toe stance, the Claimant's alternative to shoving Orton would have been to simply end the confrontation by walking away.

As regards the level of discipline assessed, the Board finds that contrary to the Organization's position, the Claimant and Electrician Orton were unequally culpable for the lunch room disturbance that had been witnessed by several employees, including those who ultimately separated the combatants. Their accounts indicate that the Claimant stepped up the level of aggression by

perpetrating an act of physical violence against Orton. Hence, the instant case is distinguishable from the arbitral precedent cited by the Organization. As opposed to cases in which employees were found to have shouldered equal blame for the Rules they had violated, here, after allowing himself to be drawn into a confrontation, the Claimant intensified the conflict by his display of verbal abuse and physical violence toward his co-worker.

In conclusion, the Board finds no evidence that the Carrier improperly administered disparate discipline in this particular case. We find that the Carrier's action to dismiss the Claimant, while imposing lesser discipline upon Electrician Orton, was justifiable under the circumstances. Neither the Claimant's service record, nor any other considerations, serves to mitigate his misconduct. The Claimant's violation of Rule S-28.6 and Rule S-28.7 subjected him to dismissal. The Board finds no reason to disturb the Carrier's disciplinary assessment.

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 Second Division

Dated at Chicago, Illinois, this 22nd day of October 2012.