

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42356
Docket No. MW-42293
16-3-NRAB-00003-130293**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees 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 (dismissal) imposed upon Mr. D. Metzger by letter dated February 13, 2012 for alleged violation of MOWOR 1.6 Conduct, the BNSF Violence in the Workplace Policy and the BNSF Harassment Policy on charges of delivering an inappropriate facsimile to ADMP Alex Franco on October 18, 2011 was arbitrary, capricious, without just cause and in violation of the Agreement (System File T-D-4070-G/11-12-0190 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Metzger 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.

On October 18, 2011, the Claimant sent a fax to ADMP Alex Franco, protesting the handling of his medical leave of absence and stating as follows, verbatim, in pertinent part:

“... I’m a poor boy. . . . Pay check-to-paycheck and, the amount of money and time I’ve spent be’n jack’d around is f**k’n ridiculous! Let me echo. . . . Just one more time . . . I’d like too keep this civil, but . . . I don’t believe its gonna happen

BNSF, I’m gonna shoot you straight up; to whom it may cocern . . . I’m not a happy Camper!! I * * *Machine I’m being transport’d in, “T-boned” by a 3-4,000 lb. projectile of a civilian f**k-off; move’n at 30-40 mph! During impact, I was hurt!!! And, as its developed . . . Possibly a career ending hurt! So, not only am I “not” happy; I’m hurt, and angry! I’m get’n real close to an impasse. . . . Brickwall, in deal’n with you people. The horrendous, faggoty Jew horseshit by R.R.B., Aetna, Union, Drs., BNSF . . . Needs to be address’d by the courts! Near as I can tell, you got no protocol for when your workers get hurt!! Jew horseshit. I don’t need no f**k’n faggoty formal threats from you people. . . . Who the f**k you think you are!?! * * *

So you wanna play hardball . . . with a hardd**k!?? You obviously don’t know who I am. You obviously don’t know who I am. Google me-up on one of those on-line snoop services <I’ll pay for it> Send me the bill\$.

The letter was signed “one angry white man . . . most adamantly.”

A second letter was attributed to the Claimant in December:

“<I must be a bad man> Phony ph**kers!!! And, I’m gonna have some fun. Heres worst case scenario . . . Ol’ Gunjack might really snap and kill all the motherf**k’n contestants present <witnesses>. .

.. That would include you and my woman. Don't much care if I do in the woman and others . . . but you, I wouldn't want that too happen to. We <brotherhood> need you too be you And in your capacity as lead boss, Local. Chm., rebel leader! I'll do fine and, it ain't over til its over or til this fat man sings. . ."

The second letter was introduced when the Union objected to both the absence of certain witnesses at the investigatory hearing and to the taking of testimony by telephone.

The October letter was found to be a violation of MOWOR 1.6 Conduct, the BNSF Violence in the Workplace Policy and the BNSF Harassment Policy. As a result, the Claimant was dismissed.

A Notice of Investigation was issued following receipt of the October fax. At hearing, C. Rasmussen testified he was appearing telephonically because he feared for his safety. He admitted he had talked to other BNSF officers about the letters because he was alarmed. When the Organization objected to telephonic testimony, the second letter was introduced into the record over the Organization's objection. The Carrier asserts the second letter was submitted to show why witnesses feared for their lives and did not show up at the investigation. The act of sending the October letter to a supervisor was an extremely serious offense and the discipline was proper.

The Organization argues there are significant procedural issues in this case. Most significant, were the pre-investigation conversations between Rasmussen and the Hearing Officer. When the Organization attempted to explore this impropriety, the Hearing Officer improperly shut down the inquiry in a denial of fair hearing.

The burden of proof should be heightened because this was a case of moral turpitude. The Claimant is charged with violation of harassment policy, when the letter was addressed to "all concerned" and not an individual. The October fax does not contain any threats. The Claimant commonly expressed himself in vivid terms, yet the Carrier gave him no notice or progressive discipline over more than 18 yrs. He had a clean discipline record; this was his first offense. The Organization maintains summary dismissal was an abuse of discretion. This was not a case of violence, altercations or weapons as the Carrier maintains, because none of those things were involved. At most this was a first time serious violation, carrying a maximum penalty of a 30-day record suspension.

The Board has carefully reviewed the record and finds the introduction of expert testimony from a handwriting expert was improper and unfair without giving the Organization prior notice so that it could have an opportunity to engage a hand writing analyst of its own. However, no prejudice resulted to the Claimant because he did not deny writing the letters. The fact that a witness spoke with other witnesses or the Hearing Officer does not preclude that witness from testifying. The Organization had an opportunity to cross-examine and surface any credibility issues. The Board does not find that the Hearing Officer shut down inquiry into the subject. The Claimant admitted to his writing and the anger behind it; there was no credibility issue and therefore there was no prejudice.

The October letter violated the Carrier's policy against harassment. This policy prohibits creation of a hostile work environment and specifically prohibits verbal abuse of a sexual, racial, ethnic or religious nature, sexually or racially degrading words, as well as ethnic or racial slurs. It is well established that harassment does not have to be directed to a single individual; graffiti on the wall, pornographic pictures on lockers and nooses hanging from a beam all constitute harassment by creation of a hostile work.

It has long been well established that subsequent acts which bear a close logical relationship to and aggravate original misconduct are both pertinent and relevant.¹ Following a position taken by the NLRB, "an arbitrator should not order reinstatement if an employee's post-discharge conduct will cause an unacceptable employment relationship."² This is a practical and necessary exception to the general rule that evidence of conduct occurring after an alleged offense is inadmissible.

In this instance, the Claimant's December letter did in fact threaten violence and even death. Under these circumstances, the possibility for an acceptable employment relationship has been destroyed. The Claimant cannot be reinstated due to intervening disqualifying conduct.

AWARD

Claim denied.

¹ Evidence in Arbitration, 2d ed, Hill & Sinicropi, BNA Books, 1999) p. 61.

² Id., at 64, citing NLRB v. Jacob E. Decker & Sons, 636 F.2d 129, 106 LRRM 2494 (5th Cir. 1981).

**Form 1
Page 5**

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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 30th day of August 2016.