

SBA No. 1112
BNSF/BMWE
Case No. 24
Award No. 25

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON NORTHERN/SANTA FE

AND

**CASE NO. 24
AWARD NO.25**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

On July 29, 1998 the Brotherhood of Maintenance of Way Employees ("Organization") and the Burlington Northern/Santa Fe ("Carrier") entered into an Agreement establishing a Special Board of Adjustment in accordance with the provisions of the Railway Labor Act. The Agreement was docketed by the National Mediation Board as Special Board of Adjustment No. 1112 ("Board").

This Agreement contains certain relatively unique provisions concerning the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction was limited to disciplinary disputes involving employees dismissed, suspended, or censured by the Carrier. Moreover, although the Board consists of three members, a Carrier Member, an Organization Member, and a Neutral Referee, awards of the Board only contain the signature of the Referee and they are final and binding in accordance with provisions of Section 3 of the Railway Labor Act.

Employees in the Maintenance of Way craft or class who have been dismissed or suspended from the Carrier's service or who have been censured may choose to appeal their claims to this Board. The employee has a sixty (60) day period from the effective date of the discipline to elect to handle his/her appeal through the usual channels (Schedule Rule 40) or to submit the appeal directly to this Board in anticipation of receiving an expedited decision. An employee who is dismissed, suspended, or censured may elect either option. However, upon such election that employee waives any rights to the other appeal procedure.

This Agreement further established that within thirty (30) days after a disciplined employee notifies the Carrier Member of the Board, in writing, of his/her desire for expedited handling of his/her appeal, the Carrier Member shall arrange to transmit one copy of the notice of the investigation, the transcript of the investigation, the notice of discipline and the disciplined employee's service record to the Referee. These documents constitute the record of the proceedings are to be reviewed by the Referee.

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The Agreement further provides that the Referee, in deciding whether the discipline assessed should be upheld, modified, or set aside, will determine whether there was compliance with Schedule Rule 40; whether substantial evidence was adduced at the investigation to prove the charges made; and, whether the discipline assessed was arbitrary and/or excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

In the instant case this Board has carefully reviewed each of the above-captioned documents prior to reaching findings of fact and conclusions.

BACKGROUND FACTS

Claimant was hired by the Carrier in 1959 and has been suspended on two prior occasions. The first, in 1990, was for failing to comply with instructions. The second, in 1992, was for failing to submit expense account receipts.

Following notice and investigation the Claimant was issued a Level S 30 day record suspension with one year probation for violating BNSF Maintenance of Way Safety Rule 1.2.9, Maintenance of Way Operating Rule 1.6, and the Carrier's Work Place Harassment Policy, all of which provide, in relevant part, as follows:

Rule 1.2.9 Horseplay

Conduct yourself in a way that supports a safe work environment – free of...harassment.

Rule 1.6 Conduct

Employees must not be:

- 6. Quarrelsome
- Or
- 7. Discourteous

Work Place Harassment Policy

Burlington Northern Santa Fe does not tolerate verbal...conduct by any employee which harasses, disrupts, or interferes with another's work performance or which creates an intimidating, offensive, or hostile work environment. All BNSF employees will treat others with dignity and respect.

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- (1) Harassment Prohibited. All BNSF employees are expected to contribute to a productive work environment that is free from harassing or disruptive activity. No person is to be harassed because of race...(or) national origin...No form of harassment will be tolerated...

FINDINGS AND OPINION

The Claimant was at all material times herein an assistant foreman on Tie Gang TP03 which included among its members several employees of Native American heritage. The record discloses that on a number of occasions during a brief period of several days the Claimant made several statements to some of those employees that made reference in one way or another to their ethnicity. More specifically, he called one of them "Chief," told another that "a bunch of drunken Indians lost their land," told another that although he had never skinned an Indian that employee might be the first, and finally, that the only thing he liked about Indian reservations was "fucking the squaws."

The record further reflects that these employees complained to management and that a meeting was held between management, a human resource representative of the Carrier, and the entire gang at which the employees in question asked, unsuccessfully, that the Claimant apologize in front of the gang. Rather, the Claimant asserted a defense, described more fully below, for his conduct.

Finally, there is no dispute that after these several incidents the Claimant did not repeat the conduct in question.

The Claimant does not deny making the statements attributed to him, but rather attempts to justify his conduct in various ways. First, he asserts that he did not intend to offend any person, that his use of the word "Chief" was an acknowledgement such a title is one of high esteem in the Native American culture, that he did not know that using the term "squaw" was or might be offensive, and that his use of the word "fucking" is commonplace in the work place. In addition, the Organization argues that once the Claimant was made aware of the impact of his conduct, he did not persist.

As a threshold matter we do not find the Claimant's efforts to excuse his conduct persuasive. For example, it is irrelevant whether the Claimant intended to offend those who were the subject of his comment for the rule in question does not require any such standard. Second, we believe his explanations for his use of the words "Chief" and "squaw" are nothing more than after the fact rationalizations. Finally, although it is undoubtedly true that employees, and perhaps even management, use the word "fucking"

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routinely, its use in this case is distinguishable, and reprehensible, when used with the ethnic slur "squaw."


Having concluded therefore that the Claimant did indeed violate the rules with which he is charged, the only remaining inquiry is whether the discipline imposed was arbitrary and/or excessive. As noted above, the Carrier disciplined the Claimant with a 30 day record suspension and one year of probation. There can be no question that a serious penalty is in order because the Claimant's statements were disrespectful. Moreover, his reference to drunkenness, the historical loss of Native American lands, and disrespect for Native American women were not only mean, but also consisted of stereotypes that are harmful and dredged up what can only be painful repetitions of the problematic relationship between Native Americans and others. On the other hand, the record clearly reflects that the conduct in question was not repeated over an extended period and that the Claimant stopped acting in the offensive fashion after his fellow employees' views were brought to his attention.

In light of the foregoing we therefore find that the record 30 day suspension is arbitrary and excessive. However, before we order that it be reduced, we must make note of one portion of the record that has particularly moved us. The record discloses that the employees who complained of the Claimant's conduct merely wanted him to apologize in front of the entire gang. Despite that justifiable request, the Claimant failed to do so. In his defense he asserts that he did not have the opportunity to do so, but we find his assertion less than convincing. We believe therefore that the request for the apology and the Claimant's failure to comply provide an opportunity for healing.

Accordingly, we find that the record suspension of 30 days should be reduced to 3 days and that the one year probation remained undisturbed. However, the reduction to the penalty will not take effect unless and until the Claimant apologizes for his conduct before the members of Tie Gang TP03. In the event that subsequent assignments and/or other personnel moves makes such an assembly impossible, the condition precedent for the reduction of the penalty in accordance with this award shall consist of a written apology by the Claimant to each of the tie gang members. In the event that the Claimant fails to meet these conditions, the discipline imposed shall stand.

AWARD

The claim is sustained in accordance with these findings.


Robert Perkovich, Neutral Chair
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DATED:  27, 2000