

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42703
Docket No. MW-43218
17-3-NRAB-00003-150456**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S combined suspension of twenty-three (23) days actual suspension, seven (7) days record suspension and one (1) year review period] imposed upon Mr. M. Dudek by letter dated April 30, 2014 for alleged violation of HR 90.2 Workplace Harassment Policy, MWOR 1.3.1, MWOR 1.6, MWOR 1.7 and MWSR S-1.2.9 in connection with charges of alleged involvement in an altercation on April 8, 2014 was on the basis of unproven charges, excessive and in violation of the Agreement (System File C-14-D040-22/10-14-0284 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant’s record shall be cleared of the charges leveled against him and he shall be compensated for wage loss suffered in accordance with Rule 40.”**

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 Carrier asserts that there is substantial evidence that the Claimant engaged in a form of harassment and workplace violence. The Investigation involved no disqualifying procedural or due process defects. The Conducting Officer properly assessed credibility. Should the claim be sustained, the Claimant should recover lost wages offset by outside earnings.

The Organization insists that other than possibly a heated discussion, nothing unusual occurred and there was no physical assault. When Mr. Algiene spoke to his supervisor that evening, he did not want the matter reported to Human Resources. He simply misunderstood the Claimant's actions. Even if rules were violated, the Claimant should have received no more than a thirty (30)-day record suspension.

The basics of the situation with which the Board is faced are summarized below. On the evening of April 8, 2014 Signal Maintainer Algiene called Signal Supervisor Shawn Premo and during the conversation reported a verbal confrontation that morning with the Claimant, Foreman Michael Dudek, during which Signal Maintainer Algiene admittedly directed the "F word" toward the Claimant. Later in the day, according to Mr. Algiene, the Claimant jumped on the running board of Mr. Algiene's truck, put his hands through the open window and attempted to pull the Signal Maintainer out of the truck.

Signal Supervisor Premo reported the conversation to his supervisor, Roadmaster Paz, and to Human Resources. Roadmaster Paz spoke to the Claimant, who said that he stuck his face in Mr. Algiene's truck but never touched the Signal Maintainer. At the Investigation, the Claimant and other witnesses confirmed that Mr. Algiene had directed the "F word" toward the Claimant, something Mr. Algiene then denied. Testimony and statements indicated elevated voices but there was no confirmation of a physical confrontation. In fact, Signal Maintainer Algiene testified that he mistook the Claimant's presence on the running board for assault,

but realized that the Claimant was simply trying to see the computer in the truck. Mr. Algiene seemingly further changed his story from the original phone call to Supervisor Premo, saying he did not tell the Supervisor not to inform Human Resources of the dispute, and that he did not feel threatened by the Claimant, who denied putting his hands on Mr. Algiene.

The fact that the Claimant has been disciplined indicates the Conducting Officer's decision that his denials were not credible. The Board has no reason whatsoever to question that determination. Indeed, trying to pin the Claimant and Signal Maintainer Algiene to the truth is a bit like trying to hit a moving target in a carnival shooting gallery. There would have been no reason for Mr. Algiene to admit to Signal Supervisor Premo that he had used the "F word" in a personal way toward the Claimant and that the Claimant later reached in the truck and grabbed Mr. Algiene if that had not happened. Moreover, had not the incident been described to Supervisor Premo as he recounted the phone conversation, it seems unlikely that the Supervisor would have commented that this was serious and needed to be reported to Roadmaster Paz and Human Resources. The other witnesses' testimony and statements that they saw no "hands on" are not compelling. They may have seen nothing and they may have conveniently said that they saw nothing to try to protect the Foreman from discipline, if not dismissal. And, Signal Maintainer Algiene's story changed between the time of his call to Supervisor Premo and the Investigation, even to the point of denying the personally-directed cursing in the face of overwhelming evidence that it occurred.

Finally, the Organization's contention that the Claimant was prejudged when removed from service hardly needs a response. That decision was justified by Mr. Algiene's original report that the Claimant attempted to pull him out of the truck and is provided for in Rule 40.B. Railroad work is inherently dangerous enough without the possibility that employees will engage in physical altercations that heighten the danger. The Carrier has the right and the responsibility to ensure to the greatest extent possible that physical confrontations are held to an absolute minimum. The substantial evidence shows a violation of the policy and rules indicated above. The Carrier's disciplinary response is in no way arbitrary and capricious.

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 12th day of July 2017.