

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 68, (Case No. 68)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

**William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
David D. Tanner, Employee Member**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing July 29, 2010, when Claimant, Victor M. Andujo (6563001) was issued a Level S 45-day Actual Suspension with 3 years probation by letter dated September 15, 2010, concerning his altercation with another employee on July 29, 2010. The Carrier alleged violation of MOWOR 1.6 Conduct and MOWOR 1.7 Altercations.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline, and reinstate with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing July 29, 2010, continuing forward and/or otherwise made whole."
(Carrier File No. 14-10-0179) (Organization File No. 180-13A2-102.CLM)**

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

On August 3, 2010, Claimant was directed to attend a formal Investigation on August 17, 2010, which was reissued with a corrected notice of August 5, 2010, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged altercation with another employee on July 29, 2010 at approximately 1000 at MP 74.01, Palm Ave.

You will be withheld from service pending the results of the investigation.

This investigation will determine possible violation of MOWOR 1.6 Conduct and MOWOR 1.7 Altercations."

On September 15, 2010, Claimant was notified that he had been found guilty as charged and was assessed a Level S-45 Day Actual Suspension.

It is the Organization's position that the Carrier did not meet its burden of proof. It asserted that the Claimant and the Organization were not furnished a copy of the transcript and because of that it was not allowed to make a thorough review of the transcript before it filed its appeal which was a violation of Rule 13. Based upon that procedural error alone it argued that the discipline should be set aside without even reviewing the merits. It further argued that even if the Carrier could produce evidence to support their charges which it did not do, the discipline was excessive in proportion to the allegations. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the Investigation was fair and impartial. In its December 9, 2010, letter of denial it addressed the Organization's allegation that it failed to provide a copy of the transcript to the Claimant and Organization as follows:

"It was Carrier's belief that the transcripts were mailed both to Claimant and the Organization. However, the Administrative Associate in the Engineering Department in charge of this task had just retired at that time and Carrier is unable to determine if in fact the transcripts were mailed.

I have been informed by the field that another set of copies of the transcript were mailed to the Claimant and Organization on December 6, 2010. If the Organization desires to present any new argument or offer any new evidence derived from its reading of the transcript, Carrier will not object so long as it is submitted to Carrier within sixty days from the date of this letter, thereby curing the Organization's sole objection in this case."

Turning to the merits the Carrier asserted that the testimony of the Claimant as well as all other witnesses verified there was an altercation between the Claimant and his co-worker Donald Inman, therefore, Claimant was guilty as charged. It closed by asking that the discipline not be disturbed.

On December 23, 2010, the Organization responded to the Carrier's offer to provide additional argument and/or evidence. It reiterated that the transcript was not provided in a timely manner pointing out that it was not furnished until 111 days after the conclusion of the Hearing.

It also argued that the officer who rendered the discipline was not the Hearing Officer, but he was the same officer who suspended the Claimant earlier and withheld him from service thus he could not make an unbiased decision. It again asked that the discipline be set aside and the claim sustained.

The Board has thoroughly reviewed the transcript and record of evidence and will first address the Organization's procedural arguments. As previously stated in Award No. 66 of this tribunal and based upon the unique facts of this case the Board has determined that the Carrier's offer to allow the Organization an additional opportunity to add new evidence and/or argument remedies the Carrier's failure to provide the transcript in a timely fashion. Additionally, the Organization argued that the disciplinary Officer could not make an unbiased decision because he suspended the Claimant from service prior to the Investigation. It is not uncommon in this industry for employees charged with serious offenses to be withheld from service prior to a Hearing. Claimant was charged with a serious offense and there has been no showing that his Investigation was not fair and impartial. The record reveals that the Claimant and Organization were not surprised by anything that arose during the Hearing and the Claimant was well represented and both were given the opportunity to provide additional argument and/or evidence. The Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

The Carrier alleged that the Claimant violated the following Rules:

"Rule 1.6 - Conduct

Employees must not be:

- 1. Careless of the 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 employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.

Rule 1.7 - Altercations

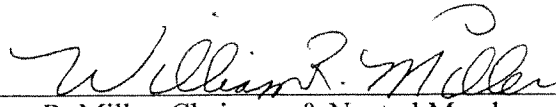
Employees must not enter into altercations with each other; play practical jokes, or wrestle while on duty or on railroad property."

Review of all testimony offered by each of the witnesses reveals a constant theme, that being that there was a verbal altercation between the Claimant and a co-worker D. Inman which escalated to cursing, finger pointing by both employees with Claimant banging on Inman's pickup door and stating that he would "**kick his ass**". At the Investigation the Claimant appeared on crutches and stated that his injury and part of his anger was due to the fact that Inman had closed the pickup door on his foot and hurt it. Whether or not that happened is unclear especially in view of the fact that when the Claimant was interviewed shortly after the incident he made no mention of any injury and even if it did transpire that did not give him an excuse to enter into a escalated verbal altercation with threats. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant violated Rules 1.6 and 1.7 as charged.

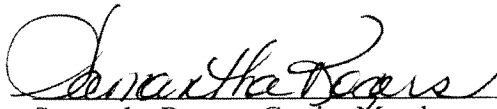
The only issue remaining is whether the discipline was appropriate. The Carrier has a legal obligation to provide a safe work place and in this instance it had a responsibility to correct the Claimant's behavior. The Carrier took into consideration that the Claimant had 17 years of service when it assessed the suspension that was corrective in nature. The Board finds and holds that discipline was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA) and it will not be set aside because it was not excessive, arbitrary or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David D. Tanner, Employee Member

Award Date: 10-12-11