

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE**

and

Case No. 16

**Claim of F. R. Diaz**

Level S Actual Suspension

- Failure to Follow

Instructions and use of

Vulgar Language

**BROTHERHOOD OF MAINTENANCE OF WAY**

**EMPLOYERS DIVISION - IBT**

**STATEMENT OF CLAIM:** Claim on behalf of Machine Operator F. R. Diaz requesting removal of the Level S actual suspension and three-year review period from his record with seniority, vacation and all other rights unimpaired, and that he be made whole for all time lost.

**FINDINGS OF THE BOARD:** The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee, within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein.

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Maintenance of Way craft. The Board makes the following additional findings.

Claimant has worked for the Carrier since July 27, 1981. On October 24, 2011, Claimant requested permission from his Foreman, Obrey Nelson, to take an unscheduled vacation during Thanksgiving week. Since Claimant did not have any scheduled vacation days available, he requested to use floaters. Foreman Nelson testified that, at that time, his calendar was in his truck and the truck was in the shop. He testified that he therefore did not give or deny Claimant permission to take the requested days off but merely told Claimant that he would have to look at his calendar before making a decision. Mr. Nelson testified that Claimant responded that "he was going to take off" and that Nelson "couldn't tell him what to do." Moments later, Gang Roadmaster William Sneed approached Claimant as he was walking away. Mr. Sneed testified that Claimant - who was "cursing" and stating that Management cannot tell him what to do - then got into a van. He testified that he asked Claimant "twice to let down the window and he did not acknowledge me." He further testified that, in response, he walked around the van and told Claimant that, because he did not do as he was instructed, he was being released for the day. In addition, Claimant was withheld from service on October 25, 2011. Thus, it appears that Claimant's suspension was for two days, at most.

The Carrier convened an investigation at which the above evidence was adduced. Based on the record, the Carrier found Claimant in violation of MWORs 1.13 (Reporting and Complying with Instructions) and 1.6 (Conduct) and assessed him an actual suspension.

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property on an expedited basis, up to and including the highest designated official, but without resolution. The Organization invoked arbitration, and the dispute was presented to this Board for resolution.

**POSITIONS OF THE PARTIES:** The Carrier argues that it met its burdens to prove Claimant's violations of the Rules and the appropriateness of the penalty. It asserts that the facts and testimony presented at the investigation make it clear that Claimant used vulgar and disrespectful language toward his supervisors when he was not given permission to take unscheduled vacation and then refused to open the window to the van as instructed and, thereby, violated Rules 1.13 and 1.6.

BNSF argues that Claimant was quarrelsome with his immediate supervisor and ignored the instruction of his Roadmaster. It contends that an employee cannot simply tell supervision that he is going to do something anyway after he has been instructed differently or ignore his boss when he is trying to speak to the employee. It asserts that Claimant acknowledged that he did both - testifying that he said "I [will] take my vacation, you like it or not" and "I didn't open the window . . . 'cause I don't want to talk to him." The Carrier asserts that various arbitration boards have held that, when there is an admission of guilt, there is no need for further proof and that the only remaining question is the degree of discipline.

As to the Organization's arguments - that it was not provided with a transcript of the investigation and that the investigation was not held within the time limits of Rule 40(a) - the Carrier contends that they are without merit. With respect to the former, it asserts that copies of the transcript were mailed to Claimant and the Organization. In any case, the Carrier maintains that it cured the Organization's objection by attaching another copy of the transcript to its response to the Organization's claim and agreeing to allow the Organization to present any new argument or offer any new evidence derived from its reading of the transcript, so long as it did so within 60 days from the date of its response.

With respect to the latter, the Carrier contends that Claimant was withheld from service on October 25, 2011. It asserts that, since the investigation was originally scheduled for November 3, 2011, i.e., nine days from the date Claimant was withheld, and was re-scheduled for and actually occurred on November 2, 2011, i.e., eight days from the date he was withheld, it was not outside the time limits of Rule 40(a).

As to the penalty, BNSF asserts that the discipline imposed is appropriate and that leniency is not in the Board's authority. It asserts that Claimant's discipline was appropriate in line with PEPA and his personal record. It points out that Claimant was given a three-year review period because his record was not injury-free in the five years preceding the instant violation.

The Carrier urges that the claim be denied as without merit.

**The Organization** argues that the Carrier failed to prove the violations and failed to establish the appropriateness of the penalty. It contends that the Carrier violated Rules 40(e) and 40(a) of the Agreement, the former because it failed to provide a transcript of the investigation and the latter because it assessed discipline *in advance* of the hearing and without a transcript to justify its behavior. The Organization asserts that Claimant's removal from service before a single word of testimony was given - and the curious lack of a transcript - bolster its position that the incident was not handled fairly and impartially.

The Organization argues that it could not conduct a proper appeal without the transcript. It maintains that, in any case, the Carrier failed to produce adequate evidence and testimony to support Claimant's alleged violation.

The Organization urges that the Claim be sustained, that Claimant's Level S actual suspension and three-year review period be removed from his record with seniority, that vacation and all other benefits lost be restored, and that he be made whole for all time lost.

**DISCUSSION AND ANALYSIS:** It was the burden of the Carrier to establish, by substantial evidence considered on the record as a whole that Claimant violated the Rules and that the penalty assessed was appropriate. The Board concludes that the Carrier met its burden to prove Claimant's violations but not the appropriateness of the three year review period.

Rule 1.6 prohibits employees from being quarrelsome or discourteous. Rule 1.13 requires that employees comply with instructions from supervisor. It is undisputed - indeed, Claimant

admitted - that he was quarrelsome and discourteous to both supervisors and that he failed to comply with Mr. Sneed's instruction that he lower the window. The Board concludes that Claimant violated both Rule provisions. Claimant was not charged with actually taking a vacation without authorization; that would be a more serious offense. Claimant's alleged mutterings about not being allowed to take a vacation and his threats to take the vacation anyway violated the rule because of quarrelsome or discourteous language. His refusal to open the window, as instructed, was a violation of Rule 1.13.

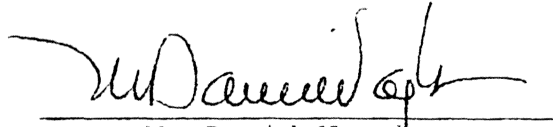
Of the alleged procedural violations, the Board is not persuaded. Rule 40(a) requires that an Investigation be held within 15 days of the occurrence being considered. In the instant matter, the incident occurred on October 24, 2011, and the the Investigation, originally scheduled for November 3 was actually conducted on November 2, 2011. Either date is well within the 15-day time limit.

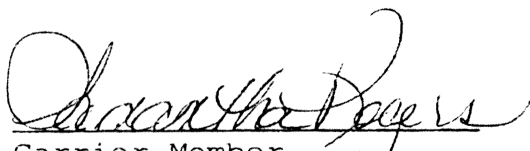
As to BNSF's alleged failure to provide copies of the transcript, the Carrier contends that it provided copies as required. In any case, the Carrier attached another copy of the transcript to its response to the Organization's claim and agreed that the Organization could present new argument and/or new evidence, so long as it did so within 60 days. There is nothing in the record to indicate that the Organization submitted either or, alternatively, that it objected to the Carrier's unilaterally imposed 60-day deadline. Therefore, the Board concludes that the Carrier cured any violation in this respect, if there ever was one.


Given the nature and circumstances of Claimant's violation, the Board concludes that the penalty of an actual suspension of no more than two days was within the range of reasonableness. The basis for a three-year review period attached to a two-day suspension is not apparent and is disproportionate to the length of time off. The Award reflects the Board's determinations.

**AWARD:** The claim is sustained in part and denied in part. The three-year review period is disproportionate to the length of the suspension and is reduced to a review period of one year. The Carrier met its burdens to prove Claimant guilty of the charges and to prove his suspension to have been an appropriate penalty.

Dated this 9<sup>th</sup> day of May, 2014.

  
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M. David Vaughn,  
Neutral Member

  
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Carrier Member  
Ms. Samantha Rogers

  
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Employee Member  
Mr. David Tanner