

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35023
Docket No. MW-35437
00-3-99-3-307**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(CSX Transportation, Inc. (former Baltimore and Ohio
(Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The thirty (30) day suspension assessed Foreman D. Deville for his alleged uncivil language and behavior on Saturday, April 18, 1998 was without just and sufficient cause, in violation of the Agreement and based on an unproven charge [System File B-D-3216/12(98-1113) BOR].**
- (2) As a consequence of the violation referred to in Part (1) above, Foreman D. Deville shall now be compensated for all wage loss suffered, credited with all benefits lost and his record shall be cleared of the incident.”**

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 centers on the Carrier's determination to assess the Claimant a 30 day actual suspension in connection with uncivil language and behavior toward D. Ostercamp, an outside contractor's employee, on the morning of Saturday, April 18, 1998.

On that date, the Claimant was assigned to pilot Ostercamp's vehicle as he sprayed weeds in the Carrier's yard at Philadelphia, Pennsylvania. During the course of that work, the Claimant and Ostercamp engaged in a heated exchange of words which resulted in Ostercamp leaving the Carrier's property. The Claimant reported the incident to his supervisor and submitted a written statement.

The Carrier maintains that there was sufficient evidence and testimony presented at the Hearing to find that the Claimant was guilty of the charges and that the assessment of a 30 day suspension was fully justified. The Carrier argues that the Claimant was afforded a fair and impartial Investigation, and therefore no basis exists to overturn the determination of discipline.

The Organization contends that the Claimant's suspension was not based on substantial evidence. It argues that the discipline was supported by nothing more than an uncorroborated statement by Ostercamp. The hearsay nature of the evidence relied upon by the Carrier compels the conclusion that the Carrier has not met its burden of proof. In addition, the Organization asserts that the level of discipline was excessive and unwarranted. The Claimant was verbally assaulted and threatened by Ostercamp, yet the Carrier imposed discipline as if the Claimant were the provocateur. Finally, the Organization submits that the Claimant was not afforded due process because he did not receive notice of the Investigation and lacked precise information as to the charges.

The Board reviewed the evidence and testimony in this case, and finds as a preliminary matter that there is no basis to vitiate the discipline on Agreement due process grounds. The Carrier sent the charge letter to the Claimant and the Organization on May 6, 1998. Based on our review, we find the charges contained therein sufficiently precise so as to enable the Organization to fully prepare its defense. Moreover, the record shows that the charge letter was sent certified mail to the Claimant's last known address with the Carrier in accordance with the Agreement.

Although the Claimant testified that he had not been home to receive the mail until May 11, and thus had no knowledge that the Hearing was scheduled until he was notified by the Organization representative on the date of the Hearing, we cannot say that such circumstances amount to procedural error. If that were the case, an employee could avoid a Hearing simply by avoiding a check of the mail. In addition, the record demonstrates that the Claimant was not prejudiced thereby. The Claimant had full opportunity to participate in the preparation of his defense and he was represented by the Organization representative at the Hearing. All aspects of the case therefore appear to be within the manner prescribed in Rule 48 of the Agreement.

As to the merits, we are convinced that the Carrier could reasonably conclude that the Claimant was guilty of engaging in an altercation with Ostercamp as charged. The Organization is correct that Ostercamp's written statement does not carry with it the same probative weight as if he had appeared at the Hearing to testify and be subject to cross-examination. However, the Claimant's own written statement and his testimony make it clear that although Ostercamp initiated the encounter and engaged in highly insulting racial insults, the Claimant accelerated the incident by rising to the bait and losing his temper. The Claimant acknowledged in his written statement that he made the following incendiary remarks:

"At this point I was becoming frustrated with his behavior and asked him who the hell did he think he was, a VIP . . .

I yelled at him to bring his ass on, we had a train crew waiting on us . . .

At this point I told him to shut up and let's do what we were being paid to do . . .

I will kick your ass from one end of Philadelphia to the other . . .

I said to him, f... with me and you won't leave Philadelphia . . .

Get the f... off the property while you can."

As these remarks demonstrate, the Claimant was not an innocent bystander, nor was he using shop talk in his response to Ostercamp. The Claimant admittedly engaged in profanity, threats and inappropriate language, all of which are contrary

to commonly accepted standards of reasonable conduct while on the job. Thus, by the Claimant's own admission there is substantial evidence to support a finding of guilt.

In determining the degree of disciplinary penalty to be applied, the Carrier's action will not be set aside by the Board unless we find it to have been unreasonable, arbitrary or capricious. In our judgment, there has been no such showing on this record. 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 25th day of October, 2000.