

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42877  
Docket No. MW-43680  
18-3-NRAB-00003-160455**

**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  
(Railroad)**

**STATEMENT OF CLAIM:**

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

- (1) The discipline (dismissal) imposed upon Sectionman S. Gandy by letter dated March 3, 2015 for alleged violation of MWOR 1.6 Conduct in connection with his alleged ‘... quarrelsome/discourteous behavior with your foreman while setting off at approximate MP 70.5 on the Forsyth Subdivision on Friday, January 30, 2015 at approximately 12:30 pm..’ was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File B-M-2841-E/11-15-0335 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Gandy shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record cleared of the charges leveled against him and he shall be made whole for all wage loss suffered including loss of wages to attend the investigation.”**

**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 Friday, January 30, 2015 an incident occurred between the Claimant and Assistant Foreman Stewart. Foreman Stewart alleges that the Claimant raised his voice, used profanity and acted in a threatening manner. The Claimant acknowledges calling Foreman Stewart a liar and a thief, but denies the use of profanity and acting in a threatening manner. Foreman Stewart reported the incident to Roadmaster Powell who, on Monday, February 2, 2015, withheld the Claimant from service. A Notice of Investigation (NOI) was issued that day for a February 11, 2015 Investigation, which was followed by a March 3, 2015 dismissal for violation of MOWR 1.6 Conduct (quarrelsome/discourteous behavior). When the above-noted claim, filed on Sectionman Gandy's behalf, was not resolved on the property, the matter was referred to the National Railroad Adjustment Board for Arbitration.

The Carrier asserts that the charge is supported by substantial evidence, that language used was not simply "shop talk," that the Board should accept the credibility determinations of the Conducting Officer and that it was not necessary to prove intent. The Claimant committed a stand-alone dismissible violation, but if only a Serious violation, it was his second in less than a year, and that, too, justifies dismissal. The Organization requests leniency, which is the Carrier's prerogative, not the Board's, nor should the Board substitute its judgment for that of Carrier management. The Investigation was timely and was fair and impartial. Although Rule 1.6 was not entered into evidence, the relevant portion was included in the NOI and read into the record. The Organization did not show that alleged procedural violations prejudiced the Claimant. Should the claim be sustained, the Claimant is entitled only to reinstatement with seniority intact and compensation for lost wages offset by outside earnings. The Board is not authorized to change the terms of the negotiated health plan as it applies to reinstated employees.

The Organization insists that the Investigation was not fair and impartial because Rule 1.6 was not indicated in the NOI, indicated or entered into evidence during the Investigation or provided in the on-property correspondence. The Investigation was not timely and the Carrier did not call all necessary witnesses. The Carrier cannot prove that a Rule not introduced was violated. The Organization has shown that language used was simply shop talk and was not threatening. The dismissal was punitive, not corrective. The Claimant responded to Foreman Stewart's giggling at an injured employee. At most a written reprimand would be appropriate. NRAB awards indicated that Rule 40G remedies should include lost overtime wages and reimbursement for premiums, deductibles and co-pays covered by health insurance had the Claimant not been wrongfully terminated.

The Board has noted previously that the Carrier's failure to introduce the Rule(s) that the Claimant allegedly violated is likely to render the Investigation in violation of Rule 40A because the Investigation was not fair and impartial. There are rare exceptions, but this case is an exception for two reasons. One is that Rule 1.6 Conduct may be the best-known of all of the MWORs; known to the Organization, those it represents and Boards that must consider claims arising from alleged violations resulting in discipline. The second reason, specific to this case, is that while the Rule itself was not introduced, the Investigation transcript documents more than one mention of the quarrelsome/discourteous standard against which the Claimant's conduct was measured.

The Organization's assertion that the Investigation was not fair and impartial because not all material witnesses were called is unpersuasive. The Investigation record includes statements from Randy Saliba, who was accidentally sprayed with hydraulic fluid, Nekoda Dietz, who witnessed the accident and Art Jordan, who wrote that he heard the Claimant "loudly expressing that he had more ammunition for a harassment case" and that Foreman Stewart "had shorted him of overtime that he deserved." Mr. Dietz wrote that "one of the coworkers" loudly asked Foreman Stewart why he giggled after the accident. Mr. Saliba wrote that there was a disagreement between the Claimant and Foreman Stewart after the latter had laughed for an unstated reason. The Board notes that none of these statements either confirms that the Claimant cursed Foreman Stewart or that they could say with certainty that no cursing took place. The Board further believes that if additional employees mentioned in the Organization's on-property appeal had had

additional exculpatory information, the Organization would have introduced additional statements. It is believed that in-person testimony from the three whose statements are in the record would not have elaborated on those statements and therefore, would not have shed additional light on the incident.

The Organization has also asserted that the Investigation was untimely and thus not fair and impartial. Despite the statement in the NOI that the Carrier's first knowledge was February 2, 2015, the investigation transcript makes clear that first knowledge was on January 30, 2015. Foreman Stewart testified that he informed his supervising Roadmaster of the incident between 1500-1600 hours that day. Roadmaster Powell testified that Foreman Stewart called him the afternoon of January 30, 2015. Because knowledge of the incident came to Roadmaster Powell after hours, he did not remove the Claimant from service until Monday, February 2, 2015. According to Roadmaster Powell, when he spoke to the Claimant, "there wasn't an elaboration on the events that happened on the 30th. It was to be dealt with with the investigation." Roadmaster Powell knew no more about the incident on February 2 than he did on January 30, which must stand as the date of first knowledge.

Rule 40B requires that when an employee is withheld from service the Investigation must be held within ten days. Thus, the meter runs, so to speak, from the date the employee is withheld from service. The February 11, 2015 investigation was held within 15 days of the incident and within ten days of the date the Claimant was withheld from service, making the Investigation timely in accordance with both Rule 40A and Rule 40B.

Turning to the charge itself, the Board acknowledges that railroading is an industry in which harsh language, if not the norm, is not uncommon. Maintenance of way work can be physically difficult and dangerous as well. One form of response to such an environment seems to be language inappropriate in polite society. But even in this industry, context is critical. Harsh language, to include the "f-word" and other expletives that some may find offensive, may be used in a general, descriptive, reactive, impersonal manner or in a directed, personal, insulting manner. If the former, such language may well pass as "shop talk" in an environment in which such talk is heard frequently, even if not daily. If the latter, such language is properly viewed as personal, insulting, possibly challenging and

therefore, properly placed in a different category than shop talk. At worst, such language becomes “fighting words,” that may trigger forms of violence in the workplace.

The Board does not dispute ADMP Shuland’s implicit conclusion that the Claimant’s language on January 30, 2015 crossed the line between “shop talk” and inappropriate, personally-directed invective. Foreman Stewart’s description of the language the Claimant used, made explicit in a memo Foreman Stewart wrote following the incident, is viewed as credible as opposed to the Claimant’s self-serving denials. Whether Foreman Stewart was giggling at a joke that he had heard or at the accident itself, with the former deemed more likely, the Claimant did not have license for the tirade directed at his Foreman. The Board finds substantial evidence that the Claimant was quarrelsome/discourteous in violation of Rule 1.6 Conduct.

At a minimum, the Claimant’s violation can be characterized as Serious. He is a relatively short-term employee, hired in April 2011, with a Formal Reprimand and two 30 day record suspensions. This is not a record that cries out as a mitigating factor. Moreover, the last record suspension, with a 12 month review period, was assessed on February 11, 2015. The January 30, 2015 incident under consideration herein occurred two days after the incident that led to the record suspension and the decision to dismiss the Claimant is dated March 3, 2015. If the January 30 incident is considered only a serious rather than a dismissible violation, it came well within the 12 month review period. Under the circumstances, this Board finds no justification for setting aside the dismissal.

**AWARD**

**Claim denied.**

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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 10th day of January 2018.**