

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41140
Docket No. MW-41250
11-3-NRAB-00003-100094**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (removed and withheld from service on February 6, 2009 and dismissal by letter dated March 4, 2009) imposed upon Mr. D. Smart, on charges of alleged violation of BNSF Railway Maintenance of Way Operating Rules 1.12, 1.6, 1.7 and Maintenance of Way Safety Rules S-1.2.8 and S-1.2.9, on February 3, 2009 while working as a truck driver at or near Mile Post 58.95 on the Saint Joseph Subdivision was arbitrary, capricious, on the basis of unproven charges, unwarranted and in violation of the Agreement [System File C-09-D070-1/10-09-0216(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Smart shall receive the remedy prescribed by the parties in Rule 40(G).”**

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.

Prior to his dismissal from service, the Claimant had been employed for approximately 17 years and had an unblemished record. On February 3, 2009, he was regularly assigned as a Truck Driver on the Weston section gang, which was working near Mile Post 58.95 on the Saint Joseph Subdivision.

The Carrier contends that on the morning of February 3, 2009, the Claimant jumped from his truck and held a pocket knife to the throat of a Welder. The Claimant allegedly returned the pocket knife to his pocket, retrieved a larger knife and held it to the groin area of the Welder stating, "I'll cut your balls off." The Claimant then placed the knife back in his pocket. The Claimant contends that he was merely engaging in "horseplay" and that no employee felt threatened or in any danger.

By letter dated February 6, 2009, the Carrier directed the Claimant to report for a formal Investigation on February 13, 2009:

". . . for the purpose of ascertaining the facts and determining your responsibility, if any, for your alleged workplace violence towards another employee, on or about, 0930 hours on February 03, 2009, while working as a Truck Driver at or near MP 58.95 on the Saint Joseph Subdivision."

The Hearing took place on February 13, 2009, pursuant to which, in a letter dated March 4, 2009, the Claimant was notified that he was being dismissed based on his violations of BNSF Railway Maintenance of Way Operating Rule 1.12 - Weapons, Maintenance of Way Operating Rule 1.6 - Conduct - pertaining to

Discourteous, Quarrelsome and Immoral acts, Maintenance of Way Operating Rule 1.7 - Altercations, Maintenance of Way Safety Rule S-1.2.8 - Reporting, and Maintenance of Way Safety Rule S-1.2.9 - Horseplay.

By letter dated March 18, 2009, the Organization appealed the decision based on the contention the Carrier failed to meet its burden of proof and, in any event, the discipline assessed was unwarranted and excessive. On May 14, 2009, Division General Manager B. D. Andrew denied the appeal. On May 21, 2009, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on July 17, 2009. A conference was held, but the parties were unable to resolve the matter. The matter was then appealed to the Third Division.

According to the Organization, the discipline imposed upon the Claimant was unwarranted, harsh, and excessive. The Organization contends that the burden of proof in a discipline matter such as this is on the Carrier and asserts that burden has not been met. The Organization claims that (1) the Carrier has been arbitrary and capricious in its treatment of the Claimant (2) the Carrier abused its discretion, and (3) the Carrier's determination to discipline the Claimant was based on inconclusive evidence, thus rendering the discipline harsh and excessive. The Organization further asserts that the Carrier should now be required to remove the discipline and make the Claimant whole for all losses.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Hearing in accordance with the requirements of the Agreement. According to the Carrier, a review of the transcript developed during the Hearing makes clear that the Claimant is guilty as charged. The Claimant engaged in dangerous inappropriate behavior in the workplace. Based on this very serious infraction, the Claimant's termination was appropriate.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for that of the Carrier, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether

there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325 and Third Division Award 16166.)

After a thorough review of the record, the Board found substantial evidence to warrant upholding the Carrier's position in whole. The Board notes that the Carrier proved that the Claimant engaged in the dangerous behavior alleged when he threatened a coworker and displayed a weapon. Further, the Board does not find that termination was inappropriate based on the transgression. Accordingly, the Board will not overturn the Claimant's termination.

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 November 2011.