

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 371, (Case No. 371)**

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
Louis R. Below, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing September 23, 2020, when Claimant Ellison H. Charley (1189372) was dismissed for carelessness of the safety of himself and others, hostile and discourteous behavior when he conducted himself in an unprofessional manner at approximate MP 206.2 on the Gallup Subdivision on August 21, 2020, at approximately 1100 while working as a Machine Operator on TSCX1111 in violation of MWOR 1.6 and MWOR 1.7.**
- 2. As a consequence of the violation referred to in part 1, the Carrier shall remove this discipline with all rights unimpaired and pay for all wage loss including overtime (if applicable) commencing September 23, 2020, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File 14-20-0344) (Organization File No. 2417-SL13C5-2042)**

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.

The facts indicate that on Friday, August 21, 2020, Surfacing Gang TSCX1111 machines were tied up in North Chamber near MP 205.3. The plan on that date was to change the oil and filters in both of the machines then travel to Adamana in preparation for beginning work at that

site the following week. Claimant was the Tamper Operator on the gang and Mr. L. Williams, Jr., was the Operator of the Ballast Regulator. Mr. Williams completed servicing his machine around 1115 and advised Foreman Hoskie that he was ready to travel. Shortly, thereafter, Foreman Hoskie informed the Claimant that the plan was to travel to Adamana that day. According to Hoskie Claimant allegedly became argumentative and quarrelsome and threw a bolt in the direction of Hoskie while Hoskie was bent over sealing a five gallon bucket of oil and because of that Claimant was directed to attend a formal Investigation on August 28, 2020, concerning in pertinent part the following:

“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged carelessness of the safety of yourself and others, hostile and discourteous behavior when you allegedly conducted yourself in an unprofessional manner at approximate 206.2 on the Gallup Subdivision on August 21, 2020 at approximate 1100 while working as a Machine Operator on TSCX1111.

This investigation will determine possible violation of MWOR 1.5 Conduct and MWOR 1.7 Altercations.”

On September 23, 2020, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately.

It is the Organization’s position that the Carrier did not provide the Claimant with a “fair and impartial” Investigation because Foreman Hoskie who had key information regarding the alleged incident involving the Claimant was not called to testify. It argued only two people knew what transpired between Mr. Hoskie and the Claimant on August 21, 2020, and failure to call both participants involved in the incident was a fatal error. It asserted that the discipline should be set aside without reviewing the merit.

Turning to the merits, it reasserted only two people were involved in the alleged incident involving the Claimant and Mr. Hoskie and since Mr. Hoskie did not testify there was no evidence to refute Claimant’s version of the incident. The Organization further argued the Claimant is a good employee with 15 years of commendable service that was annoyed with his superior on the date in question in regards to moving the equipment. It stated Claimant did not recall using any profanity towards Foreman Hoskie although Claimant admitted he tossed a bolt, but not towards Mr. Hoskie. It concluded the Carrier did not meet its burden of proof and it asked that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that in the Organization’s appeal the Organization raised the objection that the Investigation “was not fair and impartial” because Foreman Hoskie was not in attendance at the Investigation and did not testify so it was impossible to find out the facts. The Carrier argued that objection was not valid because it was not raised during the Investigation and

since the Organization chose not raise that argument at the Investigation giving the Carrier the opportunity to properly address it while the Investigation was still open the Organization had waived the right to raise such argument in its appeal after the Investigation was closed. Carrier relied upon Third Division Award 22238 and other Awards to bolster its argument.

Additionally, it is the position of the Carrier that the claim is procedurally defective because it failed identify the governing Agreement under which it was filed or any Rule that was allegedly violated. It asked that the claim be dismissed and/or denied without reviewing the merits.

Turning to the merits, the Carrier stated the record shows that on August 21st the Claimant was involved in an altercation with Foreman Hoskie wherein Claimant cursed his Foreman which was quarrelsome and discourteous conduct and Claimant tossed a bolt from his machine in the general direction of his Foreman proving that Claimant was guilty as charged. The Carrier argued that the written statement of Foreman Hoskie and the testimony of Roadmaster Schlais confirmed Claimant's guilt after which it appropriately disciplined the Claimant. It asked that the discipline not be disturbed and the claim remain denied.

The Board has reviewed the transcript and record of evidence and is not persuaded by the parties' procedural arguments. It is determined that the case will be resolved on its merits.

Review of the Claimant's written statement regarding the incident reveals it stated:

"At 2:08 had an altercation with my Foreman Gerald. I was finishing up the oil change and putting stuff away and I was about to tighten the bolts on the #2 Work Head and he wanted to travel the machines. I showed him the bolt I was going to change out be change, but he kept walking and so I just threw it on the ground and it popped back up." (Underlining Board's emphasis)

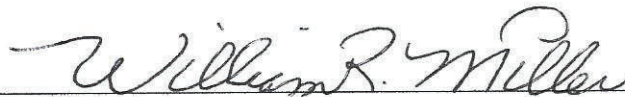
On page 12 of the Transcript, Roadmaster Schlais testified that she spoke with the Claimant and Claimant admitted to having an argument with Foreman Hoskie and then provided her with the aforementioned written statement in which he described the incident as an "altercation". He also admitted to throwing a bolt during the altercation in the vicinity of Foreman Hoskie.

In Foreman Hoskie's written statemen he asserted Claimant cursed Hoskie whereas Claimant stated he did not cuss his Superior. Roadmaster Schlais was unable to confirm whether Claimant directed foul language towards his Foreman, but assumed Claimant may have used improper language since Claimant admitted to an altercation with his boss. The Board will not make the same assumption, however, the Board is persuaded that Claimant acted unprofessional when he threw a bolt near his Foreman and was quarrelsome to a Superior who issued the Claimant a reasonable directive.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had a little over 15 years of service. Claimant's violation in this instance was his second serious violation within an active review period and made him subject to possible dismissal, however, Roadmaster Schlais testified on page 10 of the Transcript that Claimant was a good employee who on occasion needed some attitude adjustment. Based upon a generally good work record the Board finds and holds that discipline was appropriate for "attitude adjustment", but dismissal was excessive and is reduced to a lengthy suspension that is corrective in nature. Claimant will be returned to service with seniority intact, all benefits unimpaired, but with no back-pay. Because of the serious nature of the instant offense a Three Year Review Period should be attached to the Claimant's Disciplinary Record upon Claimant's reinstatement. The Board also forewarns the Claimant that after reinstatement the Claimant should be careful to adhere to all Carrier and Safety Rules as failure to do such could result in harsher discipline depending upon the severity of a subsequent violation.

AWARD

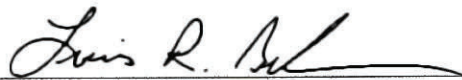
Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman & Neutral Member



Michelle McBride, Carrier Member



Louis R. Below, Employee Member

Award Date: July 25, 2022