

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45151
Docket No. MW-47745
24-3-NRAB-00003-221122**

The Third Division consisted of the regular members and in addition Referee Diego Jesús Peña when award was rendered.

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

PARTIES TO DISPUTE: (

**(BNSF Railway Company (former Burlington Northern
(Railroad Company)**

STATEMENT OF CLAIM:

- (1) The discipline (dismissal) imposed upon Mr. M. Ziebart, by letter dated July 16, 2021, for alleged violation of MWOR 1.6 Conduct and MWSR 1.2.9 Horseplay in connection with his alleged threat of violence was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-21-D070-14/10-21-0224 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Ziebart shall now be reinstated to service, have his record cleared of the charges leveled against him and he shall be compensated in accordance with Rule 40G of the 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.

Factual Background

Claimant Mark Ziebert held the position of Machine Operator in the Carrier's Maintenance of Way Department for approximately 14 years prior to being dismissed for getting into an altercation with a coworker.

On June 21, 2021, the Claimant was assigned to a scrap pick up gang in Hastings, Nebraska. A coworker, Machine Operator John Unruh, tasked the Claimant with leading the morning group stretch. When the Claimant began the stretching regimen, Unruh turned his back to the Claimant and began speaking to other gang members. The Claimant kicked Unruh's rear end hard enough to startle him. Unruh turned around and told the Claimant that he was acting like a child and for that reason Claimant should go play on a swing set. As Unruh walked away, the Claimant approached Unruh and pulled a knife from his pocket telling Unruh that he would hang him by a swing.

Later that afternoon, Unruh reported the incident to his supervisor, Assistant Roadmaster Kiyoshi Hardwick. The next day Mr. Hardwick obtained statements from other coworkers corroborating Unruh's version of events. Mr. Hardwick also notified Carrier Senior Special Agent Amanda Voborny of the incident. Ms. Voborny conducted her own investigation and issued the Claimant a citation for Third Degree Assault pursuant to Nebraska law. Based on what Mr. Hardwick and Ms. Voborny learned, on June 22, 2021, the Carrier issued an investigation notice.

The investigation was conducted on June 30, 2021 in Hastings, Nebraska. At the investigation, Unruh testified that the Claimant kicked him in the butt and then pulled a knife at him. Mr. Hardwick introduced written statements from three crewmembers who corroborated Unruh's testimony that the Claimant pulled a knife out of his pocket in a threatening manner. The Claimant admitted that he kicked Unruh hard in the butt, but he denied pulling a knife out of his pocket. The Claimant also admitted that he routinely carried pliers and a box cutter while working but could not recall if he pulled out either his pliers or box cutter in a threatening manner. The Claimant also could not recall threatening to hang Unruh by a swing.

On July 16, 2021, the Carrier dismissed the Claimant for making a threat of violence against Unruh. The Organization appealed the discipline timely. Failing to resolve this claim on property, the Organization referred this dispute to the Board for adjudication.

Carrier's Position

The Carrier argues that the evidence supports its dismissal of the Claimant for violating Maintenance of Way Operating (MWOR) Rule 1.6, Conduct, and Maintenance of Way Safety Rule (MWSR) 1.2.9, Horseplay.

MWOR Rule 1.6 Conduct states:

1.6 Conduct

Employees must not be:

- 1. Careless of safety of themselves or others.**
- 2. Negligent**
- 3. Insubordinate**
- 4. Dishonest**
- 5. Immoral**
- 6. Quarrelsome or**
- 7. Discourteous.**

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the Company or its employee is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.

MWSR 1.2.9 states:

Horseplay

Conduct yourself in a way that supports a safe work environment—free of horseplay, practical jokes, and harassment.

The Carrier argues that it is obligated to protect its employees and maintain a workplace safe from horseplay, threats of violence, harassment, and intimidation. The

evidence also supports the Carrier's conclusion that that the Claimant violated MWOR 1.6 and MWSR 1.2.9. The Carrier also believes that dismissal was appropriate based on the facts and circumstances confirmed during the investigation.

Position of Organization

The Organization objects to the investigating officer's decision to allow the written statements from the Claimant's co-workers. The Organization maintains that these witnesses should have been called to testify since their written statements could not be cross-examined. It also argues that the Carrier failed to satisfy its burden of proof. It believes the evidence was insufficient to confirm whether the Claimant brandished any weapons towards Unruh.

Finally, the Organization maintains that the discipline imposed was excessive and unwarranted. It points to Unruh's admission that he did not feel threatened by the Claimant's conduct. It also points to the fact that Unruh waited several hours before reporting the incident to his supervisor. If the Claimant's conduct was truly threatening and harassing as the Carrier claims, then Unruh should have reported the incident immediately after it occurred.

Analysis

The Board sits as an appellate review forum in discipline cases. As such, it does not weigh the evidence *de novo*. The Board's function is not to substitute its judgment for that of the Carrier, nor decide this matter in accord with what the Board believes should have been decided had it been the Board's decision to make. Rather, the Board's inquiry is to determine whether sufficient evidence exists to sustain the discipline imposed by the Carrier. If there is sufficient evidence supporting the Carrier's decision, then the Board cannot disturb the penalty unless the record reflects that the Carrier's decision was unjust, unreasonable or so arbitrary as to constitute an abuse of discretion.

In discipline cases, the burden of proof is on the Carrier. Public Law Board 5229, Award 8 explains the Carrier's responsibility in properly satisfying its burden of proof:

It is our view the Carrier has the burden to persuade, through the trial transcript and other contractually relevant and acceptable evidence, that claimant is guilty as charged. The degree of proof required is by substantial evidence, which is more than a mere scintilla but less than a

preponderance. [We] do rely upon the determination of the trial officer as to matters of credibility and veracity, tempered by our own careful study of the transcript to determine whether the trial officer's conclusions were based upon reasonably persuasive evidence. [Emphasis added.]

The Board has carefully studied the record, particularly the transcript of the June 30, 2021 investigation, and has carefully evaluated and reviewed the arguments contained in the parties' submissions.

The Claimant admitted kicking Unruh hard enough to hurt him. Not only is kicking an unsuspecting coworker a violation of the rule prohibiting horseplay, it is an act of misconduct that could lead to dismissal.

Unruh also testified that the Claimant brandished a knife and threatened to hang him. Unruh clearly had personal knowledge of this incident. While the Claimant claimed not to have a "big hunting knife," he admitted having a pair of pliers and a box cutter in his pocket at the time of the incident. He did not recall if he pulled the pliers or the box cutter out of his pocket during the altercation with Unruh. He also said he did not recall telling Unruh he was going to hang him. The investigating officer had the opportunity to evaluate the credibility of both the Claimant and Unruh and chose to believe Unruh. The written statements from the non-testifying witnesses corroborated Unruh's testimony, while the Claimant's failure to recall whether he brandished a knife, pliers, or a box cutter or whether he threatened to hang Unruh undermined his credibility.

The Board finds substantial evidence supporting the Carrier's conclusion that the Claimant violated MWOR 1.6 and MWSR 1.2.9. For this reason, the Carrier had just cause to dismiss the Claimant. The Board agrees with Referee McBearty's statement in Third Division Award 21245 that childish, uncontrolled, or irresponsible outbursts accompanied by a physical or verbal assault cannot be tolerated. Such conduct is inexcusable. The Board finds the Carrier's decision to dismiss the Claimant was not unjust, unreasonable or arbitrary.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of February 2024.