

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41141
Docket No. MW-41332
11-3-NRAB-00003-100174**

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 (withheld from service and subsequent dismissal) imposed upon Mr. R. Andersen for alleged violation of Maintenance of Way Operating Rule 1.6, Conduct, effective October 31, 2004 and Violence in the Workplace Policy for alleged inappropriate conduct and alleged threat and physical assault of Roadmaster S. Hatton at Hodge’s Conoco in Thedford, Nebraska at approximately 1755 hours on March 19, 2009 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File C-09-D070-3/10-09-0277(MW) BNR].**
- 2) As a consequence of the violation referred to in Part (1) above, Claimant R. Andersen shall now 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, Claimant R. L. Andersen had accumulated more than 30 years of service with the Carrier and was regularly assigned as a Track Inspector on the Sandhills Subdivision. At the time of the instant incident, the Claimant was regularly assigned to work from 7:30 A.M. to 4:00 P.M. Monday through Friday, and was headquartered at Mullen, Nebraska. Because the Claimant was subject to call to address service requirements, he was permitted to retain possession of his assigned company vehicle so as to ensure prompt reporting for after hours service.

Prior to the events giving rise to this dispute, the Claimant's disciplinary record consisted of a ten-day suspension in connection with a track authority incident that occurred in March 2001.

At approximately 5:30 P.M. on March 19, 2009, Division Engineer D. Jensen and Roadmaster S. Hatton were traveling west of Thedford, Nebraska. Jensen noticed a BNSF Track Inspector vehicle traveling east towards Thedford and Hatton identified the Claimant as the driver. Because the Claimant's scheduled work period ended at 4:00 P.M., Jensen and Hatton thought it was odd that the Claimant was driving a company vehicle at 5:30 P.M. Jensen called the Claimant's supervisor, Roadmaster Haga, who confirmed that the Claimant had ended his shift at 4:00 P.M. and that there was no reason for him to be driving a company vehicle into Thedford.

In response, Jensen and Hatton went to Thedford. They noticed the company vehicle at a gas station. They also observed the Claimant's wife exiting the vehicle. Because it is against Carrier policy to drive company vehicles for personal reasons or for non-company employees to ride in company vehicles, Jensen and Hatton chose to investigate the matter further. Hatton took two pictures of the Claimant's vehicle. The Claimant's wife and daughter approached Hatton and asked him not

to take pictures of them. Hatton said that they were only taking pictures of the company vehicle for evidence because the Claimant's family was not permitted to ride in the truck. The Claimant's wife and daughter returned to the Claimant's truck.

Hatton contends that while he was looking for a notebook to document the conversation, the Claimant violently opened Hatton's door, blocked the doorway of the truck and began to yell and swear at Hatton for talking to his wife and daughter. Hatton tried to explain that it was the Claimant's family that had approached him and not the other way around. The Claimant then allegedly poked his finger into Hatton's chest and said, "Listen here motherf*****, you don't talk to my family. You talk to me." When Hatton asked if the Claimant was threatening him, the Claimant reiterated his demand that if Hatton had anything to say, he was to say it to him and not to his family. The Claimant asked Hatton, "Do you f***ing understand?" slammed the door, returned to his vehicle and sped off. The Claimant denied touching Hatton, but admitted using profanity during the discussion with Hatton.

By letter dated March 20, 2009 the Carrier directed the Claimant to report for a formal Investigation on March 26, 2009:

“. . . to develop all the facts and circumstances concerning your alleged inappropriate conduct when you allegedly threatened and physically assaulted Roadmaster Samuel F. Hatton when you approached his vehicle, swung open the driver's door, verbally abused Mr. Hatton and physically touched him at Hodge's Texaco in Thedford, Nebraska at approximately 1755 hours on March 19, 2009 while assigned to Gang TINS1402 headquartered at Mullen, Nebraska.”

The letter also indicated that the Claimant was being withheld from service pending the Investigation. The Hearing took place on March 31, 2009, pursuant to which, in a letter dated April 17, 2009, the Claimant was notified that he was dismissed from service for his violation of Maintenance of Way Operating Rule 1.6. as well as the Carrier's Violence in the Workplace Policy.

By letter dated April 29, 2009, the Organization appealed the decision based on the contentions (1) the Carrier did not meet its burden of proof (2) the discipline

assessed was unwarranted and excessive, and (3) the Claimant was denied a fair and impartial Hearing. On June 19, 2009, General Manager T. Albanese denied the appeal. On July 10, 2009, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on September 4, 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. It 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. It further 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 dismiss the Claimant was based on inconclusive evidence, thus rendering the discipline harsh and excessive. The Organization further contends that the Claimant was denied a fair and impartial Hearing. Lastly, the Organization asserts that the Carrier should now be required to overturn 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 it clear that the Claimant is guilty as charged. The record evidence shows that the Claimant threatened and assaulted a Supervisor. Based on his behavior, the Claimant's dismissal was certainly 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 case record, the Board has not found substantial evidence in the record to uphold the Carrier's position in whole. The

Board notes that the while Carrier proved that the Claimant engaged in inappropriate behavior towards Roadmaster Hatton, we find that the discipline imposed was too severe. In light of the specific and unique circumstances of this case, including the Claimant's lengthy tenure with one minor suspension, the Board concludes that a long-term suspension coupled with a Last Chance Order is more appropriate. Therefore, the Board orders the Claimant's reinstatement with seniority unimpaired, but without backpay subject to a Last Chance Order. In the event the Claimant engages in any similar behavior within 12 months of his reinstatement, he shall be subject to immediate dismissal.

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 21st day of November 2011.