

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 379, (Case No. 379)**

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
Jeffery L. Fry, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing May 17, 2021, when Claimant Jacob W. McCormick (0317404) was dismissed for being discourteous and quarrelsome towards Supervisor in the Amarillo South Yard at approximately 1045 hours on April 6, 2021, in violation of MWOR 1.6.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove this dismissal with all rights unimpaired and pay for all wage loss including overtime commencing May 17, 2021, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties”
(Carrier File No. 14-21-0166) (Organization File No. 2404-SL13C5-2109)**

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 Claimant was assigned as a Truck Driver on April 6, 2021. At approximately 1045 hours on the aforementioned date in the Amarillo South Yard Roadmaster R. Medlin was the Supervisor in charge. It was asserted Medlin approached the Claimant on duty and asked Claimant why he was not wearing his personal protective equipment (PPE) and allegedly Claimant’s response was less than professional and because of that Claimant was directed to attend a formal Investigation on April 20, 2021, that was mutually postponed until April 21, 2021, concerning in pertinent part the following:

“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your allegedly being discourteous and quarrelsome towards supervisor in the Amarillo South Yard at approximately 1045 hours on April 6, 2021 while assigned as Truck Driver.”

On May 17, 2021, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately.

It is the Organization's position that Claimant was denied a "fair and impartial" Investigation because the Hearing Officer acted in an unprofessional manner and he attempted to lead witnesses and was interruptive and threatened to postpone the Investigation until Claimant secured different representation. Based upon the aforementioned procedural errors it requested the discipline be set aside without reviewing the merits.

Turning to the merits the Organization asserted Claimant may have used two curse words, but they were not directed to Claimant's Supervisor. It argued the language spoken by Claimant was common "shop talk" and was not discourteous and/or quarrelsome towards Supervisor Medlin. It suggested that when Mr. Medlin directed Claimant to go to the depot to get PPE and Claimant stated "their shit is always locked up" that comment was not quarrelsome, Claimant was simply stating a fact and the conversation was elevated because a diesel semi-truck was running causing the Claimant to speak louder to be heard. It further argued as for the alleged statement "Oh here we fucking go again" that was an alleged statement of a frustrated individual who in this instance felt that his boss was always on his back about something. It pointed out that Claimant did not recall using the F-word and that Witness Coen Neuhold did not believe anyone present acted improperly. It reasoned the Carrier blew the incident out of proportion and if discipline was warranted (which it wasn't) it was excessive, therefore, it requested the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier the Investigation was held in a fair manner and the Hearing Officer acted in an appropriate manner whereas the Claimant's representative was unprofessional. It reasoned there were no procedural errors and it asked that the claim be resolved on its merits.

Turning to the record, the Carrier argued the Organization's attempt to mask the event as typical banter between employees was in error. It asserted Claimant intentionally acted in a discourteous, quarrelsome and disrespectful manner towards a fellow employee/Supervisor which was substantiated by Roadmaster Medlin and Supervisor of Welding D. L. Comstock. Additionally, it argued that after proving Claimant was guilty as charged it appropriately disciplined the Claimant as this was Claimant's Second Serious Violation (Level S) in an active review period and according to Carrier's Policy constituted a dismissible offense. In closing it asked that the discipline not be disturbed and the claim remain denied.

The Board has reviewed the transcript and record of evidence and will first address the Organization's procedural arguments. The transcript reveals some tension between the Claimant's representative and the Hearing Officer, however, the Board is not persuaded that the Organization was hampered in its defense of the Claimant. The case will be resolved on its merits.

Review of the record, reveals that when Supervisor Medlin and Comstock approached Claimant and Mr. Neuhold and Medlin questioned Claimant and Mr. Neuhold as to why they were not wearing all of their PPE and Claimant responded in a less than professional manner. Claimant's reliance upon Mr. Neuhold's statement as verifying that Claimant was not discourteous or quarrelsome is not particularly helpful because it states in pertinent part:

“...I do not believe either side was out of hand from what I heard when I was present.”

(Underlining Board's emphasis)

Neuhold clearly stated he didn't hear all of the conversation whereas Supervisor Comstock substantiated Roadmaster Medlin's recollection of the incident. Mr. Neuhold not hearing all of the conversation between Claimant and Medlin could be attributed to the fact that when Neuhold was asked where his hard hat was, he responded by stating that it was in the truck. At that time Neuhold went to the truck and retrieved his hard hat and put it on with no subsequent problems (See pages 10 and 11 of Transcript). Claimant should have responded in a like manner and followed Medlin's reasonable directive and gone to the depot that was only 100 yards away and secured the required PPE without the unnecessary commentary. The old adage is correct “think before you speak” as it fit the instant situation. The Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately seven plus years of service. This was Claimant's Second Serious Violation (Level S) in an active review period and in accordance to the Carrier's Policy for Employee Performance Accountability (PEPA) subjected Claimant to possible dismissal. This Board has repeatedly determined that every case must be judged on an individual basis regarding merits and appropriate discipline. The Board finds and holds that discipline was appropriate, 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



Jeffery L. Fry, Employee Member

Award Date: April 10, 2023