

**BEFORE
PUBLIC LAW BOARD NO. 6054**

IN THE MATTER OF ARBITRATION BETWEEN:

| | | |
|--|---|---------------------|
| THE NATIONAL RAILROAD PASSENGER |) | |
| CORPORATION (AMTRAK) |) | AWARD NO. 11 |
| |) | CASE NO. 11 |
| AND |) | |
| |) | |
| THE BROTHERHOOD OF MAINTENANCE |) | |
| OF WAY EMPLOYEES |) | |

STATEMENT OF CLAIM

- (1) The dismissal of Foreman G. Duarte for alleged involvement in an incident that occurred in Diridon Yards in San Jose on September 22, 2004, was without just and sufficient cause and excessive and undue punishment.
- (2) Foreman Duarte shall now be reinstated to service with seniority and all other rights unimpaired with compensation for all wage loss suffered. He shall also have his record cleared of this incident.

FINDINGS

This Board, upon the whole record and all of the evidence, finds that the parties herein are the Carrier and the Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement dated August 5, 1997; and has jurisdiction over the parties and the subject matter.

Grievant was employed by the Carrier as a Foreman in the Track Department, and had seniority dating from December 1, 1997, at the time giving rise to this claim. He had no prior discipline on his record.

According to evidence in the transcript of the Investigation held on October 13, 2004, Grievant and several others were observed by a San Jose, California police officer at around 9:45 PM, on September 22, 2004.

The officer was responding to an alarm from a nearby building. Upon arrival, the officer heard what sounded like gunfire, and observed four individuals standing in the train yard, two of whom were shooting rifles, and one (or both) of the others were holding flashlights. When the individuals with rifles pointed them in her direction, the officer drew her own weapon and ordered them to drop the rifles. They complied almost immediately, and she called for assistance.

When assistance arrived, the police officers handcuffed the Grievant and discovered what they described as "high powered air rifles." An inspection of the immediate area revealed that the weapons had been used as "paint-ball" guns, as well as evidence that the communication tower, signal appliances and helmets on the back of the truck had been struck by "paint balls." The four individuals were detained, but not arrested, by the police, and after they were identified as Amtrak employees, they were released.

The Carrier argued forcefully that, although the rifles were only "paint-ball guns," the situation was quite serious, and might have been disastrous. Had they not immediately dropped the rifles when challenged by the police officer, she might well have fired upon them, resulting in serious injury or even death.

Moreover, the Carrier argued, damaging company property is, in itself, as serious offense, and firing "high powered paint guns" at signal devices could easily have disabled the appliances and caused a serious accident. The Carrier urges us to uphold the discipline.

The Union stipulates that the Grievant's actions were foolhardy and inappropriate on Company property, but argues that the penalty is excessive for such an offense, especially for an employee with over five years' of unblemished service.

Here is a case where a group of employees engaged in what potentially could have been a serious situation, but amounted, in the final analysis, to simple horseplay. The record does not include a charge of abusing work time, so that is not a factor here. It also does not establish which of the four (or whether all four) actually were shooting the weapons, and which (if any) were simply

watching. I believe there should be a lesser degree of culpability for the spectators, but that cannot be determined from the record.

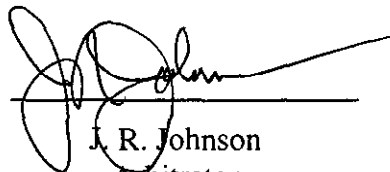
It is clear, however, that Grievant was employed as a Foreman and, as such, carried a greater degree of responsibility for even permitting such activities to occur on Company property. His involvement in this situation was not in keeping with the trust the Carrier places in Foremen and, thus, he has greater culpability.

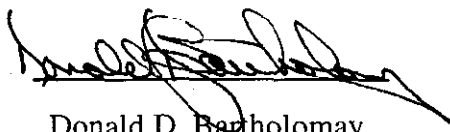
The Board finds that there was sufficient credible evidence in the record that the Grievant was guilty of the charges placed against him, and deserving of discipline. We believe, however, that permanent discharge is an excessive penalty for what actually occurred (as opposed to what might have happened), and will reinstate the Grievant to service without pay for time lost.

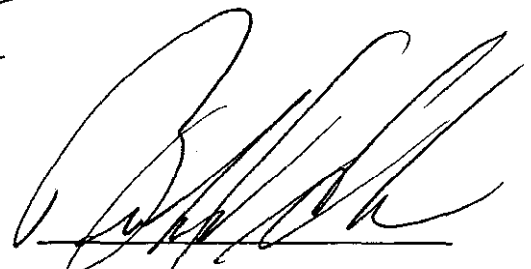
Grievant also will be disqualified from holding a Foreman's position for a period of six months following his reinstatement, but will otherwise have his seniority and all other rights under the Agreement between parties restored.

AWARD

The claim is sustained to the extent described in the findings.



J. R. Johnson
Arbitrator

Donald D. Bartholomay
Employee Member

Richard Sandler
Carrier Member

Dated: 4/1/05