

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44837
Docket No. MW-47011
23-3-NRAB-00003-210697**

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 (dismissal) imposed upon Mr. V. Martinez, by letter dated May 15, 2020, for alleged misconduct and threats of violence was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-20-D070-9/10-20-0196 BNR).**
- (2) The claim* shall be allowed as presented because the appeal was not disallowed in accordance with Rule 42 upon cancellation of the Electronic Claims Handling Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant V. Martinez shall now have the discipline ‘... removed as it is excessive, without merit and it is in violation of the CBA. I ask this discipline to be removed from his records in accordance with Rule 40 of the current agreement. I request Mr. Martinez be reinstated to service with all seniority rights restored and all entitlement to, credit for benefits restored, including vacation and health benefits I request that Mr. Martinez be made whole for all straight time and overtime lost during this violation, not to be reduced by outside earnings obtained while he was removed from service. He is to be made whole for all health, dental, and vision care paid out during this dismissal. He is to get any general lump sum payments or retroactive general wage increases**

provided in any agreement that become affective (sic) while he was out of service.'

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.

Factual Background:

On the day in question, the Claimant was working as a sectionman laborer. The Carrier determined that the Claimant left "a threatening message on BNSF vehicle 21329 at approximately 0815 hours on September 26, 2019 at the Scottsbluff Depot while assigned as a Sectionman." The Carrier relies on the Claimant's arrest warrant, which was based on fingerprints and handwriting analysis, and deems hostility and threats of violence in the workplace to be utterly intolerable.

Position of Organization:

The Organization protests that the investigation, held May 15, 2020, fell outside the Rule 40 deadline, mandating that the claim be granted. It maintains the Carrier was on notice of the note as early as September 26, but the Claimant was not pulled from service for seven months. In its assessment, the contractual timelines are not changed by the State's criminal investigation.

As to the merits, the Organization maintains the Carrier cannot meet its burden of proof because there was no handwriting match between the Claimant and the person who left the note (Shannon admitted it was not a match); the cameras on the outside of the building did not show any entry to the building by the Claimant before or after working hours; Shannon could not produce the actual (or a copy of)

the allegedly threatening note, plus he gave testimony based on a seven month-old memory; the Claimant left the section house with his work group before the other work groups left and they had no knowledge of a note allegedly being left on the other section truck; the Claimant was not seen alone in the truck bay and does not go to that area as a matter of habit; the note that was allegedly left on the truck was signed by someone named 'Mark' when this is not the Claimant's name.

Position of Carrier:

The Carrier asserts the state's investigation was completed on April 17, 2020, the date of the warrant issued by the state of Nebraska. This became the date of the Carrier's knowledge, hence the investigation held April 27, 2020 was within the timelines set in the parties' collective bargaining agreement. Through mutual agreement of BNSF and Union Representation, the investigation was postponed until May 1, 2020. Shannon explained that he gathered handwriting samples from multiple individuals as a part of the investigation and submitted them to the state authorities in Lexington, Nebraska. According to Shannon, the report indicated the Claimant's was the closest handwriting sample. Shannon also indicated that the Claimant's fingerprints were the only ones on the tape and note (Official Transcript Pg. 11, Lines 1 - 8). The cameras only show the front view of the building and do not show the rear of the building or back entrance, meaning the Claimant could have entered without it being recorded.

Analysis:

We find it unreasonable to deem the Carrier on notice of the violation as of the moment it knew of the note, because the basis for holding the Claimant accountable, that is the state's fingerprint and handwriting analysis, was not available until the state finished its investigation. The state was in possession of the note and tape with the fingerprints and handwriting on it; the Carrier was not in a position to examine the crucial evidence or have it analyzed by experts. It was relegated to waiting for the state to perform these analyses. Hence, it was not on notice of the Claimant's alleged identification as the culprit until after the state's investigation was complete. It follows that there was no untimeliness problem in the case.

On the merits, we are persuaded that the state's findings of the Claimant's, and only the Claimant's, fingerprints -- not only on the tape, but also the note, coupled with the assessment that the Claimant's handwriting was the closest match to that of the note, operate together to constitute substantial evidence that the Claimant was the

most likely author of the note. The Carrier does not have to meet the burden of proof required in criminal cases, but has satisfied its burden when it has shown the Claimant to be the most probable perpetrator.

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 10th day of March 2023.