

NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION

Award No. 29703  
Docket No. 49489  
19-1- NRAB-00001-180233

The First Division consisted of the regular members and in addition Referee Meeta A. Bass when award was rendered.

(Brotherhood of Locomotive Engineers and Trainmen  
**PARTIES TO DISPUTE:** (  
(BNSF Railway Company

**STATEMENT OF CLAIM:**

“It is hereby requested that Conductor K. Banks' discipline be reversed with seniority unimpaired, requesting pay for all lost time, with no offset for outside earnings, including the day(s) for investigation with restoration of full benefits and that the notation of “Dismissal” be removed from his personal record, resulting from the investigation held on August 17, 2016.”

**FINDINGS:**

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Carrier hired the Claimant on February 23, 1998 as a Brakeman. He was subsequently promoted to Conductor in May, 1998. On July 26, 2016, the Claimant was assigned to and working as a Conductor in Dayton, Texas as the Foreman on the crew operating train Y-DYT381 1-26A. Another crew, including Mr. Brown, was called to

duty at the Houston South Yard at 23:03 hours on the same day, July 26, 2016. Mr. Brown was working as the Foreman on train Y-HOU313 1-26A ("313"). In the early morning hours of July 27th, as the two crews were winding up their shifts, the Yardmaster instructed Mr. Brown to watch the shove for the Claimant, and she advised the Claimant that Mr. Brown would provide the necessary shoving protection. Mr. Brown watched the shove in tracks 52 and 42, however, when the Claimant began to shove track 41, he was unable to contact Mr. Brown and was forced to stop the move after shoving approximately ten cars. He then walked to the lead car and protected the shove by riding the car. After stopping, the Claimant walked to the crew shanty where he found Mr. Brown. He scolded Mr. Brown for not doing as he had been instructed by the Yardmaster. The Claimant was very angry, to the point of using several expletives, as he felt Mr. Brown had put his (the Claimant's) job in jeopardy. The Claimant responded with expletives over the radio, before protecting his own shove into track 41. After completing the move, the Claimant then approached Mr. Brown and stated, among other things, "You don't know who you are f\*ing with" and "Next time you better do your f\*ing job or I will f\*you up" and attempted to have Mr. Brown follow him to where the yard cameras could not see them. At one point, the Claimant was so aggressive that Mr. Brown's engineer stepped in to hold the Claimant back. During the incident, multiple individuals thought that the Claimant might strike Mr. Brown. After about five minutes, the Claimant calmed down and apologized to Mr. Brown. Later that morning, Mr. Brown phoned Superintendent Darren Hale and informed him of the incident.

The Carrier issued a Notice of Investigation letter dated July 29, 2016 which stated as follows:

“... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged misconduct and creating a hostile and violent workplace environment by being quarrelsome and discourteous at approximately 0535 hours on July 27, 2016 while working as crew members on the Y DYT3811-26 on duty at Dayton, TX Yard on July 26, at 2359 hours, and the Y HOU3131-26A on duty at Houston South Yard on July 26, 2016 at 2303 hours...”

After some postponement, the Investigation was held on September 1, 2016. Following the Investigation, the Claimant received a Discipline Notice dated September

29, 2016, finding a violation GCOR 1.6 Conduct, GCOR 1.7 Altercations, Corporate Policy EEO Anti-Discrimination and Corporate Policy Violence in the Workplace. The Organization appealed the Carrier's decision by letter dated October 17, 2016 and the Carrier denied the same on November 8, 2016. The Organization advanced the claim to the Highest Designated Officer, and the same was denied. A formal conference was held with no change in the position of the Carrier. This matter is before this Board for a final resolution of the claim.

The Board has reviewed the record developed by the parties during their handling of the claim on the property and considered evidence related to the following to make its determination of this claim:

- 1) Did the Claimant receive a full and fair investigation with due notice of charges, opportunity to defend, and representation?
- 2) If so, did the Carrier establish by substantial evidence that the Claimant was culpable of the charged misconduct or dereliction of duty?
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory, or unreasonably harsh in the facts and circumstances of the case?

The Carrier contends that the Claimant was afforded a fair and impartial Investigation. The Carrier contends that the Claimant was properly held from service due to his aggressive and threatening behavior. The Carrier asserts that the Claimant's apology did not absolve him from his behavior when he yelled obscenities and threatened physical violence in the workplace. The Carrier asserts that there was a legitimate fear that the Claimant would follow through on his threat because he had to be held back by another coworker. The Carrier further contends that the Claimant's erratic and aggressive behavior created an unsafe work environment. Based thereon, the Carrier has met its burden of proof that the Claimant violated the Rules. Moreover, the Carrier contends that the discipline was commensurate with the nature of the offense. The Claimant also failed to accept responsibility for his actions during the Investigation. He stated that he did not threaten Mr. Brown with physical violence or enter into an altercation with him. Such statements by the Claimant weakened his

credibility and suggest that he still does not understand the gravity of his behavior. The discipline assessed is in line with the Carrier's PEPA Policy, and there is no reason to overturn it. The Claimant's behavior arguably qualifies for stand-alone dismissal, but considering that this was his second serious violation in a six-month span, there is no question dismissal is appropriate. The Carrier is committed to a culture of respect and dignity for employees and the Claimant's behavior is directly opposed to that vision. The Claimant's behavior was leading to physical violence, which easily rises to the level of a standalone dismissible offense. It is the position of the Carrier that the claim should be denied.

The Organization contends that the Claimant was denied a fair and impartial Investigation due to the actions and examination of the conducting Hearing Officer during the Investigation. The Organization further contends that the Carrier improperly held the Claimant from service. The Claimant's Supervisor stated that he made his decision after reviewing the statement of the Claimant. The Organization argues that nothing in the Claimant's statement suggests that if permitted to work, he would be a hazard to himself or his fellow employees. The Organization asserts that it does not dispute that the Claimant lost his composure and his language and demeanor were unacceptable but contends that the Claimant's personal record indicates that the behavior was completely out of character. The Organization contends that the situation was aggravated by failure of the Yardmaster to clearly communicate her instructions to the Claimant and Mr. Brown's helper. Moreover, the Organization contends that the Claimant's emotional outburst was due to a fear of discipline for the unprotected shove which the Carrier deems as a serious offense. The Claimant had recently been disciplined for the same offense and was particularly concerned about employment status with any future violations. In addition, if an employee commits two serious violations within a three year review period, they are subject to permanent dismissal. Lastly, the Organization asserts that following the incident, the Claimant enrolled in the Employee Assistance Program (EAP) and was hospitalized for two weeks after being diagnosed with Major Depressive Disorder. The Organization contends that the Claimant's verbal outburst was the direct result of his inability to cope with his depression, and the two men had resolved their conflict within a few minutes and shook hands. The Organization maintains that the penalty of dismissal is unwarranted, arbitrary and disparate due to the mitigating circumstances. It is the position of the Organization that the claim should be sustained.

The Carrier charged the Claimant with violation of GCOR 1.6 Conduct, GCOR 1.7 Altercations, Corporate Policy EEO Anti-Discrimination and Corporate Policy Violence in the Workplace, incorporated herein as fully rewritten.

**Rule 1.6 Conduct reads:**

**“Employees must not be:**

- 1. Careless of the safety of themselves or others.**
- 2. Negligent**
- 3. Insubordinate**
- 4. Dishonest**
- 5. Immoral**
- 6. Quarrelsome**
- Or**
- 7. Discourteous**

**Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.”**

**Rule 1.7 Altercations reads:**

**“Employees must not enter into altercations with each other, play practical jokes, or wrestle while on duty or on railroad property.”**

The Board has reviewed the record, and finds no material procedural error in this case. The Organization argues that the Claimant was withheld from service in violation of his agreement which reads, in pertinent part:

- (1) An employee shall not be discharged on any charge whatsoever, until after a fair and impartial formal investigation has been held by the Superintendent or his representative, and his guilt established.**

- (2) An employee may be held off duty pending formal investigation in instances when, if permitted to work, it is apparent that he would be a hazard to himself or his fellow employees.

The record reflects that the Carrier had a reasonable and well promulgated written policy aimed at assuring all employees a safe working environment by discouraging behavior such as that at issue. The Claimant's conduct violated critical workplace policies. Although the Claimant was fearful of a potential disciplinary violation for an unprotected shove, his behavior was unjustified. Although no physical altercation occurred, his action was creating a situation where physical violence could have occurred. His actions disrupted the normal operations of the Carrier. The Claimant was properly withheld from service.

The Board further finds that the Carrier has satisfied its burden of proof by substantial evidence that the Claimant's actions directed toward his coworker created a hostile and violent workplace environment in violation of the cited Rules. The Claimant did seek treatment following the incident, and was subsequently diagnosed with depression. His enrollment in treatment occurred after the incident, and leniency is left to the discretion of the Carrier due to the seriousness of the proven charges. The Board should not substitute its judgment for that of the Carrier. The Board finds that the penalty of dismissal is otherwise commensurate with the offense.

**AWARD**

Claim denied.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of First Division

Dated at Chicago, Illinois, this 17th day of June 2019.