

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42822  
Docket No. MW-43107  
17-3-NRAB-00003-150262**

**The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.**

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

**PARTIES TO DISPUTE: (**  
**(Dakota, Minnesota & Eastern Railroad Corporation**

**STATEMENT OF CLAIM:**

- “(1) The discipline (dismissal) imposed upon Mr. A. Januszewski by letter dated December 30, 2013 alleged violation of General Code of Operating Rule 1.6 and 1.7, Canadian Pacific Policy 1803 and Canadian Pacific Policy H&S 4320 in connection with his alleged ‘\*\*\* altercation with threats to a company supervisor, conduct unbecoming of an employee, and unsafe actions in a moving vehicle in violation in the workplace and other related rules on November 5, 2013,’ was without just cause, arbitrary, excessive, on the basis of unproved charges and in violation of the Agreement (System file B-1434D-102/8-0019DME).**
- (2) As a consequence of the violation referred to Part (1) above, Claimant A. Januszewski shall be reinstated to service and ‘\*\*\* must have his personnel record cleaned of the assessed charges and dismissal, as well as he must be made whole for all loss incurred as a result, such as but not limited to, wages, retirement, months of service under RRB, reimbursement for loss of health and welfare benefits, or expenses incurred throughout the discipline process and subsequent assessed discipline.”**

**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.

Claimant A. Januszewski had established and held seniority within the Carrier's Maintenance of Way Department. At the time of the occurrence of the incident giving rise to the subject claim, Claimant had been employed by the Carrier for three years and was assigned and working as a Machine Operator B.

At the end of the 10 hour work day on November 5, 2013, various members of the crew which included Claimant and Work Equipment Supervisor Tim O'Neal were gathered at various locations in a public parking lot and all were getting ready to depart to return to their designated quarters so as to be rested and report for work the following morning. Claimant was one of at least four co-workers assembled in a Carrier van driven by crew member Devin Munoz to be shuttled to a nearby hotel where crew members were temporarily housed and O'Neal was sitting in his truck speaking to two of the crew members, Mechanics Cody Peacock and Kevin Harkness.

Claimant left the van to speak to O'Neal to inquire about a situation involving his being in possession of a firearm at the hotel he was quartered at. O'Neal explained that prior to November 5 an employee informed him that Claimant had a firearm in his room and, in turn, he apprised Manager Jon Thulen what he had been told. Thulen and O'Neal then convened a conference call with Trevor Nelson, Director of Track Renewal and apprised him of the situation. Nelson counseled O'Neal and Thulen not to take one person's word regarding Claimant being in possession of a firearm and to initiate an inquiry of other persons to either substantiate or refute the information. O'Neal acting on Nelson's counsel, initiated a conversation with Claimant's roommate, Dustin Johnson who told him he did not know if Claimant had a firearm in his possession during the week in question but he did know that at a previous time, Claimant did have in his possession a firearm he kept in the hotel room.

Upon approaching the driver's side of O'Neal's truck, Claimant asked to speak with O'Neal at which time crew members Peacock and Harkness yielded to Claimant by walking away but remained close enough in proximity to O'Neal's truck to hear

most of the verbal interchange between Claimant and O'Neal. According to Claimant he heard through the grapevine that O'Neal was saying he had a firearm in his room and his purpose in speaking with O'Neal was to confront him and ask him the reason why he was saying he had a firearm in his room. O'Neal denied saying such a thing to which Claimant responded by asking him who was it that was spreading such a rumor. O'Neal declined to reveal the identity of the person who told him about his having possessed a firearm in his room saying to Claimant, "I don't have to tell you." Claimant asked him a second time who was spreading the rumor but again, O'Neal refused to tell him the person's identity. Claimant responded telling O'Neal he was going to go over his head to find out who it was that was spreading the rumor. Claimant related that at this juncture in his interaction with O'Neal he began walking back to the van and when he reached the front of the van O'Neal had exited his truck and started to approach him with arms raised in the air and yelling. Claimant characterized O'Neal's demeanor as being irate. According to Claimant, as O'Neal was approaching him, he yelled back at O'Neal saying he wanted to be treated like a human being and shown respect as he was tired of being harassed. As Claimant was responding he was walking toward O'Neal and met up with O'Neal in the middle between the van and O'Neal's truck. With O'Neal's arms still raised in the air in a fighting manner, Claimant asked him what was the next step, "are we going to go in the weeds and duke it out," to which O'Neal responded, "anytime anywhere." Claimant responded telling O'Neal he got off work on Thursday and would be leaving the hotel to which O'Neal said in response, "okay, see you there" adding, that's also Company property so you're out of commission, meaning "out of service." According to Claimant, at this point, their "discussion" ended.

O'Neal's account of his verbal interchange with Claimant differs from Claimant's account. According to O'Neal, Claimant started the verbal interchange by asking why he had queried his roommate, Dustin Johnson if he had a gun, asserting that O'Neal did not have a right to be asking that of Johnson. O'Neal responded he did have the right to ask as it was brought to his attention that he previously had in his possession a gun. According to O'Neal, Claimant wanted to know the identity of the person who brought that information to his attention and he responded by telling Claimant he was not at liberty to reveal the person's identity, that he was following through with an investigation. O'Neal related Claimant informed him he was going to go above him to get the answer he was seeking to which he said to Claimant, "that's fine" explaining he was going to give Claimant Nelson's number so he could talk to Nelson about the investigation. O'Neal then recounted that from that point forward, their verbal interchange "escalated" as Claimant began to "rant and rave" and walk away yelling and screaming he had no right asking about possessing a gun. O'Neal

related that as Claimant walked away, he exited his truck responding to Claimant he had the right to ask his roommate and anybody else as he informed Claimant he was not allowed to have a firearm on the property and the motel was classified as Carrier property as a result of Carrier paying for the rooms adding that he (Claimant) was representing the Carrier. At this juncture O'Neal recounted, Claimant began walking back toward him and declared that if he didn't have his vest on he would kick his ass and throw him in a ditch. O'Neal related that at this point he realized their interchange had gotten out of hand and that he had over stepped his bounds by having yelled , that as a result of not knowing what to do, he told Claimant he was taking him out of service until further notice.

The record evidence reflects that the following day, November 6, 2013 Carrier made the decision to also take O'Neal out of service until the altercation could be further investigated. By letter dated November 7, 2013, two days after the occurrence of the "altercation," Carrier directed Claimant to attend a formal investigation set to convene the morning of November 13, 2013 to determine all the facts and circumstances and to place responsibility, if any, in connection with the alleged altercation with the threats to a company supervisor, conduct unbecoming of an employee, and unsafe actions in the moving vehicle in violation of the violence in the workplace policy and other related rules. By mutual agreement the formal investigation/hearing was postponed and was subsequently held on December 5, 2013.

The record evidence reflects that the day following the "altercation," (November 6, 2013), Carrier Manager Thulen took O'Neal out of service and requested crew members who had witnessed any part of the verbal interchange between O'Neal and Claimant to submit a written account of whatever they had observed and heard of their verbal interchange. Thulen received written statements from at least eight crew members, four of whom testified at the investigation/hearing, Mechanics Peacock and Harkness, Laborer Matt Weller, and Machine Operator Devin Munoz. A composite of these statements all reference the fact that Claimant approached O'Neal as O'Neal sat in his truck and confronted O'Neal as to the spreading of a rumor about his possessing a gun on Carrier property and wanting to know the identity of the person who divulged this information to O'Neal. All four written statements are in concurrence that O'Neal refused to provide Claimant with the name of the individual and that thereafter, voices by both were raised and an argument began. All statements concurred that Claimant at some point in the argument walked away from O'Neal's truck and that something impelled O'Neal at this point in time to exit his truck and utter remarks to Claimant about his right to inquire of others as to whether he (Claimant) was in possession of a firearm while on

Company property. All statements concur that as a result of O'Neal exiting his truck and directing remarks toward Claimant while yelling at him, that O'Neal's action was responsible for re-engaging the discourse between the two of them. All statements referenced as fact that Claimant proposed to settle matters by engaging in a physical fight with O'Neal and that O'Neal accommodated this proposition by acknowledging his consent to participate. All statements concur that Claimant was the only one of the two that made a threatening remark during the last half of their verbal altercation, which they referenced variously as follows: Peacock wrote that Claimant said to O'Neal, lets go across the street and I'll leave you lay in the ditch. O'Neal responded by starting to take off his vest and said to Claimant, lets go and then told Claimant he was being taken out of service; Harkness reported in his written statement that when Claimant emerged from the work van to meet O'Neal who was out of his truck and walking toward the van Claimant said to O'Neal he was going to kick his ass and as the yelling between them continued, O'Neal told Claimant that whenever he was ready that he (O'Neal) would be too. At that, O'Neal informed Claimant he was taking him out of service and Claimant returned to the work van; Mat Weller in his written statement recounted that after Claimant informed O'Neal he would go over his head to find out who it was that was spreading the rumor of his possessing a firearm on Company property and O'Neal told Claimant to go ahead, Claimant tried to start a fight with O'Neal telling O'Neal he would beat him up and O'Neal responded telling Claimant to go ahead. Claimant then remarked to O'Neal he wasn't going to lose his job over him and then proceeded to say to O'Neal, meet me in the parking lot Thursday after work so he could kick his ass then; and Devin Munoz wrote in his statement that during the time Claimant was talking to O'Neal as O'Neal sat in his truck, Claimant began cussing and yelling at O'Neal and O'Neal responding by denying he was the one spreading rumors about him. Claimant then started to provoke O'Neal by threatening to call the Union on him and at that point O'Neal told Claimant he was out of service and Claimant retorted, okay, we will see.

Employee William Kurtz in his written statement recounted that he witnessed Claimant exit the van, walk over to O'Neal while O'Neal was sitting in his truck and soon thereafter, observed their conversation became heated. Kurtz related that as Claimant was walking back to the van, O'Neal exited his truck and he heard Claimant tell O'Neal he wanted to be treated equally like a normal human being. As Claimant directed this remark to O'Neal, O'Neal was throwing his hands in the air and ranting though Kurtz stated he could not make out what O'Neal was saying. Kurtz related he observed Claimant walk back up to O'Neal and that they exchanged a few more words at which point Thulen arrived on the scene, exited his truck as O'Neal yelled out to Thulen that Claimant was out of service. After Claimant asked for what he was

taken out of service he then said to O'Neal, talk to my Union and we'll go from there. Claimant then walked away and the crew was debriefed and left the area.

Other written statements submitted to Thulen were by Claimant's roommate, Dustin Johnson, by employee Kyle Nicola, and another short statement by William Kurtz. Johnson stated that Claimant has not had a gun in our room for the past few months we have roomed together. Kurtz wrote that at the following day's re-briefing, O'Neal apologized to the crew saying he was sorry for the way he handled the conflict with Claimant, that it was unprofessional but he got upset and now its (the situation) not in his control. Employee Nicola in his written statement related that O'Neal apologized at re-briefing about handling the situation the wrong way with Claimant.

Written statements were also submitted by employees Devin Munoz and Michael Thompson pertaining to Claimant's conduct in the van during the ride back to the hotel but the Board finds this entire accounting not to be germane to the main reasons for his dismissal from service which Carrier informed Claimant of in a letter dated December 30, 2013. It is noted that while Carrier dismissed Claimant for having violated a number of GCOR rules and its policy on violence in the workplace, it reversed its decision approximately a week after the occurrence of the incidence and returned O'Neal back to service while continuing to hold Claimant out of service pending the investigation and outcome of the investigation.

The Board has reviewed the several procedural objections raised by the Organization in defense of Claimant and finds them not to be valid. We find that Claimant was provided with a fair and impartial hearing though admittedly it was not handled perfectly but this did not prejudice Claimant in any major way. We find that the difference in the way in which Carrier treated O'Neal and Claimant, specifically, returning O'Neal to service while ultimately determining to dismiss Claimant did not, as the Organization argued, constitute disparate treatment. There is no evidence in this record proceeding that O'Neal directed threats toward Claimant that imperiled his physical safety whereas, all testimony rendered and written statements submitted prove without doubt that Claimant threatened O'Neal to harm him physically. Thus, we conclude that even though O'Neal should have contained himself in light of the threats directed at him by Claimant and not engaged Claimant by continuing his participation in the diatribe in this manner, nevertheless it was Claimant and not O'Neal who was the provocateur and aggressor in this verbal interchange and encounter.

So finding on the merits, the Board rules to deny the Claim in its entirety.

**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 28th day of November 2017.**