

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43679
Docket No. MW-44432
19-3-NRAB-00003-170509**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

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

PARTIES TO DISPUTE: (

(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The discipline [thirty (30) day record suspension with a three (3) year review period] imposed upon Track Inspector W. Lauderdale by letter dated February 29, 2016 for alleged violation of MWOR 1.6 Conduct in connection with his alleged insubordination and discourteous behavior towards RDM Kleman and ADE Heusler on January 19, 20 and 21, 2016 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-16-D040-10/10-16-0200 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant W. Lauderdale 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.

As the Carrier describes it, on January 19, 2016 Assistant Division Engineer Heusler noticed a frog was missing five bolts and specifically instructed the Claimant to report the defect in TIMS. The next day Heusler checked and found no report. When he spoke to the Claimant about it, the Claimant's response was to stare at Heusler, cross his arms, refuse to respond and become "very agitated." The Claimant was shown a picture on a phone about another instance of inadequate performance. Roadmaster Kleman, who was also present and who confirmed Heusler's description of events, stated the Claimant looked at the phone and "basically [threw] it onto the table." Both Kleman and Heusler deemed the Claimant's conduct to be inappropriate and aggressive.

The Organization sees the January 20 exchange differently: following a morning job briefing, Kleman asked to speak with the Claimant, who complied. He was asked to provide reports and did. Though the Carrier assumes the Claimant was insubordinate and discourteous, this is based on Kleman's and Heusler's subjective opinions. A review of the record indicates the only employee being discourteous and insubordinate was Heusler. In the Organization's assessment, Heusler and Kleman tried to provoke the Claimant and repeatedly asked him the same questions. Despite this, the Claimant maintained his composure.

Both Carrier witnesses present at the time of the alleged conduct corroborated allegations that the Claimant was unresponsive to supervision. Both described him as aggressive and agitated when he threw down a phone. This constitutes adequate evidence to meet the Carrier's burden of providing substantial evidence. The Board is persuaded that the conduct of management has been taken into consideration in the configuration of a penalty.

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 18th day of June 2019.