

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1049

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	
DIVISION – IBT RAIL CONFERENCE)	
)	Case No. 276
)	
)	Award No. 276
NORFOLK SOUTHERN RAILWAY COMPANY)	
(FORMER SOUTHERN RAILWAY COMPANY))	

Richard K. Hanft, Chairman and Neutral Member
D. M. Pascarella, Employee Member
D. L. Kerby, Carrier Member

STATEMENT OF THE CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. R. Buchanan, issued by letter dated November 21, 2016, in connection with his alleged conduct unbecoming an employee, in that on October 10, 2016 Supervision: (a) discovered that he sent threatening and flagrantly inappropriate text messages to a coworker on October 8, 2016; and (b) learned that he intentionally damaged Company property on October 7, 2016 was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File Buchanan-R-11-16-INV/MW-GNVL-16-55-LM-986 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant R. Buchanan shall have his dismissal set aside with all notations thereof removed from all Carrier records and he shall be reinstated to service with all seniority rights restored and entitlements to and credits for benefits, including vacation and health insurance benefits restored as well and he shall be made whole for all financial losses occasioned as a result of the violation, including: (a) straight time pay for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the Claimant at the time of removal from service (this amount is not reduced by earnings from alternative employment obtained by Claimant while wrongfully suspended); (b) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service; (c) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service, or on and performed had Claimant not been removed from service; and (d) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service.”

FINDINGS:

Special Board of Adjustment No. 1049, upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

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

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

Claimant in this matter was a Laborer on the TM-33 Gang. On the morning of October 7, 2016 he read, while sitting waiting for track time in a gang truck, an e-mail from the Office of Administrative Services informing employees of the positions that had been bulletined and awarded. A position that he had put a bid on had been cancelled and he thus found himself out of work as his current position was scheduled to be filled by a more senior employee, displacing him.

Claimant reacted, understandably, angrily, and reportedly kicked the truck door open, exited and slammed the door shut. He finished that day's work and went home.

On the next day, Saturday, October 8, 2016, Claimant, still angry that he had not been awarded the hoped-for position engaged in an e-mail conversation with one of his previous gang members. Writing about the remaining members of the TM-33 Gang, the Claimant wrote: "I will slaughter their entire families" and "Show them this text."

That employee did just that and showed the Gang Foreman the texts. The Foreman reported the texts to management and Claimant was summoned on November 8, 2016 to an investigation to determine his responsibility, if any, for conduct unbecoming an employee, for sending the aforementioned threatening texts. The Hearing Officer found substantial evidence to find Claimant guilty of violating Corporate Policy 322 – Workplace Violence.

That Policy provides, in relevant part, that: "...Employees are prohibited from engaging in threats or acts of violence, in physical, written or verbal form. A threat or act of violence that actually bring about such harm.

Written threat is defined as the use of letters, electronic mail or other media which convey the intention to physically harm persons or property. The Corporation will not tolerate such words or actions,”

Employee’s written statements from co-workers entered into the record indicate that co-workers were “offended” by the threat; that neither the foreman nor co-workers “...feel safe or want to work with or for anyone like this in the workplace...” and that “...The day he got rolled he blamed Mr. West for his bid being cancelled and said ‘I’m going to beat his ass.’”

As a result of the findings at the investigation Claimant was notified by letter dated November 21, 2016 that he was dismissed from service. The Organization contends that Carrier failed to meet its burden of proof in establishing that Claimant violated the charged rules and that the discipline imposed, dismissal was harsh and excessive and cannot stand. The Organization opines that for a four (4) year employee with no previous disciplinary record, progressive discipline should have been utilized rather than the harshest measure Carrier could have employed. The Organization argues that Claimant is salvageable and should be given a second chance.

There can be no doubt that Carrier established Claimant’s responsibility in sending the written threats. Copies of the texts were entered into the record and Claimant admitted that that was the electronic conversation that he had with his co-worker.

While progressive discipline for correctable infractions of the rules is generally preferable to dismissal, it must be understood that the Carrier has a legal obligation to provide a work environment that is free of harassment, discrimination and intimidation. Employers have a duty to their employees, who are also members of the Organization, to take appropriate action to protect them from violent situations. While the Organization tries to chalk this incident up as a one-time, isolated incident where Claimant lost his temper in response to not winning a bid that was cancelled, the record demonstrates otherwise. The written statements of Claimant’s supervisor and co-workers indicate violent, threatening behavior over a long period of time. That behavior need not be tolerated.

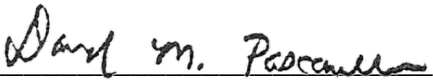
The Board finds no basis to interfere with the decision reached on the property.

AWARD:

The Claim is denied.



Richard K. Hanft, Chairman



D. M. Pascarella, Labor Member



D. L. Kerby, Carrier Member

Dated at Chicago, Illinois November 21, 2018