

**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

**AWARD NO. 211**

Parties to Dispute:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**AND**

**NORFOLK SOUTHERN RAILWAY COMPANY**

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The dismissal of Machine Operator D.T. Worley for conduct unbecoming an employee in connection with kicking the glass in the door on Norfolk Southern Bus 308539 causing it to break and making physically threatening Remarks to Foreman J.F. Smith on January 13, 2010 is based on unproven Charges, unjust unwarranted, excessive and in violation of the Agreement (Carrier's File MW-ATLA-10-01-0J-SG-010).
2. As a consequence of the violation referred to in Part 1 above, Claimant Worley shall be reinstated to service with seniority, pay for lost time, Vacation and all other rights unimpaired. "

Upon the whole record and all the evidence, after hearing, the Board finds 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 precedent in any other case.

**AWARD**

The incident which led to the Claimant being removed from service occurred on January 13, 2010. The work crew of T&S 2 was waiting to be driven to the work site in a bus. Some of the crew members were on the bus and some were standing outside the bus. The Claimant was standing outside the bus, smoking a cigarette. Foreman Smith was driving the bus and closed the door right before the Claimant states he was intending to board the bus. The Claimant tried to indicate to the Foreman that he wanted to board the bus but Foreman Smith proceeded to converse with some people behind him, keeping the Claimant waiting outside. The grievant pushed his foot through the bus glass door, which shattered the glass. Foreman Smith would later state that the Claimant was still smoking, which is why the door was closed in front of him when he attempted to board the bus. The Claimant stated that as he approached the bus, the Foreman closed it and then did not re-open it, and instead of offering a justification became engaged in a

conversation with people behind him. This behavior by Foreman Smith gave the impression that he was effectively ignoring the Claimant outside the bus.

After the Claimant shattered the glass door with his foot, Foreman Smith went to go look for another Foreman for assistance and left the bus. At that point the record indicates the Claimant called out to Foreman Smith "Why don't you come off the bus and I'll whoop your ass?" Then Claimant approached the Foreman until they were chest to chest. Foreman Smith did not respond and kept walking toward Supervisor Myers to report the incident. The Claimant admitted that he broke the window of the door. Supervisor Myers ordered Foreman Smith drive the rest of the employees to their jobs and ordered the Claimant back to the camp area while he proceeded to interview various witnesses as they arrived to their work sites. Later after consulting with General Division Engineer J.M. Hunter, Supervisor Myers informed the Claimant he was being removed from service pending an investigation. In a letter dated January 20, 2010, the Claimant was charged with conduct unbecoming an employee and physically threatening the Foreman. The resulting investigation lead the carrier to conclude the Claimant was guilty of the charges and dismissed him from service on March 2, 2010.

The Board notes that the Claimant's service record prior to this case includes 4 other incidents: On 11/21/09, the Claimant was found to have failed to protect his job assignment for 14 days. On 10/30/08, the Claimant was found to have failed to protect his job assignment for 30 days. On 7/21/08, the Claimant was found to have been absent without leave for a period of several days without leave. Finally, on 5/30/08, the Claimant was found to also have been absent for days without leave. At the time the incident leading to this case occurred, the Claimant had 4 years of seniority with the Carrier.

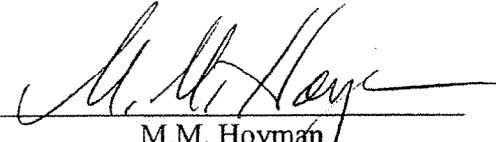
There are two distinct infractions in the letter from the Carrier. One is the conduct unbecoming an employee charge for kicking in the door and the other is the physical threat to the supervisor. The union mounts two defenses for the latter behavior. First, there is the fact that Smith did not consider it a threat and he was supposedly the object of the threat. The second defense is the shop talk defense, mounted elaborately via the following awards: NRAB, Second Division Awards 8714, 13507 and Third Division Awards 20077, 35766. This defense here is quite simply that strong language may be the norm in the workplace and that what would be normally viewed as foul language happens often enough that it does not warrant disciplinary action that would otherwise be mandatory in such cases.

However, the context of the Claimant's actions are relevant and offer much insight into this case even if the remarks were found not to be threatening by the intended target. Had the comments occurred in a moment of frivolity, laughter, or horseplay, we would view them as simple examples of shop talk. However, it would appear that they were said in anger. The evidence for this was that the Claimant's kicking of the door was forceful enough to shatter the glass. It was not just a case of pushing the door open with one's foot, because his hands were full, as Claimant asserted. Thus, the defense of shop talk is inadequate given the context of the case.


Even were we to assume for a moment that the comments were but a mere idle threat said in jest, there would still be the angry destruction of property that the Claimant admits to doing.

That conduct in and of itself is more than enough to constitute conduct unbecoming an employee. Given that there is no dispute that the Claimant shattered the glass door, and given his multiple other disciplinary actions and relatively low level of seniority, the Board finds that the action of dismissal was justified.

The claim is denied.

  
M.M. Hoyman  
Chairperson and Neutral Member

  
T. Kreke  
Employee Member

  
D.L. Kerby  
Carrier Member

Award Date: June 30, 2011