

PUBLIC LAW BOARD NO. 5850

Award No.  
Case No. 307

PARTIES TO DISPUTE:

(Brotherhood of Maintenance of Way Employees

(The Burlington Northern Santa Fe Railroad (Former  
(ATSF Railway Company)

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when Claimant, R. G. Smith, was withheld from service on July 24, 2006 and dismissed on August 28, 2006 for a violation of Maintenance of Way Operating Rules 1.6-Conduct and 1.7-Altercations when Claimant instigated a verbal altercation with a coworker on July 24, 2006; and
2. As a consequence of the violation referred to in part 1 the Carrier shall immediately return the Claimant to service with seniority, vacation and all other rights unimpaired, remove any mention of this incident from Claimant's personal record, and make Claimant whole for all time lost commencing July 24, 2006.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

Claimant commenced working on July 23, 2006 at 1800 hours and worked all the night into the morning of July 24 to install what the Carrier calls "a number 24 turnout." Apparently, the only opportunity to do this work was during the late evening and early morning hours of July 23 & 24, 2006.

Claimant and the Welder Foreman, Shells, are of different ethnic backgrounds.

The two got into a verbal altercation when Shells took umbrage at Claimant's racist remarks (referring to Shells as n\_\_\_\_\_), and threatening to kick Shells' butt. Claimant also made abhorrent remarks regarding Shells' wife who was staying at the motel.

When Shells went to his Supervisor reporting Claimant, the Supervisor called both in to find out what was said to whom and about whom.

The Supervisor, following guidelines, determined that Claimant was the aggressor and Shells the victim. They immediately suspended Claimant from service pending the outcome of an investigation:

"...to determine all facts and place responsibility if any in your alleged rules violations; 1.6 Conduct, item 6: Quarrelsome, item 7: Discourteous and Bullet Point: 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. And Rule 1.7 Altercations of the Maintenance of Way Operating Rules in effect Sunday, October 31, 2004 with revisions up to December 12, 2006."

Following the investigation, the Carrier determined that they had furnished sufficient evidence of Claimant's culpability for the charges and dismissed Claimant from service.

After reviewing the transcript, this Board fully agrees with Carrier's decision to dismiss.

It has been said before, and will probably be often repeated, that in discipline cases the Carrier shoulders the burden of proof.

In this case, it is rather easy to determine who was the aggressor as Claimant's testimony was a prefabrication of the facts.

Without citing page references and quoting where Claimant's testimony was less

than truthful was the incident of Shells' wife. When first interviewed, he stated that Claimant's wife was staying with him at the motel and he (Shells) was driving her around in a company vehicle.

In the investigation, when asked about the remarks he made concerning Shells' wife, he stated he never made such remarks as he doesn't know Shells' wife or if he has ever seen his wife.

When first interviewed, both Shells and Claimant stated they were unaware of anyone else overhearing the altercation (and it was an altercation although verbal), yet Claimant at that investigation came up with a form signed by 14 other employees of the gang in a non-notarized statement, with each alleging they witnessed nothing and heard nothing relative to the altercation.

There is testimony relative to the noise level in the work area. Working 1800 hours to 0600 hours, naturally lights had to be furnished. There were five lights each run by a generator. There was a backhoe and there were generated power saws. In fact, the testimony was that conversation were difficult, even when standing side by side.

When reviewing the decision to terminate Claimant, his past record was reviewed. It started out with two letters of accommodation followed by two incidents where discipline was imposed.

The Board does take into consideration the letters of accommodation, but in the two instances of discipline, undoubtedly the good of those accommodations had some effect on the two later instances of discipline. The accommodation letters cannot alter subsequent incidents of Rule infractions over and over. Besides, accommodation letters aside, the charges in this case were serious and Carrier, ever mindful of furnishing a

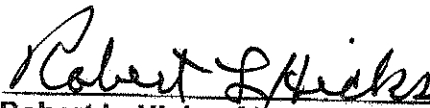
safe working environment, had no alternative than to dismiss.

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.



Robert L. Hicks, Chairman & Neutral Member



David D. Tanner, For the Employees



Samantha Rogers, For the Carrier

Dated: March 10, 2008