

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4370

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 55

Case No. 55

STATEMENT OF CLAIM

Claim in behalf of R. T. Jones, Social Security Number 528-88-5294, Payroll Number 796133-7, that his dismissal from service on April 29, 1994 for alleged use of profane, vulgar language and altercation involving M. L. Henderson is arbitrary, capricious and on the basis of unproven and disproved charges in a violation of Rule 26 of the Agreement. It is respectfully requested that the claimant be returned to service with all seniority and other rights unimpaired and compensated for all wage loss suffered.

FINDINGS

The Claimant, a Mobile Track Laborer, was summoned to an investigative hearing to determine his responsibility, if any, "in connection with your use of profane, vulgar language and altercation involving M. L. Henderson, Section Gang Foreman, and B. Brooks, Assistant Section Gang Foreman, on or about 1600, April 8, 1944".

The Claimant and another employee were at work building a panel. The Claimant was aware that he was being displaced from his

position, and he was eager to telephone a "bump number" to enable him to displace on another position. This day was apparently the last day (prior to 3:30 p.m.) that the Claimant could report for a bump number without losing a day's pay. At around 3 p.m., the Claimant asked the fellow employee to drive him to the compound where a telephone would be available. The fellow employee agreed, but he told the Claimant to first get permission from the Section Gang Foreman.

When asked, the Section Gang Foreman asked the Claimant to "wait 30 seconds", but, for whatever reason, the Claimant became impatient and starting walking to the compound. Shortly thereafter, the Claimant's fellow employee picked him up in the truck. However, the Claimant was apparently too late when reaching the compound to complete the call as to his bump number.

At this time, the Section Gang Foreman also arrived by separate truck at the compound. In his testimony, he gave the following account of what occurred:

So, we all got out of the truck, and I started walking toward the door and [the Claimant] came out of the door cussing me, hollering, holding a pick handle, and threatening me. As I got close, [the Claimant] got closer; he started poking me with the ax handle; one time swung and caught me right--I just blocked it with this hand; one time he went inside the hand and hit me on the left shoulder, all this time cussing. And I told [the Claimant], I said "I'm not going to hit you and I'm not going to fight with you, Ray. Put down the maul handle and calm down." He says, "You're right; you're not going to hit me 'cause I'm going to kill your ass."

The Claimant agreed that there had been a "hollering" match between him and the Section Gang Foreman and admitted to having a

pick handle (or maul, as it is also called) in his hand, but he denied that he had actually used it to strike the Section Gang Foreman or that he had threatened him.

Other witnesses, however, support the Section Gang Foreman's version. A Track Laborer, who had been working with the Claimant and later was also at the compound, testified that he heard the Claimant using foul language toward the Section Gang Foreman. He also stated that the Claimant was "prodding him [the Section Gang Foreman] with a maul handle".

The Assistant Foreman also witnessed the incident. He testified as follows:

I went around and I heard some screaming and hollering. When I come around the truck, [the Claimant] has a pick handle, and he's screaming and cussing at Mr. Henderson, telling him "You've messed with me the last time." Said, "Because of you I'm going to miss a day of work" and run up to him, shoved the pick handle at him.  
 . . . . .

Q You could clearly see and hear [the Claimant] threatening Mr. Henderson?

A Yes, sir, I was right there. He was saying, "I'm going to kill you," cussing him every other word . . .

When the Assistant Foreman tried to intervene, he testified that the Claimant told him, "You back off, or you're next."

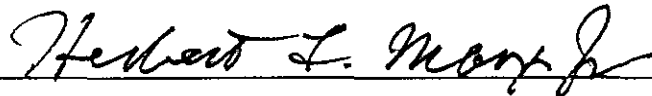
The Board finds the version of the incident, as related by the Section Gang Foreman and supported by witnesses, to be fully credible. It is obvious that the Claimant was upset at his failure to complete his call for a bid number. This, however, clearly did not justify his actions, physical and verbal, against a supervisor. The Carrier found this unacceptable conduct, and the Board has no

basis to find otherwise. In addition, there is some indication that the Claimant might have obtained his bump number prior to the last day. Further, according to the Claimant, he was offered the use of the mobile telephone while still at the work site, but the Claimant had decided it was inappropriate for him to use it.

Given the nature of the offense, the Board finds no basis for mitigation of the penalty, despite the Claimant's 17 years' service.

A W A R D

Claim denied.



HERBERT L. MARX, Jr., Neutral Referee

NEW YORK, NY

DATED: October 18, 1995