

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35766
Docket No. MW-35541
01-3-99-3-452**

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service and subsequent dismissal) imposed upon Mr. M. L. Aaron was arbitrary, capricious and in violation of the Agreement (System File C-98-D070-8/MWA 98-08-13AA BNR).**
- (2) The claim as presented by Vice General Chairman G. A. Holder to Superintendent T. Sarrett on April 9, 1998 shall be allowed as presented because said claim was not disallowed in accordance with Rule 42.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant M. L. Aaron shall be ‘ . . . reinstated with all back pay and benefits unimpaired and his record be cleared of this 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.

On February 26, 1998, the Claimant was assigned to a tie replacement gang. According to the Carrier, the Claimant was instructed to shovel ballast off newly installed ties and tie plates, and then place the tie plates in the proper place on the end of ties for the plater to put them into place. The Carrier says the Claimant shoveled the ballast, but refused to place the tie plates. In his refusal, the Carrier asserts the Claimant said, "F*** that, I ain't going to," and "F*** that, I would just as soon whip your ass." Before the end of the Claimant's shift, he was given a Notice to attend a formal Investigation and was removed from service pending the outcome of the Investigation. The Claimant was charged with his failure to comply with instructions, insubordination, vulgar language and the threat of physical violence. Following the Investigation, the Claimant was dismissed from service.

The Organization argues the claim must be sustained due to the Carrier's failure to deny it within the applicable time limit upon the initial filing. The record shows that the initial appeal of the discipline was by letter dated April 9, 1998. This claim was sent by certified mail, and received by the Carrier on April 20, 1998. On June 23, 1998, the Organization phoned the Carrier to advise that no response had been received. The Carrier issued a letter on June 24, 1998, stating that the claim had been denied by letter dated April 28, 1998. A copy of that denial letter was attached.

The Organization denies receiving the April 28, 1998, letter. It further asserts the Carrier is required to respond by certified mail whenever the claim is filed by certified mail. We find no such requirement in the Agreement, nor in the Awards cited by the Organization. Obviously, a certified mail receipt would have been conclusive evidence that the denial was mailed on the date asserted by the Carrier. In this case, however, the Carrier has provided a signed statement from the clerk who typed and mailed the letter, attesting to the fact that it was mailed on April 28, 1998. The Board finds there is sufficient evidence in the record to conclude the Carrier issued a timely denial of the claim.

With regard to the merits, the Board finds that there is substantial evidence to support the Carrier's conclusion that the Claimant's conduct was insubordinate. We

find the language used by the Claimant, while inappropriate in most settings, was shop talk and did not rise to the level of a physical threat. Under the circumstances, the Board finds that permanent dismissal was excessive and will direct the Carrier to reinstate the Claimant to service with full seniority rights, but without compensation for time lost. The Claimant is to understand that he must fully comply with the Carrier's Rules, as well as with instructions from his Supervisors and Foremen. Any future occurrence of this nature may be grounds for permanent dismissal.

In reaching this conclusion, the Board has considered the other procedural objections raised by the Organization and found them to be without merit.

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 24th day of October, 2001.