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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 chose 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.

The Agreement further establishes 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 investigation, the transcript of investigation, the notice of discipline and the disciplined employee's service record to the Referee. These documents constitute the record of proceedings and are to be reviewed by the Referee.

In the instant case, this Board has carefully reviewed each of the above-described documents prior to reaching findings of fact and conclusions. Under the terms of the Agreement the Referee, prior to rendering a final and binding decision, has the option to request the parties to furnish additional data; including argument, evidence, and awards.

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 the applicable provisions of 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.

#### Background Facts

Mr. Michael R. Ott, hereinafter the Claimant, entered the Carrier's service as a Sectionman, on June 26, 1979. The Claimant was occupying that position when he was suspended for ten (10) days by the Carrier commencing on November 17, 1989.

The Claimant was suspended as a result of an investigation which was held on October 20, 1989 in the Carrier's Northtown Hump Tower Conference Room in Minneapolis, Minnesota. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rule 563 as the result of his allegedly being involved with the use of vulgar language "in that you made racial comments to a fellow employee on board a Burlington Northern rail relay crew bus in the vicinity of Bridal Veil, Minneapolis, Minnesota at approximately 3:10 p.m. on September 12, 1989".

### Findings and Opinion

The Claimant and several other employees, all members of Rail Relay Gang #2, had finished their work day on September 12, 1989 and were being returned by Carrier bus to their headquarters point in the vicinity of Minneapolis, Minnesota.

As the bus was passing through a neighborhood where the Claimant resided, the Claimant and Laborer G.L. Forbord engaged in a conversation in which the Claimant allegedly spoke the word "nigger". During the course of the investigation the Claimant denied that he made any such remark, and numerous witnesses, including the driver of the bus, Ms. Rheault, who was seated within a few feet of the Claimant, testified that they heard no such remark.

The Claimant was sitting on the right side of the bus in the front seat, Mr. Forbord was sitting approximately four (4) seats from the front of the bus on the left side, another laborer, G.L. Schneider was sitting in the seat directly behind Mr. Forbord and another laborer, Mr. Nathaniel W. Hopkins, was sitting in the seat directly behind Mr. Schneider.

Mr. Hopkins, who is a black man, and Mr. Forbord, Mr. Schneider and the Claimant, who are white men, were named as principals in the investigation as the result of an incident which occurred at approximately 3:10 p.m. on September 12, 1989.

Witnesses testified that, sometime after the conversation between the Claimant and Mr. Forbord regarding the Claimant's living in a particular neighborhood, Mr. Hopkins walked to the back of the bus, took a 30 inch hard wood pick ax handle out of the tool box, proceeded to the middle of the bus, struck Mr. Schneider, who was sleeping, in the mouth and then began striking Mr. Forbord in the head with the ax handle.

Mr. Hopkins was restrained by two other employees, and an emergency call was placed to Special Agent representatives who met the bus in the vicinity of the Bridal Veil shop in Minneapolis.

Messrs. Forbord and Schneider sustained serious head injuries which required ambulance service. Mr. Hopkins was arrested by the Minneapolis police. Special Agent representatives took statements from all witnesses, including the Claimant, on September 12 and 13, 1989.

While the transcript of this investigation is lengthy, and numerous witnesses were called to testify regarding the incident on the bus, the resolution of the discipline regarding the Claimant is,

in this Board's opinion, relatively simple.

As the result of the recent tragic loss of his five year old son by motor vehicle accident, Mr. Hopkins was, apparently, in an emotionally distressed state. A document in evidence entered on Mr. Hopkins' behalf and authored by the physician who was treating him for his mental health problems stated that "[the incident on the bus] would not have happened but for the stress that he [Hopkins] was going through".

While this written statement alone does not support a finding that Mr. Hopkins was suffering from diminished capacity, the testimony of other witnesses to the effect that Mr. Hopkins seemed to be "confused" and acting "out of character", as well as Mr. Hopkins' testimony to the effect that he did not recall striking two (2) fellow employees, supports this Board's conclusion that it was Mr. Hopkins' condition that was the cause of the incident.

There is no evidence in the record that the Claimant, or for that matter any other employee, directed any "racial slurs" at Mr. Hopkins. Even if the Claimant did use the word "nigger" during the course of a brief conversation he had with Mr. Forbord, there is no showing, based upon the evidence presented to this Board, that the Claimant provoked or intended to provoke Mr. Hopkins.

This Board does not, in any way, countenance the use of racial, ethnic, religious or sexist derogatory commentary; whether that commentary be used in serious or jestful conversation.

However, Rule 563, the rule under which the Claimant was charged, provides in relevant part as follows:

"Burlington Northern service demands the faithful, intelligent, courteous and safe discharge of duty. Courteous, orderly conduct is required for all employees. Boisterous, profane, sexist or vulgar language is forbidden. Employees must not enter into altercation with any person, regardless of provocation, but will make note of the facts and report such incident in writing to their immediate supervisor."

There is insufficient and unsubstantial evidence in the record to establish that the Claimant violated Rule 563.

The investigation was held for the purpose of "determining your responsibility, if any, in connection with the incident which occurred on board a Burlington Northern rail relay crew bus which resulted in physical injury to Burlington Northern personnel". It is

this Board's opinion that the Claimant was not responsible, in any way, for the incident which occurred on the crew bus, nor was he responsible, in any way, for the injuries which resulted from Mr. Hopkins' assault upon other crew members.

Based upon these findings, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to physically expunge any reference to the ten (10) day suspension from the Claimant's Personal Record. The Carrier is further directed to make the Claimant whole for any lost wages and/or benefits suffered as a result of the suspension.

This Award was signed this 26th day of March 1990.



Richard R. Kasher  
Chairman and Neutral Member  
Special Board of Adjustment No. 925