

**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

**AWARD NO. 143**

Parties to Dispute:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**AND**

**NORFOLK SOUTHERN RAILWAY COMPANY**

**(Carrier File MW-SOMR-03-16-SG-329)**

Statement of Claim:

Claim on behalf of E. W. Turner for reinstatement with seniority, vacation and all other rights unimpaired and pay for all time lost as a result of his dismissal from service following a formal investigation on March 22, 2004, in connection with his unbecoming conduct in that he engaged in an altercation with a co-worker on October 13, 2003, around 5:00 p.m. near Surgoinsville, Tennessee.

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This Award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

**AWARD**

After thoroughly reviewing and considering the transcript and the parties' presentation, the Board finds that the claim should be disposed of as follows:

BACKGROUND

E. W. Turner, the Claimant herein, entered the Carriers' service on September 16, 1980 as a Laborer. On October 13, 2003<sup>1</sup>, the date of the incident at issue, the Claimant was working as a

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<sup>1</sup> All dates noted herein occurred in calendar year 2003 unless otherwise noted.

Spiker Machine Operator near Surgoinsville, Tennessee. The Claimant is represented by the Brotherhood of Maintenance of Way Employees.

The record evidence shows that on October 13<sup>th</sup>, the Claimant was working as a Spiker Machine Operator on Gang T&S 8, a timber and surfacing gang, working in the vicinity of Surgoinsville, Tennessee. The spiker machine operated by the Claimant had been malfunctioning intermittently throughout the day, resulting in more than the usual number of bent spikes. At approximately 5:00 p.m., D. B. Evans, a fellow employee, approached the Claimant's spiker machine, and the Claimant and Evans spoke briefly, following which the Claimant swung open the side arm rest of the seat on which he was sitting, striking Mr. Evans in the chest and knocking him to the ground. The Claimant then dismounted this machine, fell upon Mr. Evans, and began to repeatedly punch him, shoving his head into the ballast. As a result of the Claimant's actions, Mr. Evans required medical attention.

As a direct result of this incident, by letter dated October 20, 2003, the Claimant was directed to attend a formal investigation on October 30<sup>th</sup> to determine his responsibility, if any, in connection with his "[c]onduct unbecoming an employee in that [he] engaged in an altercation with another employee, D. B. Evans on Monday October 13, 2003, at around 5:00 PM near Sugoinville, TN." The investigation was subsequently postponed twice at the request of the Organization, and ultimately held on March 22, 2004. The Claimant was at all times represented by the Organization. By letter dated April 10, 2004, the Hearing Officer, following his review of the transcript together with evidence admitted at the formal investigation, determined that the Claimant was guilty of the charge of conduct unbecoming an employee, and advised the Claimant that he was dismissed from the Carrier's service. The Organization took exception to the discipline assessed, and the instant claim for review ensued.

## DISCUSSION

Initially, this Board notes that it sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, we must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record.

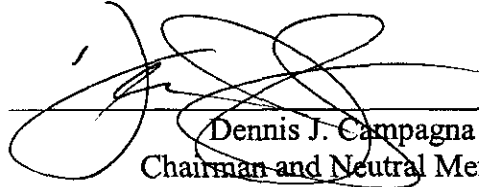
At the investigation, the Claimant alleged that in addition to experiencing a great deal of frustration over the malfunctioning of his spiking equipment, he was under a great deal of personal stress. The Claimant also alleged that he was provoked into his assault upon Mr. Evans because Evans was hollering at him. In finding the Claimant guilty as charged, it is evident that the Hearing Officer was not moved by either of the Claimant's claims. However, assuming, arguendo, the Claimant's assertions as correct, the Claimant's violent reaction cannot be condoned. In this regard, well established arbitration precedent rejects actions of "self help", suggesting instead an attempt at a peaceful resolution seeking, for example, Supervisory assistance. Following our review of the relevant facts as contained in the record, we find that the Hearing Officer's conclusion bears a rational relationship to the record evidence.

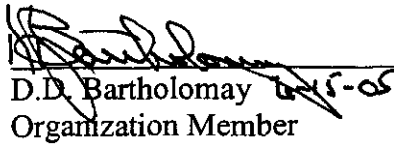
Turning now to the discipline sought to be imposed, it is well established arbitration precedent that the penalty sought to be imposed by an Employer will not be disturbed so long as it is not arbitrary, capricious or discriminatory.

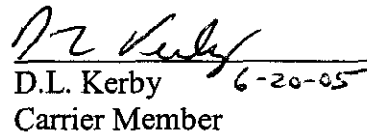
In this case, the Organization maintains that given the Claimant's unblemished record, dating back to September 1980, the penalty of dismissal represents excessive and undue punishment. The Board respectfully disagrees. The concept of "just cause", which applies to instances of discipline and/or discharge, provides for the use of progressive discipline, except for those situations deemed to be egregious in nature. For actions of the later type, it is well established that the penalty of dismissal, while harsh, is appropriate, even for one instance. In the instant matter, the Claimant engaged in an unprovoked assault, clearly an egregious act. In cases of this nature, the Carrier's "zero tolerance" position against such an action has been designed as part of its obligation to protect the work force. Simply put, the Carrier cannot and should not tolerate the conduct herein described. Accordingly, we cannot find that the discipline sought to be imposed by the Carrier, consisting of the Claimant's dismissal from service, is arbitrary, capricious or discriminatory.

CONCLUSION

For the reasons noted and discussed above, the instant claim is denied in its entirety.

  
Dennis J. Campagna  
Chairman and Neutral Member

  
D.D. Bartholomay 6-5-05  
Organization Member

  
D.L. Kerby 6-20-05  
Carrier Member

Dated May 6, 2005, Buffalo, New York