Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 43120
Docket No. MW-43715
18-3-NRAB-00003-160482

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Indiana Harbor Belt Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (dismissal) imposed on Mr. L. Williams by letter dated October 13, 2015 for alleged violation of NORAC General Rule D on September 10, 2015 for alleged acts of hostility when attending a job briefing while on duty was without just and sufficient cause and in violation of the Agreement (System File 15-148-IHB).

(2) As a consequence of the violation referred to in Part (1) above, Claimant L. Williams shall now be reinstated to service and be compensated '... for all lost time and wages restoring all rights and benefits and expunge his personnel record removing assessed discipline and any and all reference of this issue from the record."

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.

After Investigation completed on October 1, 2015 and by letter dated October 13, 2015, the Claimant – an employee in the Carrier's service since May 2006 – was dismissed for allegedly making disrespectful, belligerent and threatening remarks to an Assistant Supervisor along with other threatening actions on September 10, 2015.

While a number of witnesses were presented at the Investigation, the relevant testimony is set forth below.

Assistant Supervisor E. Ritter testified that at the conclusion of the morning safety meeting on September 10, 2015, the Claimant stated that he had a comment to make and the Claimant explained that he received a field SET (a federally mandated safety observation program) on the previous day for not wearing his shin protectors and that it was bullshit; he should have just been stopped and told to put on his shin protectors; he should not have received an observation failure; he felt the Carrier was out to get him; and that all of the employees should be watching their backs. Tr. 59. Ritter testified that he was the individual who wrote the observation failure on the Claimant. Tr. 66.

According to Ritter, the Claimant was asked at the meeting by Track Supervisor D. Flores if he was wearing his shin protectors as required and the Claimant responded that he was not, but the Claimant also stated that Flores didn't follow all of the rules either. Tr. 59-60. Ritter testified that there was discussion about whether rules were being followed and Ritter believed the conversation was "getting out of hand", so Ritter directed Welder S. Cwik to lead morning stretches. Tr. 60. Ritter testified (id.):

> **"A. ... Mr. Williams was very disgruntled and pointed his finger at me and said, "You just wait. You will get yours." I asked Mr. Williams, "Are you threatening me?" and he said again even louder, "You just wait. You will get yours."**

According to Ritter, "... by the look on his face and the way he was screaming at me, I felt very threatened and told Mr. Williams to come back to my office." Id.

Ritter then testified that as he was walking with the Claimant and another employee, J. Trammell who followed the Claimant and Ritter (Tr. 61-62):

> **"A. ... As Mr. Williams got about halfway to the office, Mr. Williams turned around and very violently said, "What, are you sizing me up?" I said, "Excuse me?" And again Mr. Williams said, "What, are you fucking sizing me up," with his fist balled and staring right through me. I said, "No, I am not," and continued to walk around him before he hit me.**
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> **As we got into Mr. Flores' office I told Mr. Flores that Mr. Williams was threatening me, and I wanted the police called, and Mr. Williams removed from service, as I felt very threatened that Mr. Williams was going to attack me.**
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> **At this time I gave Mr. Williams a direct order to sit in my office until further notice. Mr. Williams said he was sick of my direct orders, and he wasn't going to listen to any of them. ...**
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> **Mr. Williams then chose to walk out of my office, back into the front break room, where he had been previously told not to go. I followed Mr. Williams for a few steps and said, "I am giving you a direct order to wait in my office until further notice."**

According to Ritter, he determined that the Claimant was not going to follow his order; the Claimant was getting angry; Ritter was afraid of being attacked by the Claimant; and Ritter then told Supervisor Flores to call the Carrier's police. Tr. 62.

Flores testified that when the Claimant spoke up after the meeting, he "... told everyone he had received a noncompliance safety observation the day before for not wearing his shin protectors ... [and] said it was bullshit, and he said that the supervisors and the company are out to get them, so they better watch their backs ... [and] also said he was sick of the company's petty ass rules." Tr. 138-139. Flores further testified he heard the Claimant tell Manager of Track Maintenance V. Reyes that he told Ritter "you are all going to get yours." Tr. 141.

The Claimant testified that after Ritter asked if anyone had comments, concerns or complaints, the Claimant told everyone that he had received a noncompliance safety observation the day before for not wearing his shin protection. Tr. 203-204. Specifically, according to the Claimant, he said "I have a comment ... [e]veryone need to pay close attention to what you are doing, because they are going around writing everybody up with fail SETs, whether you are right or wrong ... I got a writeup today for shin protectors, and I haven't even started grinding." Tr. 204. The Claimant also testified "[t]hat's why I was upset." Id. The Claimant further testified that Ritter told Cwik to start the morning exercise and then, according to the Claimant (Tr. 212):

> **A. ... I had said, "You know, them guys be playing with people all the time. They day will come. Just like when Parnitzke and them did what they did, just like when Mr. Flores had the PPE guy come one day, and he thought he was coming for me or Steve Smith, and he came for Mr. Flores."**
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> **I made that statement just like that in front of everybody, and that's when Mr. Ritter jumped up in, "How about are you threatening me?" He just came out of the blue, nowhere, and I looked like I was surprised.**
>
> **"Are you threatening me?" I said, "No, I am not threatening you." "Are you threatening me?" I said, "No, I am not threatening you."**
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> *** * ***
>
> **Q Were you mad?**
>
> **A I was - - I was a little upset, because he had wrote me a fail SET the day before, and I didn't - - I haven't even started grinding. He has stopped me before I even started, that's why I was upset.**

The Claimant testified that Ritter "... was standing over me, hitting the table like you know, 'are you threatening me' ..." and then Ritter told the Claimant to follow him to his office. Tr. 213-214. The Claimant testified that he then told Trammell to come with as a union representative "... because you guys are not going

to have me in the room by myself ...", which Trammell did. Tr. 214. According to the Claimant, Ritter then stated to Trammell that "I am giving you a direct order to get out of here ...", which Trammell complied with. Tr. 216.

The Claimant further testified (id.):

> **"Q It's been testified to by Mr. Flores that you stated to Victor that you did say "you all are going to get yours"?**
>
> **A Yes. I said "you all are going to get yours, your day will come, your day will come." It's like karma."**

The Claimant also testified that he was pulled out of service and that Ritter followed him. Tr. 218. According to the Claimant (id.):

> **"A ... When I turned around and backed up, I had a pop in one hand and a lunch bag in another hand. I said, "Why are you walking on my heels, man? What are you doing? Are you trying to size me up?" I say, "I am going. You all pull me out of service already. I am getting my bag and going."**

The Claimant denied that he had his fists balled up or that he threatened Ritter. Tr. 223-225.

Trammell testified that at the meeting he heard Ritter ask the Claimant "are you threatening me?" as Ritter leaned over toward the Claimant and he heard the Claimant respond "No, I'm not ... but everyone has their day" or "everyone's day comes" ..., which Trammell took to mean "like karma comes around ... if you do something bad, something bad happens to you later in life." Tr. 324, 328. According to Trammell, Ritter told the Claimant to go to the office. Tr. 324. Trammell testified that he followed Ritter and the Claimant and Ritter asked Trammell what he was doing, to which Trammell responded, "I am going to act as his union rep ... I am his union president" and Ritter responded with a direct order for Trammell to leave which Trammell did so as to not be insubordinate. Tr. 325-326. According to Trammell, he did not witness the Claimant ask Ritter if Ritter was sizing him up. Tr. 330.

The initial question before the Board is whether substantial evidence supports the Carrier's position that the Claimant engaged in the charged misconduct? If that burden is met, the question becomes whether the amount of discipline imposed was arbitrary. See First Division Award No. 27218:

> **"The standard of review of discipline cases before the Board addresses two areas of inquiry. The first area of inquiry looks to whether substantial evidence in the record supports the Carrier's determination that the employee engaged in misconduct. If that question is answered in the affirmative, the second area of inquiry looks to whether the amount of discipline imposed was arbitrary."**

Further, in determining whether substantial evidence in the record exists, "[a]bsent compelling reason in the record, it is not the function of the Board to make de novo credibility determinations ...." First Division Award No. 26852. To decide this case, we do not make credibility determinations but, as explained below, we will take the differing versions of the events at face value as testified by the relevant witnesses.

The Carrier's Rule D provides that "[a]cts of insubordination, hostility or willful disregard of the Company's interest are prohibited." Substantial evidence shows that the Claimant violated Rule D.

In making that determination, the Board needs to go no further than the Claimant's testimony as corroborated by Trammell. As set forth above, the Claimant testified that on the day of the incident, he was "upset" because Assistant Supervisor Ritter wrote him up the previous day; the Claimant stated to Ritter that "[t]hey day will come" and the Claimant later told Ritter "[a]re you trying to size me up?" As further set forth above, Trammell testified that the Claimant told Ritter "everyone has their day" or "everyone's day comes". Under a substantial evidence standard – and without considering Assistant Supervisor Ritter's version that the Claimant's statements were more threatening – the versions offered by the Claimant as corroborated by Trammell amounted to a threat made by the Claimant to Assistant Supervisor Ritter.

The argument that the Claimant was only explaining "karma" does not change the result. As explained by Trammell, he took the Claimant's statement to mean "like karma comes around ... if you do something bad, something bad happens

to you later in life." With the Claimant "upset" because of the previous day's write-up by Ritter followed by the Claimant's statement to Ritter that his "day will come" as explained by Trammell which means "... if you do something bad, something bad happens to you later in life", under the substantial evidence standard, the Carrier's position that the Claimant's statement that Ritter's "day will come" is a threat to Ritter and in violation of Rule D.

The next question is whether dismissal was arbitrary? In this case, we find that dismissal was excessive and therefore arbitrary.

For this determination, we look to Assistant Supervisor Ritter's testimony (as basically corroborated by Flores) and accept it as given. According to Ritter, the Claimant told him "You just wait ... [y]ou will get yours"; the Claimant was "screaming" at him; and the Claimant asked Ritter "'... are you fucking sizing me up,' with his fist balled and staring right through me." That is certainly a threat having more force than the statements as testified by the Claimant and Trammell.

"Discipline is meant to be corrective ... [and u]nless the demonstrated misconduct is sufficiently serious so as to warrant immediate dismissal without regard to prior disciplinary actions, that corrective goal is accomplished through progressive discipline consisting of increasing amounts of discipline (e.g., suspensions) to get the message through to the employee that he or she must follow the Carrier's Rules." First Division Award No. 28215.

The Carrier argues that the Claimant has exhibited "poor work quality" and lists a number of write-ups in the Claimant's personnel record, which the Carrier characterizes as showing "... a poor attitude throughout his career ... [with] recorded and anecdotal reports of poor performance at work." See Carrier Submission at 11. What is missing is evidence of prior suspensions for misconduct that would show that progressive and corrective discipline has not worked for the Claimant. See the Claimant's "Employee's Past Record" attached to the Carrier's Submission (no prior disciplinary suspensions).

The statements made by the Claimant to Ritter were serious – whether viewed from the Claimant's perspective or from Ritter's perspective. However, even accepting Ritter's version, we are unable to find that those statements were sufficiently serious in and of themselves to warrant dismissal of an employee who has been in the Carrier's service since May 2006 (with the Carrier describing him as "a fairly senior employee" – Carrier Submission at 11). While threats are obviously

prohibited, there is no requirement that all cases of threats must be met with dismissal as opposed to something less as progressive and corrective discipline. Even coupled with the Claimant's prior record of write-ups cited by the Carrier, we find that even given the statements attributed to him by Ritter, there is not a sufficient demonstration that the Claimant with his years of service with the Carrier will not benefit from progressive and corrective discipline and conform his conduct accordingly.

Dismissal was therefore excessive and arbitrary. We shall therefore require that the Claimant be reinstated to his former position without loss of seniority. However, given that the Claimant threatened Ritter, a strong corrective message needs to be sent to the Claimant that he cannot make those kinds of statements to any employees. To send that corrective message, we find that the Claimant's reinstatement shall be without backpay. That long-term suspension will, in our opinion, send the message to the Claimant that he cannot threaten other employees – even subtly as the Claimant asserts, with notions of "karma."

If the Claimant believes that he is being mistreated by supervision with improper instructions or write-ups, his obligation is "... to adhere to the fundamental requirement of labor relations that employees are to 'obey now, grieve later'". Second Division Award No. 13816.

Finally, we have considered the Organization's procedural and other substantive arguments and find them insufficient to change the result. However, we note that prior to the Investigation, the Organization's Assistant General Chairman sent a letter to the Carrier which was given to the Hearing Officer asking 27 questions which the Organization referred to in the Investigation as "... a qualifying letter ... [i]t's just to determine whether or not you will be able to conduct yourself as a fair and impartial gatherer of facts." Tr. 10; Investigation Exhibit C. There is no requirement for a Carrier hearing officer to answer such a letter. The hearing officer's objectivity and qualifications are demonstrated by the manner in which the record is developed – and in this case, we find that the hearing officer met those responsibilities.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 30th day of May 2018.