

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41423
Docket No. MW-41793
12-3-NRAB-00003-120010**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Terminal Railroad Association of St. Louis**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. D. Garrett under letter dated August 5, 2010, for alleged violation of TRRA’s General Code of Operating Rules: 1.6 - Conduct, 1.13 – Reporting and Complying with Instructions in connection with alleged discourteous, negligent and quarrelsome behavior toward Supervisor E. O’Bannon in the vicinity of the Madison pit on Thursday, July 22, 2010 was arbitrary, capricious and in violation of the Agreement (Carrier’s File 013-30 TRR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Garrett shall now “***be reinstated immediately with all rights and privileges, including pay for all lost time.”**

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 claim was timely filed and appealed by the Organization to the highest Carrier officer designated to handle this matter and was responded to by the Carrier at all stages during the on-property processing including conference. Having been processed in the usual and customary manner, this unresolved claim is before the Board for adjudication.

The Claimant, a Track Laborer with a seniority date of April 17, 2000, was charged with negligent, discourteous, and quarrelsome behavior towards Mechanical Supervisor O'Bannon. Specifically, on July 22, 2010 at approximately 7:45 A.M., O'Bannon addressed the Claimant ("come here I need to speak with you") on four occasions in the vicinity of the Madison Pit in Madison Yard where the Claimant was retrieving ice. The Madison Pit houses an ice machine and break room referred to, respectively, as the "ice house" and "the Pit."

The Carrier states that the Claimant walked past O'Bannon on at least two occasions, as well as walked away from him without responding to the Mechanical Supervisor's requests. The Claimant entered a work truck and left the Pit. The Carrier asserts that the Claimant's negligent, discourteous, and quarrelsome behavior violates the following Rules:

Rule 1.6 – Conduct, which states that employees "must not be: [n]egligent . . . [q]uarrelsome, or . . . [d]iscourteous" and "any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported."

Rule 1.13 – Reporting and Complying with Instructions, states:

“Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.”

According to the Organization, the Mechanical Supervisor pointed his finger in the Claimant’s face and spoke in an aggressive manner, advising the Claimant that he was prohibited from entering the Pit. The Mechanical Supervisor threatened and yelled at the Claimant in an effort to create a confrontation and, when that did not occur, the Mechanical Supervisor levied this bogus charge.

The situation at the ice house, the Organization notes, is the basis for the charged misconduct involving Rules 1.6 and 1.13. Additional situations after the ice house situation were not identified in the Notice of Investigation, but the Hearing Officer allowed the Carrier to place them in the record. The additional situations are described as follows.

After the Claimant exited the Madison Pit with his ice chest, a co-worker drove the work truck with the Claimant away from the Pit towards the opposite end of Madison Yard. The Mechanical Supervisor signaled for the truck to stop and, once stopped, informed the Claimant that he was not welcome in the break room.

Following the truck situation, the Mechanical Supervisor informed the Manager of Track (MT) that the Claimant was difficult to deal with, whereupon the MT instructed the Mechanical Supervisor and the Claimant to meet with the MT for a discussion. When the MT arrived for that discussion, the Mechanical Supervisor and the Claimant already were in the midst of a vigorous exchange; the MT instructed them to proceed to Building 10 where, in the presence of the Carrier’s Police Sergeant, the MT asked the Claimant for his view of the ice house situation. The Claimant stated that the situation at the ice house was over, whereupon the Claimant was released to return to work and completed his assigned shift. The following day (July 23, 2010) the Claimant was notified that he was removed from service pending an Investigation into his alleged misconduct on July 22, 2010.

The Organization argues that receipt of testimony on these additional situations by the Hearing Officer constituted an Agreement due process violation, because the situations were not identified in the Notice of Investigation. The Organization further argues that it was not accorded a reasonable amount of time to prepare prior to the Hearing, the Hearing Officer allowed hearsay testimony into the record and the Police Sergeant's statement confirms that the Claimant was not negligent, discourteous, or quarrelsome. Finally any discussion or evidence of the Claimant's prior disciplinary history was not exchanged during handling on the property and, therefore, must be excluded and not considered by the Board consistent with on-property Third Division Award 24098.

The Board reviewed the record regarding the ice house situation, as well as the additional situations contested by the Organization, and finds that the Notice of Investigation was not deficient, but specific for developing facts, discovering the cause and determining the Claimant's responsibility, if any, for his charged discourteous, negligent and quarrelsome behavior when he "refused to acknowledge [the Supervisor's] verbal requests on multiple occasions when he approached [the Claimant] in the vicinity of the Pit on Thursday, July 22, 2010, at approximately 7:45 A.M. . . . The investigation will determine if any Operating Rules, Safety Rules, or Specialist Instructions were violated in connection thereto." (Emphasis added.) Although the additional situations were "in connection thereto" none of them were considered by the Carrier as a basis for the Claimant's dismissal and, therefore, the Claimant was not subjected to any prejudicial conclusions.

The Organization asserts that it was not given a reasonable amount of time to prepare for the Hearing because it was not aware of the Carrier's witness list; however, the Carrier notified the Organization of that list on July 23, 2010 and the Police Sergeant was removed from the list. The Organization interviewed the Police Sergeant by telephone on July 29, 2010 - the day prior to the Hearing; the Claimant's demeanor in the presence of the Police Sergeant, which was some time after the ice house situation with the Mechanical Supervisor, was subdued. The Carrier did not include co-worker Oliver on the witness list because he was not present during the ice house situation. Nevertheless, the Organization was informed on July 23, 2010, of its right to call witnesses and make arrangements for them - "You are entitled to representation and witnesses, if you so desire, as provided by your agreement" - but the Organization never placed Oliver's name on a witness list.

Two witnesses at the ice house confirm that the Mechanical Supervisor was not angry or upset, and he did not yell or act aggressively towards the Claimant, but spoke in a firm tone. The Claimant told one of those witnesses that he (the Claimant) heard the Mechanical Supervisor's inquiries but chose not to answer them and the other witness' written statement reveals that the Claimant "acted like [the Mechanical Supervisor] wasn't even there." The Claimant's written statement confirms that he ignored all of the Mechanical Supervisor's inquiries. There is ample testimony from witnesses and the Claimant to discount any hearsay that may be littering this record.

Based on the record established by the parties, the Board finds that the Claimant received a fair and impartial Hearing. Furthermore, and contrary to the Organization's assertion, the Board finds that the Claimant's disciplinary history was discussed during conference on the property. In this regard, there is no dispute that a conference occurred and the documented record is complete in all aspects but for the Organization's assertion that it did not have in its file a copy of the Carrier's letter summarizing the conference.

The ice house situation is the Claimant's fourth infraction within the past 31 months. Prior infractions were a 30-day suspension for failure to protect his assignment (January 14, 2008) a six month suspension for physically assaulting a co-worker (October 8, 2008) and a five-day suspension for violation of Rule 10.50 – Fouling Live Track (July 28, 2009). Where an employee is accorded opportunities to demonstrate rehabilitation but repeatedly fails or refuses to correct his behavior, the Carrier's remaining recourse is to sever the employment relationship.

In short, there is substantial evidence that the Claimant violated Rules 1.6 and 1.13. He acknowledged not responding to the Mechanical Supervisor's repeated requests to speak with him. Moreover, testimony and written statements from witnesses present during the July 22, 2010 situation at the ice house do not confirm the Claimant's assertions about the Mechanical Supervisor's effort to create a confrontation by using threatening, aggressive speech and manner. The ice house situation is a continuing pattern of the Claimant's failure or refusal to reform his conduct.

Given these findings, the Board concludes that the Carrier's decision to dismiss the Claimant was not an arbitrary, capricious decision. On the contrary, it conforms to the terms of the parties' Agreement. Accordingly, the claim is 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 5th day of September 2012.