

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42022  
Docket No. MW-41969  
14-3-NRAB-00003-120296**

**The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.**

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

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline [Level S thirty (30) day record suspension and a one (1) year review period] imposed upon Mr. R. Jarvis by letter dated June 9, 2011 for alleged violation of MOWOR 1.6 Conduct and MOWOR 1.7 Altercations in connection with alleged quarrelsome and discourteous conduct when he entered the radio shop in Galesburg, IL on March 15, 2011 at approximately 0830 hours and allegedly became loud, visibly upset and discourteous concerning the GPS unit installed in his low boy truck was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-11-D040-30/10-11-0507 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Jarvis shall now receive the remedy prescribed by the parties in Rule 40G.”**

**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.**

**The Claimant has been employed by the Carrier since April 24, 2006 and holds seniority in the Roadway Equipment Sub-Department. At times relevant to the claim, he was assigned to operate a tractor-lowboy trailer rig ("lowboy"). The Claimant had no discipline prior to that at issue in this proceeding.**

**Installed on all Carrier lowboys, including the lowboy assigned to the Claimant, were GPS units. On Friday evening, March 11, 2011, the Claimant dropped off his vehicle at the Carrier's radio shop, informing the technician that the GPS unit was malfunctioning and requesting that the problem be investigated and repaired. The Claimant opined to the Technician his belief that his superiors thought he was responsible for breaking the unit.**

**On Monday, March 14, the radio shop completed the repairs, but did not inform the Claimant or his Supervisor that the lowboy was ready for pickup. Based on that failure, the Claimant was not able to work his lowboy assignment and was involuntarily assigned instead to work as a Sectionman.**

**When the Claimant returned to the radio shop on March 15 to check on the status of his vehicle, he inquired why it had taken so long and was told that the vehicle had been ready the day before, but that he had not been notified. The Technician told the Claimant that he believed that the Operator had "messed with" the GPS unit, causing the malfunction. In response, the Claimant eventually identified himself as the Operator and denied causing the damage. According to the Carrier, he became irate, loud, aggressive and discourteous, accusing the Carrier of "screwing with" him and disrupting a shop conference call then in progress. The Carrier supported its charge that the Claimant was quarrelsome and discourteous through the testimony of and written statement from Roadmaster Dye, who was not present during the incident, and by written statements of radio shop employees Moor and Byam, neither of whom testified (notwithstanding an assertion in the Carrier's Submission that they did).**

**Following his exchange with the Technician, the Claimant advised Roadmaster Dye, his Supervisor, what had happened and asked Dye to check the GPS unit to ensure that it was working. Dye testified that the Claimant acknowledged to him that he had**

been upset at having been accused of unhooking the GPS system. The Claimant then returned to his assignment.

The Carrier directed the Claimant to report for a formal Investigation, during which the foregoing evidence was adduced. Based on the record and pursuant to PEPA, the Carrier assessed the Claimant a Level S 30-day record suspension and 12-month review period for violation of MOWOR 1.6 (Conduct) and MOWOR 1.7 (Altercation).

The Carrier argues that it met its burden to prove, by substantial evidence considered on the record as a whole, that the Claimant violated the Rules cited. It asserts that the Organization failed to show that the discipline was unwarranted and/or in violation of the Agreement.

The Carrier argues that the testimony of Roadmaster Dye and the evidence from the other employees constituted substantial evidence of the Claimant's guilt, obviating its need to have called additional witnesses. For those persons whose absence from the Hearing the Organization protests, the Carrier argues that had the Organization needed their testimony, it was the Organization's obligation to call them. Because the Organization failed to do so, the Carrier urges that the discipline cannot be overturned based on their absence.

The Carrier argues that the Organization's various procedural protests claiming denial of a fair and impartial Hearing are trivial and illusory, establishing no prejudice to the Claimant's rights or to the Organization's ability to defend against the charges.

In conclusion, the Carrier urges that the claim be denied.

Conversely, the Organization argues that the Carrier failed to afford the Claimant the required fair and impartial Hearing by committing various violations, including allegation that the Hearing Officer and Roadmaster Dye colluded in advance of the Hearing, by submitting written statements in lieu of witness testimony, by the Hearing Officer's abusive questioning of the Claimant, constituting bias, abuse, disparagement of and disrespect toward the Organization's representative, the Hearing Officer asking questions unrelated to the incident at issue and leading his own witness. It asserts that this range and pattern of conduct denied the Claimant the fair and impartial Hearing to which he was entitled and interfered with the ability of the Organization to defend the Claimant against the charges.

**The Organization also argues that the Carrier failed to meet its burden of proof of the charges. It denies that the Carrier submitted any direct evidence to prove that the Claimant became angry, threatened, intimidated, yelled, screamed, cursed or entered into an altercation. The Organization concedes that the Claimant was loud – as it maintains he always is – but points to the direct testimony of both the Claimant and the Technician with whom he spoke, denying that the Claimant was aggressive or offensive.**

**The Organization argues that, even if the Claimant was found to have been aggressive or offensive, in violation of the Rules cited, the penalty was clearly excessive, arbitrary and unwarranted. It points out that the Claimant was a hard-working, long term employee, whose only violation was having a loud voice. It denies the essence of the conduct with which he was accused.**

**In conclusion, the Organization urges that the claim be sustained.**

**It was the burden of the Carrier to prove, by substantial evidence considered on the record as a whole, that the Claimant was guilty of violating the Rules as charged. The Carrier sought to meet its burden through the testimony of Roadmaster Dye, who concededly was not present during the incident and lacked any firsthand knowledge of it, other than what the Claimant told him, and from written statements from other employees who allegedly were present. Those employees were not called as witnesses by the Carrier, although there is no evidence that they were not available.**

**The testimony of Roadmaster Dye as to what transpired during the incident was offered for the truth of what he was told. However, his statements about the incident constitute hearsay and his second-hand description was not subject to cross-examination. His statements about what the Claimant allegedly said are insufficient to prove violations of the Rules cited. The written statements suffer from the same defects – they are offered for the truth of the matters asserted but cannot be cross examined. The first-hand witnesses – the Claimant and the Technician with whom he talked - both denied that the Claimant had been aggressive or offensive. The Claimant's acknowledgement that he routinely talks loudly is insufficient to establish a violation of the Rules.**

**It was the responsibility of the Carrier as having the burden of proof, to have called witnesses sufficient to prove its case. It did not. The Board concludes that the indirect, hearsay testimony offered by the Carrier, but contradicted by the firsthand testimony of two witnesses, does not constitute substantial evidence, considered on the record as a whole. Because the Carrier failed to meet its burden of proof, the claim must be sustained without reliance on the Organization's various procedural arguments.**

Accordingly, the discipline assessed shall be rescinded and expunged from the Claimant's record and he shall be made whole for any wages and benefits lost.

**AWARD**

Claim sustained.

**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 28th day of August 2014.