

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36110
Docket No. MW-36210
02-3-00-3-403

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(I & M Rail Link, LLC

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [sixty (60) working days suspension] imposed upon Mr. L. Jones on March 16, 2000 for an alleged violation of I&M Rail Link General Code of Operating Rule 1.6, items 6 and 7, and CP Safety Handbook Rule O, items 6 and 7, on October 29, 1999 was arbitrary, capricious, excessive, on the basis of unproven charges and in violation of the Agreement (System File D1-100-99-512-041).**
- (2) As a consequence of the violation referred to in Part (1) above, the aforesaid discipline shall be set aside and removed from Claimant L. Jones' record and he shall now be compensated for all lost wages, including but not limited to straight time, overtime, paid and non-paid allowances and safety incentives, flex time, health and welfare benefits, and any and all other benefits lost as a result of said discipline."**

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 October 29, 1999, the Carrier's new Chief Engineer, Scott Woodward, was in Mason City, Iowa, to discuss an offensive cartoon that had been circulating around the railroad. The cartoon was observed on a bulletin board administered by the Claimant, Welder Foreman Lee Jones. The Claimant denied being the author of the cartoon. Nevertheless, he agreed to remove it from his bulletin board.

At the end of the conversation about the offensive cartoon, Chief Engineer Woodward asked the Claimant if there was anything else he wished to discuss. It should be noted that Woodward had been an employee of the Carrier for only ten days on October 29, 1999. The Claimant told Chief Engineer Woodward that he wanted to discuss "the bulls*** safety rhetoric being tossed around on this property." The Claimant took exception to the stress being placed on Dispatchers by the Carrier.

The Claimant became emotional and vociferous during his colloquy with Chief Engineer Woodward. He accused the Carrier of being responsible for the recent fatalities of four individuals at Clinton, Iowa, by pushing employees to work harder. The Claimant pointed his finger at Woodward. When Woodward responded that safety was a prime concern of management the Claimant said, "That's a bunch of f***ing bulls***." He told Woodward "he was full of sh***" and "you're so full of sh** it is coming out your eyes." After this invective, the Claimant left the section Foreman's office where the meeting was held.

On November 3, 1999, General Roadmaster Dean Holloway notified the Claimant to appear at a fact-finding to determine the facts surrounding his alleged quarrelsome and discourteous demeanor with his supervisors on October 29, 1999. The fact-finding was held on January 20, 2000. The Conducting Officer was General Roadmaster Holloway.

At the January 20, 2000 fact-finding, the Claimant acknowledged that he became emotional during his meeting with Chief Engineer Woodward and Roadmaster Harvey Reiss on October 29, 1999. He admitted telling Woodward "he did not have to take his crap or sh**. The Claimant recognized that some of the things he said to Chief Engineer

Woodward were not very nice and it was not very smart of him to criticize his boss's boss. He recognized that he was out of control at the meeting and used profanity. He agreed that it was inappropriate to talk to his supervisor in the manner that he addressed Woodward on October 29, 1999.

Under Article 26, the Discipline Rule on this property, "The employee and the Union representative shall be informed of discipline assessed, if any, within thirty (30) days of the fact-finding session." On February 4, 2000, it was mutually agreed to extend this 30-day time limit to March 20, 2000 due to technical problems in recording the January 20 fact-finding session. Evidently, the final nine minutes of the session were not recorded.

After reviewing the incomplete transcript of the January 20, 2000 fact-finding, the Organization and the Claimant concluded that substantial testimony was missing. The Organization argues that this deprived the Claimant of his Agreement due process rights. The Carrier agreed to reconvene the fact-finding on March 6, 2000 to correct this omission. The Organization and the Claimant chose not to attend the March 6, 2000 reconvened fact-finding session.

On March 16, 2000, General Roadmaster Holloway advised the Claimant that he was being assessed a 60-working day suspension for his conduct on October 29, 1999. The Organization made a timely appeal of the Claimant's suspension to the Board.

It is the Organization's contention that the Claimant was denied a fair and impartial fact-finding because the same Carrier officer authored the fact-finding notice; served as the Conducting Officer at the fact-finding session; and issued the Claimant his discipline.

A recent Award of the Board in a dispute between these same parties addressed the question of multiple roles served by the same Carrier officer in a disciplinary proceeding. This is oftentimes unavoidable on small properties such as the I&M Rail Link. In Third Division Award 35506, the Board ruled that:

"At the outset, the Organization asserts that certain procedural errors were serious enough to require modification of the discipline. The issue of multiple roles by one officer in discipline proceedings in this industry has been the subject of many Awards. While these Awards caution the

Carrier against this practice because of the obvious due process risks involved, the better reasoned majority of these Awards also provide that, in the absence of Agreement language specifically prohibiting one officer from serving multiple roles, each case must be reviewed to determine if the employee's due process rights were actually compromised or prejudiced in any way. We are persuaded that the multiple roles filled by Hearing Officer Holloway did not result in any prejudice to the Claimant sufficient to compromise his right to a 'fair and impartial Hearing.'"

We agree with Award 35506. In the instant case, the Claimant admitted at the January 20, 2000 fact-finding session that he acted inappropriately toward a Carrier officer during a heated meeting on the property. In the light of this admission, we find that the Claimant was not prejudiced in any way by the multiple roles assumed by General Roadmaster Holloway in the disciplinary proceeding.

The Organization additionally contends that the Claimant was also denied a fair and impartial fact-finding because there was no complete transcript of the January 20, 2000 fact-finding session as required by ARTICLE 26. The Carrier advised the Claimant and the Organization that due to technical reasons the final nine minutes of the fact-finding were not recorded. It reconvened the fact-finding on March 6, 2000 to complete the record, but the Claimant and the Organization chose not to attend that session. Consequently, it is our opinion that they waived any right to assert that there was no complete transcript of the fact-finding proceedings.

There is no question that the Claimant was quarrelsome and discourteous toward a supervisor during a colloquy about safety on October 29, 1999. He admitted becoming emotional and directing profanity at Chief Engineer Woodward. Woodward did not provoke the Claimant into his unacceptable behavior, in our view. Indeed, when Woodward asked the Claimant if there was anything else he wished to discuss, the Claimant immediately responded that he wished to address "the bullsh** safety rhetoric being tossed around on this property." It was, therefore, the Claimant who instigated the heated discussion about safety on the property, not Chief Engineer Woodward.

That the Claimant's conduct toward Chief Engineer Woodward was totally inappropriate cannot be gainsaid. Indeed, he admitted that he should not have addressed Woodward in the manner he did. Nevertheless, we find that the 60-working

day suspension assessed the Claimant was excessive for several reasons. As noted above, at the January 20, 2000 fact-finding session the Claimant acknowledged that his conduct toward Chief Engineer Woodward was improper. He also became emotional when discussing safety because of recent fatalities on the property at Clinton, Iowa. Also, the Claimant had a clear disciplinary record at the time of this incident.

For the reasons set forth above, the Claimant's 60-working day suspension was excessive and unreasonable, in our opinion. A 30-calendar day suspension was justified, in our view. Therefore, the Claimant's 60-working day suspension must be reduced to a 30-calendar day suspension and he must be made whole for his losses beyond a 30-calendar day suspension.

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 22nd day of July 2002.