Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 26065
Docket No. 45976
04-1-03-1-B-2192

The First Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
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(Burlington Northern Santa Fe

STATEMENT OF CLAIM:

"It is hereby requested that Engineer Petersen's discipline be reversed, that he be made whole for all lost time and benefits resultant from this incident and investigation, and that notation on his personal record be removed."

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.

Claimant was dismissed for making threatening remarks in violation of Carrier's rules and policies regarding violence in the workplace. At the time of his dismissal, Claimant had some nine years in service. His prior work record contained four prior instances of discipline, two of which had some connection with his ability to control his temper.

The Organization raised certain procedural objections to the Carrier's action that warrant comment. Among them, it contended that the Carrier unilaterally, and therefore improperly, postponed the Investigation several times and, as a result, did not conduct the Investigation within the applicable 10-day time limit imposed by the Agreement. This objection must be rejected. It is well settled that procedural objections of this kind must be raised at the first opportunity to do so or they are deemed waived. No exception to the Carrier's scheduling of the Investigation was taken either before or during the Investigation.

The Organization also objected to the fact that the conducting officer admitted the signed statement of a co-employee, who allegedly overheard the Claimant making improper remarks, without requiring the employee to personally testify at the investigation. The Carrier countered the objection by introducing a letter from the employee's doctor that recommended the employee avoid experiencing the additional stress associated with such a personal appearance. The doctor's letter noted the employee suffered a prior heart attack and that live testimony was "contraindicated" for the employee. On this point, it is also well settled that Carrier's have an obligation to produce witnesses for live testimony at Investigations. Accordingly, they must undertake reasonable efforts to fulfill that obligation. The awards of this Board, however, recognize that there are practical limits to the Carrier's ability in this regard. Non-employees are usually not within its span of control or influence. Moreover, the Carrier has no effective subpoena power. The same is true regarding its own employees. Thus, the Carrier is only required to exhaust all reasonable efforts to obtain live testimony. It is not a fatal flaw to go forward without live testimony where, as here, the Carrier has undertaken such efforts and there is a reasonable explanation for its inability to produce the live testimony. See, for example, Fourth Division Award 3542. On this unique record, therefore, we do not find it was impermissible for the conducting officer to receive in evidence the properly authenticated signed statement of the co-employee.

Notwithstanding the foregoing, however, we must go on to note that hearsay evidence has traditionally been viewed with suspicion and given reduced or little weight, even when it is admitted, because of its inherent reliability problems. The instant case is a classic example of why that suspicion is normally warranted; all three of the Carrier's witnesses who gave accounts of what the co-employee told them related alleged comments that are not only somewhat inconsistent with each other but also differ in significant ways from the content of the co-employee's signed

statement. The ability to cross-examine a live witness is felt to be the only effective way to resolve such reliability concerns. Because the right of cross-examination was denied in this case, a fair and impartial Investigation requires that the content of the alleged threatening remarks may not be amplified or embellished by the testimony of the Carrier's witnesses. Therefore, the alleged remarks must be confined to the precise content expressed in the co-employee's signed statement.

According to the record, Claimant became angered when he learned his assignment was being abolished. It is undisputed that he has bipolar disorder II and had received treatment for it through the Carrier's Employee Assistance Program for some time prior to the event in question. The record also establishes that the Carrier officials who supervised him had, at least, a vague awareness that Claimant had some kind of medical condition for which he had been treated via the EAP. To control his anger upon learning the news of his job, Claimant declared he was going home sick and left Carrier's facility. Out in the parking lot, Claimant continued to talk to himself to vent his anger. According to the record, he was looking up at the sky and talking to no one but himself when the co-employee heard him say the offending words. The co-employee's statement reads, in pertinent part, as follows:

> "* * * I recall overhearing either "I hate this place!" or "This place sucks!", followed by this hypothetical statement, "I ought to get a fuckin' gun and shoot everybody!"

The co-employee's statement went on to describe how he perceived the Claimant's remarks as "... in extremely bad taste ..." and what he considered to be "... rudeness ..." The statement carefully points out that the co-employee did not use the word *threat* when he reported the remarks to management shortly thereafter. Indeed, his statement concludes with this final sentence:

> "At no time during any conversation that morning did I use the word, or any form of the word threat, in any context."

After detailed review of the instant record, we must the find Carrier had a proper basis for crediting the co-employee's account of what Claimant said. Having so found, however, we must make the further finding that the Carrier's dismissal action is not supported by substantial evidence. While Claimant indulged in an extremely poor choice of words to vent his anger, it is undisputed in the record that he did not address his remarks to anything but the sky. He was not even aware the

co-employee was present to overhear him talking to himself. Most importantly, however, is that his words, on this record, did not constitute a threat. The co-employee who heard them did not consider them to be such. Moreover, all of the Carrier's witnesses to whom the co-employee reported the remarks confirmed that they did not feel threatened by Claimant. The Carrier did not refer Claimant for a drug test to check on any potential physiological impairment. Claimant was permitted to go back to work and stay on the job for three hours thereafter before being withheld from service. When Claimant was called to the office to be withheld from service, the Carrier took no personal safety precautions; an unaccompanied female messenger was merely sent to bring him back to the office. Finally, a letter from Claimant's doctor eliminates any concern about Claimant having suicidal or homicidal tendencies.

Even if, for the sake of discussion, Claimant's remarks were viewed as constituting a threat, in the context they were uttered, they would fit only within the lowest level of workplace violence described by Carrier's policy on the subject. Nothing in the policy suggests that conduct falling within the lowest level warrants dismissal.

In addition to the foregoing lack of sufficient supporting evidence for the dismissal penalty, it must also be noted that the Carrier's action was also based on Claimant's violation of the provisions of the Chicago Division Timetable No. 4 Safety Vision. However, the conducting officer did not enter the document into the record as an exhibit. Nor did the Carrier include a copy of it with its submission to this Board. We are, therefore, left completely without any basis upon which we could determine if the timetable provisions were violated. The conducting officer apparently overlooked this rather significant defect when he reviewed the transcript and issued his dismissal letter. Because of the absence of the entire timetable text, we must overturn this part of the Carrier's disciplinary determination.

Carrier's have a legitimate right and, indeed, an obligation to provide a workplace free of violence. Thus they are justified in being aggressive in prohibiting such conduct and responding to such conduct when it occurs. But they must also be careful not to mistakenly over-react to situations where the evidence does not establish violence.

As we previously noted, Claimant used extremely poor judgment when he vented in the manner he did. Moreover, his condition does not free him from his

obligation to control his temperament. Under the circumstances, we find his conduct did violate the discourtesy provision of Rule 1.6 and calls for substantial discipline. He should have a last chance to preserve his employment. Accordingly, and without undue delay, Claimant must be offered reinstatement to his former employment status with seniority and the other non-economic benefits of that status unimpaired but without back pay for the time he is out of service. If Claimant accepts reinstatement to service, he must successfully fulfill Carrier's customary return-to-service requirements applicable to the instant situation. In addition, he must receive a recommendation from the EAP in support of his return to service in a capacity that does not compromise the Carrier's safety standards. If he is successful in completing this requirements, Claimant should also be of the mind set that any future situations involving unacceptable loss of temperamental control will result in his permanent dismissal from service.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 24th day of November 2004.