

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31789
Docket No. MW-32630
96-3-95-3-557**

The Third Division consisted of the regular members and in addition Referee Charles J. Chamberlain when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Burlington Northern Railroad Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of machine operator J. N. Williams for alleged violation of Burlington Northern Railroad Safety Rules and General Rules 563, 564 and 576 was arbitrary, capricious on the basis of unproven charges and in violation of agreement (System File C-95-D070-1/MWA 95-01-18AA).**
- (2) As a consequence of the above-stated violation, Claimant J. N. Williams shall be 'returned to service with all back pay and benefits and the incident removed from his record.'"**

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 entered the Carrier's service on August 18, 1989, as a Laborer and was later promoted and established seniority as a Grinder Operator, Machine Operator, Bus Driver, Sectionman, Head Welder, Section Foreman, B & B Skilled Laborer and Welder.

On August 25, 1994, the Claimant was employed as a Machine Operator assigned to Tie Gang TP01 under the supervision of Roadmaster D. L. Sedlacek.

The incident in this case involved the Claimant throwing rocks at bottles that he had set up on the track ties and a verbal confrontation that took place between the Claimant and Assistant Foreman G. T. Heim when instructed to quit throwing rocks at bottles.

A thorough review of the record reveals that there is no dispute as to the factual situation on the day of the incident. The witnesses to the incident whose statements were part of the record and the statements of the Claimant and Assistant Foreman Heim clearly support this conclusion.

The issue advanced by the Organization that the Claimant was not afforded a fair and impartial Investigation cannot be supported by the record. The Carrier conducted an Investigation on September 6, 1994.

The transcript reveals no defective procedures which support the Organization's contention in this regard.

The record clearly shows that the action of the Claimant on the day of the incident in throwing rocks at bottles was inappropriate and the ensuing verbal conversation which took place between the Claimant and Assistant Foreman Heim did not lend itself to a reasonable resolution of the problem at that time. To the contrary, it is clearly a case of a minor infraction of rules escalating into a major dispute because of verbal profanity used unnecessarily by both the Claimant and the Assistant Foreman.

Based on the foregoing, it is clear that the issue to be decided by the Board is whether the discipline of dismissal is excessive in this case.

We find that reinstating the Claimant to service with seniority and all other rights unimpaired, but without pay for time lost is in order.

This Award shall notice to the Claimant that his conduct on the day of the incident was not appropriate and remind him and all other employees that any practices engaged in on railroad property not related to their work assignment, including throwing rocks as a pastime, will not be tolerated.

Additionally, it serves notice that this Board does not condone the use of profane language, uncivil conduct or insubordination by any employee or supervisory personnel.

We find that the discipline was excessive.

AWARD

Claim sustained in accordance with the Findings.

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 26th day of December 1996.