

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42825
Docket No. MW-43214
17-3-NRAB-00003-150470**

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 on Mr. J. Fogle by letter dated March 31, 2014 for alleged violation of ‘*** GCOR 1.6 Conduct: 1) Careless of the safety of themselves or others; 6) Quarrelsome; 7) Discourteous; GCOR 1.7 Altercations; GCOR 1.9 Respect of Railroad Company; Violence in the Workplace Policy 1803; and Workplace Harassment – Including Sexual Harassment Policy 1300.’ in connection with his alleged ‘... “... altercation with and threats to other employees and conduct unbecoming of an employee in violation of the violence in the work place policy, discrimination and harassment policy and other related rules on Thursday, March 6, 2014”’ was on the basis of unproven charges, excessive and in violation of the Agreement (System File J-1434D-501/8-0024 DME).**
- (2) As a consequence of the violation referred to Part (1) above, Claimant J. Fogle shall ‘*** be compensated all lost time, be made whole of all losses, including months of service credit with the Railroad Retirement Board, until he is returned to work and have any reference to the investigation removed from his personnel record as outlined in Rule 34(6) of the effective Agreement.”**

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 J. Fogle had established and held seniority within the Carrier's Maintenance of Way Department. In and around the time the events at issue occurred, Claimant had been employed by the Carrier four months shy of eight years having a hire date of July 25, 2006. On the date of March 6, 2014, the date giving rise to this dispute, Claimant was assigned and working as a Material Truck Operator and had held this position for the last three years of his employment.

In and around 9:30 A.M. Claimant was directed by James (Jim) Manning, Roadmaster of Quad Cities Division, Davenport, Iowa to load up some 112 pound rail and to get ready to follow the rail detector as rails needed to be changed out. At the same time, Manning contacted Nahant section crew Foreman John Tady along with crew members J. Bergendahl and V. Rivera to also follow the rail detector and perform the same work of changing out rail. Prior to 1:30 P.M., Claimant had a job briefing with Supervisor, Rail Detector Jake Ward which entailed his proceeding to Marina Crossing and waiting for a section crew to arrive to help him change rail. The Nahant section crew was directed to proceed to the Marina Crossing in Fairport, Iowa as one rail at the end of the crossing needed to be changed out. Claimant arrived at Marina Crossing first and remained sitting in his truck awaiting the arrival of Foreman Tady and his two crew members. Tady and his two crew members arrived ten minutes later and upon arrival remained seated in their truck. Shortly thereafter, Claimant exited his truck with note book and pen in hand and walked over to Foreman Tady's truck with the sole purpose of receiving a job briefing from Tady.

Claimant approached Tady's side of the truck and as Tady had only rolled his window partially down, Claimant needed to mount the running board in order to talk to and confer with Tady face to face. According to Claimant, he then asked Tady what the plan was and Tady responded there was no plan and then turned his head away from him. According to Tady, in answer to Claimant's query he responded by informing that there was no plan yet as they were awaiting the arrival of the Signal Maintainer, A. White. Claimant next asked Tady if he was getting track and time to

which Tady responded in a very rude way, I don't know what I'm doing yet. According to Tady, Claimant's question to him was, who would be getting track authority to which he responded, that it would probably be him. Claimant next asked Tady if he was the Employee-in-Charge (EIC) and, in response, Tady just ignored him. Claimant then said to Tady why don't you show me some respect and roll the window down to which Tady responded, he wasn't going to get any respect and directed him to get the fuck off his truck and fuck off. According to Tady's account of this verbal interchange, Claimant advised him to roll down his Goddamn window and show him some respect to which he told Claimant to get off his truck and go away. Claimant recounted he then told Tady that he, Tady may not like him but that he and Tady needed for the sake of the work to get along. Claimant asserted that Tady wasn't having any of it and that Tady started mocking him at which point Claimant told Tady to get out of his truck but Tady remained in his truck. According to Tady, after he told Claimant to get away from his truck, Claimant proceeded to call him names and cuss at him and he responded by complimenting Claimant on his language. Tady recounted that Claimant at this point invited him to exit his truck in an attempt to do him physical harm and that he declined Claimant's invitation. When Tady did not get out of his truck, Claimant related he and Tady cursed at each other for a few seconds and he then walked away from Tady's truck to cool down and when he cooled down he then called Manning to inform him as to the verbal interchange that occurred between himself and Tady. Tady recounted that after he refrained from getting out of his truck at Claimant's invitation, Claimant continued to threaten violence and physical harm toward him whenever he saw him away from work. Tady related that Claimant then walked away in the direction of the front of the truck, turned and threw his pen at the truck and announced he wanted everyone in the truck to get out and declared he would beat everyone up. According to Tady, Claimant then proceeded to call section men Bergendahl and Rivera who had remained completely quiet and did not respond to the verbal confrontation between himself and Claimant, calling them racists names and directing insults at them both.

Revera's account corroborates Tady's account of what transpired in the confrontation that occurred between Tady and Claimant. After Claimant snidely told Tady to roll down his window and show him some respect and Tady said no to showing him some respect, Tady then said to Claimant, why don't you get off my truck. Claimant then stepped down and started to walk away from the truck but then turned around back towards Tady's side of the truck and said to Tady, you know what, you better hope I don't run in to you out there somewhere, I will beat your ass. As Claimant walked away again, he said to Tady, you're a punk ass bitch adding, as a matter of fact, I would kick all your asses. Rivera recounted this last declaration by

Claimant surprised him since he and Assistant Foreman Bergendahl had not said a single word throughout the encounter between Claimant and Tady. At this juncture, Claimant began yelling names at all three of us and he then asked Tady if he wanted to take care of it right now by getting out of his truck. According to Rivera, Claimant called the three of them, “nigger”; “fag”; “kike”; and “cocksuckers” pointing to each of us individually and stating you, you, and you, adding, he better not see us out. At that, Claimant then threw his ink pen he had in his hand at the windshield of the truck and stormed off to his truck. Rivera recounted he felt threatened and had no idea why Claimant had included him in his attack as he had had his window rolled up and had not spoken a single word to Claimant.

Like Tady’s and Rivera’s account, Bergendahl recounted that Claimant had already arrived at the site and after they arrived, Claimant remained in his truck for about 10 minutes before he exited his truck and walked over to speak to Tady. After Claimant mounted the running board, he asked Tady who was sitting on the passenger side of the truck what was the plan to which Tady replied, he was waiting the arrival of the Signal Maintainer. Claimant then asked Tady if he was getting track and time to which Tady replied, don’t know yet, we’ll wait and see. Claimant then remarked to Tady, why don’t you roll your window down and show me some fucking respect, Bergendahl noting that at this time, Tady’s window was rolled down about 5 to 6 inches. Tady then said to Claimant, get off the truck to which Claimant responded by saying a bunch of cuss words adding, wait till I see you outside of work, I’m going to fuck you up. According to Bergendahl, at this point, Claimant started cussing at him and Rivera although neither of them had said a word throughout the encounter between Claimant and Tady. Next, Claimant then threw his pen at the windshield of the truck and continued threatening Tady and cussing at all three of us according to Bergendahl, calling him a nigger and Rivera a kook. According to Bergendahl, this was not the first incident he witnessed Claimant making racial remarks asserting Claimant has blown up with just about everyone who works around him including Manning. To this day, Bergendahl recounted, Claimant still brags about the time he and Manning got into a screaming match then Manning fired him but as he walked away, Manning directed him to get back. Bergendahl described Claimant as a loose cannon and not very pleasant to work around when he is not sitting in his work truck elbows on the steering wheel and on his personal phone.

After Claimant apprised Manning of the verbal interchange he had with Tady, Manning withdrew the Nahant crew of its assignment and called in another crew to work with Claimant to replace the one rail at the site.

Although the eyewitness accounts of the verbal interchange that transpired between Claimant and Tady differ with respect to the precise language that was uttered by both, meaning the various swear words spoken by both and directed at the other, the sequence of events reported in their respective handwritten statements were almost identical. All accounts detail the arrival of Claimant, Tady and his crew to the site and all reference the same triggering event which started the confrontation between Claimant and Tady as Claimant's pique that Tady by not rolling down his window all the way to hold a discussion with him and answer his various questions, was interpreted by Claimant as Tady not showing him any respect. From that point going forward, Tady, Bergendahl and Rivera are in agreement that Claimant got angry at Tady when Tady told him he was not inclined to show him any respect and then ordered Claimant to get off his truck. Whether or not Tady was the first to utter a swear word during the verbal altercation that followed between himself and Claimant, specifically Tady telling Claimant to get off his "fucking" truck, all eyewitness' written statements including that of Claimant's make it crystal clear that Claimant elevated what began as a fairly reasonable verbal interchange between himself and Tady into a heated exchange of words that involved threats made by Claimant and directed to Tady and subsequently to crew members Bergendahl and Rivera to inflict personal harm to them. As proof Claimant was the instigator of the verbal altercation that occurred between Tady and himself the Board finds significant that Claimant himself provided the required substantial proof of wrongdoing at the investigation/hearing convened on March 14, 2014 to determine his responsibility for being in violation of Carrier's work place policy on violence and its policy on discrimination and harassment by reading the following written apology at the very outset of the hearing:

"I would like to take this opportunity to publicly be on the record to apologize to Mr. Taday, Mr. Bergendahl, and Mr. Rivera. I may have said some things in the heat of discussion that I'm not proud of. I was attempting to get a job assigned to me and done. I didn't feel as though I was getting your cooperation. I would also like to apologize to Ms. Ingram [Carrier official who conducted the investigation/hearing] and Mr. Manning for having to take the time out of their day for this hearing. I am sorry and hope you allow me the opportunity to put this behind us and move forward. Thank you."

The Board is persuaded that Claimant's apology substantiates the eyewitness accounts rendered by Tady, Bergendahl and Rivera as to the truth of what transpired between Tady and Claimant and that the altercation that ensued was initiated by

Claimant by voicing threats of bodily harm and swear words directed at Tady to begin with and at the end of the altercation directed to Bergendahl and Rivera as well. We are of the opinion that while an apology by Claimant helped to clear the air and was a good thing for Claimant to make for his own sake, the apology cannot negate his conduct and the violations of applicable Carrier policies he committed by having threatened to inflict bodily harm on his co-workers. Accordingly, we find that substantial proof was provided by the whole of the record evidence to support Carrier's decision to assess Claimant the discipline of dismissal as the appropriate disciplinary action to address his unbecoming conduct and infracting its policy on violence exhibited on the claim date in question.

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.