

**PUBLIC LAW BOARD NO. 7585**

**Case No. /Award No. 97**  
**Carrier File No.: 10-19-0239**  
**Organization File No.: C-19-D040-17**  
**Claimant: R. Prichard**

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**BNSF RAILWAY COMPANY** )  
**(former Burlington Northern Railroad Company)** )  
 )  
**-and-** )  
 )  
**BROTHERHOOD OF MAINTENANCE** )  
**OF WAY EMPLOYES DIVISION - IBT** )  
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**STATEMENT OF CLAIM:**

The Organization objects to BNSF's decision to issue Claimant a Level S 30-day Actual Suspension with a 1-year review period for his conduct when he entered into a verbal and physical altercation with a co-worker on March 21, 2019 at or near Elk Creek, NE in violation of Maintenance of Way Operating Rule 1.6-Conduct and 1.7-Altercations.

**CARRIER POSITION:**

On March 21, 2019, Claimant Prichard was working as foreman of the surfacing gang when he got into an exchange with M. Keller, who was operating the regulator with relatively little experience. Apparently, there were a number of people watching. At one point, Claimant got on the radio and told Keller to stop and go pull up a rock. Keller took issue with his tone of voice. He became upset and cursed into the radio: "There's too many fucking people watching me." Claimant told Keller to go to his truck to cool off, then came over to the truck to talk to him.

Claimant asked what the problem was and Keller responded that he, Prichard, was. Keller then exited the truck, putting his two hands against Claimant's chest as he went. Keller went back to work until Claimant came and told him to stop.

The Carrier maintains that Claimant contributed to the improper exchange and escalated the confrontation in contravention of applicable rules. In its view, the suspension it issued was the proper penalty and should be upheld. It notes that under Maintenance of Way Operating Rule 1.6 (7), "Any act of hostility, misconduct or willful disrespect, or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported."

**ORGANIZATION POSITION:**

The Organization contends the contact between Claimant and Keller was nothing more than a light bump that was unavoidable since the two were so close to each other when Keller exited the truck. In its view, Claimant was trying to alleviate the situation, and did not escalate it at all. He came to Keller's truck to see if he was all right. It maintains this in no way demonstrates the escalation implicit in the allegations made against Claimant. Indeed, the charge against Claimant was that he was disciplined for "improper conduct that occurred during a physical and/or verbal altercation." In its view, there is nothing in the record and/or the transcript of the Investigation which would support the discipline taken in this case. There simply was not a great deal of space between the two individuals when Keller exited the truck. There was no workplace violence, states the Organization; rather, the whole situation has been blown out of proportion. It concludes the discipline was completely unjustified.

**DECISION:**

Keller testified at the Investigation that he cursed over the radio because Claimant was telling him he "did it wrong" in front of "all these people watching me." He felt Claimant was embarrassing him in front of everybody. TR 69 He described the incident as follows:

So I was a little irritated and uh we had words about it. I told him if he wanted it done faster, he was gonna have to do it his self, and he told me that I bid the job and I needed to do it myself. So that's what I did. I proceeded to get out of the truck and go. And he was standing in the doorway, and you know, like everybody said, there just wasn't enough room to get by, so I just I don't know what you'd call it, but I didn't push him or anything. I just nudged by him, and our bodies touched, but uh I guess that's what this is all about. TR 69-70

Claimant admitted during the Investigation that he "hollered" at Keller on the radio, after which Keller cursed on the radio. TR48. He said he told Keller that if he was getting frustrated, he needed to go take a breather. He described the following as Keller exited the truck:

Mr. Keller uh I said, he he said he was frustrated. And I said, yeah, I understand that. When you bid a job, we need, I said well, you knew it was gonna kind of be frustrating, and we talked about that a couple weeks ago. Mike's uh said uh said something, and he exited the machine. I said, well, we still got to get the job done, and that's when he exit the machine. When he, I mean, excuse me, exited the truck. When he exited the truck, he slid by me, and I lost my, I don't know if I lost my balance. He kind of punched pushed into me. I hit uh backed into the door. As Mike was exiting, he

made a verbal comment and then walked up to his machine and started running the machine.

Eye witness testimony was largely consistent. C. Hall testified that he investigated the incident and found that no criminal offense had occurred. He did not voice an opinion regarding a possible rule violation because that was not his responsibility. He described the two men as “husky” stating it “I’d be hard to co-occupy that space without touching each other.” TR 29 J. Bartels said he was 75-200 feet away with no clear view of the truck, but saw no aggression, but possibly a light chest bump. M. Flynn stated that “Mike got in Ronny’s face and then tried to shove past him.” TR 36. He described the incident as a “belly bump” and saw no act of hostility or misconduct. TR 38

Correcting an employee in front of other employees is not the most sensitive way to supervise, but falls squarely within the performance of supervisory duties, since the alternative is to allow employees to perform poorly without saying anything if others happen to be in the area. However, using a tone of voice that is denigrating or which foments tension is improper. Claimant has admitted “hollering” on the radio. We find this “hollering” to match Keller’s description of the radio exchange which aggravated his frustration, resulting in cursing over the radio.

Claimant approached the truck to see if Keller was all right. The exchange that followed cannot be deemed improper on the part of Claimant. He allowed Keller to voice his frustration and responded to it truthfully: Claimant had bid on the job, so even if it was frustrating or if there was an audience, his job was to perform the duties of the job. We find nothing improper in these remarks, and the record does not establish that they were spoken in an unacceptable tone of voice. However, the record clearly evidences frustration on Keller’s part. When he pushed himself out of the truck, he made a choice to express his irritation by forcing himself past Claimant rather than asking Claimant to step aside. We do not find adequate basis in the record to deem this behavior to be misconduct on the part of Claimant. Flynn stated it was Keller who got in Claimant’s face, not the other way around.

We find Claimant’s misconduct to be limited to “hollering” on the radio in a manner that introduced tension into the situation. We do not find that Claimant aggravated Keller’s frustration when both were at the truck. We do not deem it necessary to determine whether the physical touching between the two was a shove, a push or a belly bump due to lack of space because our focus is on Claimant’s behavior, not Keller’s. We find Claimant did indeed engage in minor, non-violent caustic behavior which did not rise to the level of an act of “hostility, misconduct or willful disrespect, or negligence affecting the interest of the company or its employees.” The Carrier found, based on Keller’s statement, that Claimant took up space in the doorway by putting his chest out, and therefore contributed to the contact that resulted. We do not find the record sufficient to support a conclusion that Claimant contributed in an unacceptable way to the contact between the two employees.

**AWARD:**

The claim is granted in part. The Level S 30-day Actual Suspension with a 1-year review period shall be removed from Claimant's record, and shall be replaced with a Standard Formal Reprimand with a 1-year review period. If affected, seniority, vacation and all other rights shall be restored. Lost overtime shall be compensated at the overtime rate. Any discipline current at the time of his dismissal, including any on-going review period, shall resume in applicability to the extent of its remaining duration at the time of his discipline. Any other claims not expressly granted by this Award are hereby denied.

**ORDER:**

The Carrier shall comply with the terms of this Award immediately upon receipt of a fully executed copy thereof.

Dated: November 25, 2020



Patricia T. Bittel, Neutral Member

***Zachary C. Voegel***

Zachary Voegel, Labor Member



Samantha Rogers, Carrier Member