

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33219
Docket No. MW-33878
99-3-97-3-388

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The forty-five (45) day suspension and entry of censure assessed Track Inspector R. D. Burkitt for his alleged quarrelsome and discourteous actions towards Mr. D. C. Gonzales on February 17 and 21, 1996 was without just and sufficient cause and based on unproven charges (System File C-96-S090-16/MWA960703AA BNR).
- (2) Track Inspector R. D. Burkitt shall now have his record cleared of the incident and he shall be compensated for all wage loss suffered.”

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.

After reporting to Claimant's Supervisors that Claimant had called him a "retard" and a "son-of-a-bitch," employee D. C. Gonzalez was again allegedly subjected to verbal abuse on February 17 and 21, 1996, when Claimant repeatedly referred to him as a "snitch." Following Investigation and Hearing, Claimant was removed from service for 45 days for violation of General Rule 1.6. That disciplinary action was suspended on condition that Claimant enroll in Carrier's employee assistance program to address issues of anger control in the workplace, with the further understanding that whether or not the suspension was served, "it will remain part of your personal record." Claimant accepted that offer and lost no time as a result of these incidents.

Rule 1.6 CONDUCT reads as follows:

"Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome
- or
7. Discourteous"

The Organization asserts a number of procedural objections to Carrier's on-property handling of this discipline, including violation of Rule 40 by not issuing its letter of discipline within 30 days of the Investigation. On the merits, it contends that Carrier has failed in its burden of proving the misconduct charged since the witness whose testimony it relied upon was not credible. The Carrier maintains that the record clearly supports its action; that the discipline imposed was proportionate to the offense, as affirmed by numerous Awards of this Division; and that, in accepting its offer to

withhold imposition of the suspension with the understanding that the record of discipline would be permanent, Claimant is now attempting to breach the clear terms of his understanding with the Carrier.

A careful review of the Organization's procedural arguments suggests that all are without merit. In particular, the Board finds that Hearing in this matter was held on March 5, 1996 and a decision rendered on April 3, 1996 in compliance with Rule 40.

That credibility determinations are the province of the Carrier in these proceedings is a proposition too well established to need annotation here. Accordingly, the Organization's challenge to Gonzalez's credibility is beyond the Board's jurisdiction to address. On the merits, the Board concludes that the charges of violating Rule 1.6 were amply supported by record evidence; that the 45 day suspension assessed - but never served - was neither arbitrary nor capricious; and that it would be inappropriate for the Board to now serve as a kind of cat's paw to relieve the Claimant of the consequences of the bargain he struck with Carrier in agreeing to live with this mark of discipline in order to avoid significant loss of pay. For the reasons stated above, 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 April 1999.