

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NUMBER 7048

BNSF RAILWAY
(former ATSF property)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 7048 Case No. 8
Carrier File No. 14-06-0193
Organization File No. 170-13A2-063.CLM
Claimant: Marvin L. Begay

Claimant Marvin Begay is employed as a Trackman and assigned to the RP14 Gang. He was assigned to work at Milepost 77 on the Cajon Subdivision at approximately 1300 hours on May 24, 2006. The

Claimant was issued a Level-S 48-Day Suspension for an alleged

violation of

HR-90.2, Workplace Harassment; HR-90.4, Violence in the Workplace; and Maintenance of Way Operating Rule 1.6 - Conduct and Rule 1.7 - Altercations for allegedly engaging in an altercation with a co-worker on a Carrier jobsite on May 24, 2006. The Claimant was advised to appear at

the Division's Office in San Bernardino, California on Friday, June 2 for an Investigative Hearing. The Hearing was postponed to June 13, 2006. The Claimant appeared at the hearing and was offered an opportunity to offer testimony and to cross-examine witnesses called by the carrier regarding the incident that occurred on May 24, 2006. The parties were unable to resolve their dispute, and the matter was appealed for adjudication to Public Law Board 7048.

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing May 24, 2006 when Claimant, M.L. Begay, was issued a Level – S Forty-Eight (48) Day Suspension for an alleged violation of HR-90.2-Workplace Harassment, HR-90.4 Violence in the Workplace and Maintenance of Way Operating Rules 1.6-Conduct, and Rule 1.7-Altercations when the claimant and another employee were involved in a physical altercation on the job site May 24, 2006; and
2. As a consequence of the violation referred to in part 1, the Carrier shall reinstate all seniority, vacation, all rights unimpaired and pay for all wage loss commencing May 24, 2006, continuing forward and/or otherwise made whole.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant was issued a forty-eight day suspension for violating applicable Carrier rules prohibiting horseplay, fighting, violence in the workplace, discourtesy and harassment of co-workers. The Claimant

acknowledges having an interaction on May 24, 2006 with a co-worker, Jack Segay Jr., a Crane Operator also assigned to the RP14 Gang, but characterizes the interaction as jesting. The Organization contends that this discipline was without just cause, as Claimant Begay was a victim of an attack, rather than a participant in the physical altercation justifying a suspension.

The transcript of the investigative hearing held on June 13, 2006 at the Carrier's offices in San Bernardino, California demonstrates persuasively that Claimant Begay and his co-worker, Jack Segay, Jr. were seated in a Carrier van, enjoying the cool air and taking a break, speaking to each other in the Navajo language, a language that the eye witness who testified at the investigative hearing did not understand. After Mr. Segay advised Claimant Begay that the machine he was following had started to move, Claimant Begay continued eating his lunch. Shortly thereafter, Mr. Segay advised him that the machine following Mr. Begay's machine had also started to move and would catch up shortly. After a few minutes, Mr. Begay began to exit the vehicle to return to his duties. Mr. Segay reached toward the door in order to conserve the cool air in the vehicle, whereupon Mr. Begay pushed the door open again. The two began tapping each other's hands until Mr. Segay turned away, whereupon Mr. Begay continued touching his hand with greater force.

As Mr. Segay turned his head, Mr. Begay punched him with a closed fist, whereupon Mr. Segay exited the vehicle and, in the ensuing altercation, Mr. Begay hit Mr. Segay twice in the face, causing Mr. Segay's nose to bleed. Mr. Segay then walked away from the altercation and sought assistance.

This description, which is consistent with the written statement submitted by Mr. Segay on May 24, 2006, established persuasively that Mr. Segay was not the instigator of violence, but rather the victim of an unanticipated escalation of horseplay that resulted in his nose being bloodied by a punch with a closed fist. Although Mr. Segay then exited the vehicle and attempted to swing at Mr. Begay, all witnesses agree that Mr. Segay was unsuccessful as a pugilist, and was unable to land any punches on Mr. Begay. Mr. Segay admitted that he desisted in trying to punch Mr. Begay only after his nose had been bloodied, whereupon he sought to speak with the Roadmaster and the Foreman immediately after the incident ended.

Claimant Begay described the genesis of the altercation differently from Mr. Segay. According to Claimant Begay, Mr. Segay jumped out of the van and looked threatening. However, Mr. Begay testified that they had just been joking in the van to the degree that he found Mr. Segay's

verbal conduct to be irritating and asked him to stop. However, when Mr. Segay did not discontinue the verbal banter, Claimant Begay admitted that he struck Mr. Segay because he was joking. The escalation from irritating verbal conversation to bloodying the nose of a co-worker constitutes a material distinction between the conduct of the two employees.

By striking Mr. Segay in the face with a closed fist, causing a bloody nose, Claimant Begay clearly escalated the interaction from verbal conversation and fairly benign physical interaction to a full-fledged fight. The Carrier cannot reasonably be expected to tolerate this kind of conduct under any circumstances.

By his own admission, Mr. Begay violated Maintenance of Way Operating Rule 1.7. Rule 1.7 provides that "Employees must not enter into altercations with each other, play practical jokes, or wrestle while on duty or on Railroad Property." Maintenance of Way Rule 1.6 provides that "Employees must not be: quarrelsome or discourteous." The evidence does not indicate that Mr. Segay was being quarrelsome or particularly discourteous to Mr. Begay before the altercation escalated. However, Mr. Begay engaged in horseplay once he touched Mr. Segay's hands prior to the escalation of the incident. Thus, the Carrier had

cause to impose discipline upon Mr. Begay. At issue in the instant case is the severity of discipline that is appropriate.


Mr. Begay's description of the events is less credible than the version offered by Mr. Segay. In his written statement, Mr. Begay claims that Mr. Segay started to bother him by talking nonsense "...which I didn't like. So I told him to shut up." He claimed that he closed the door, and then Mr. Segay jumped out after him, and all Mr. Begay could do was defend himself. This account is inherently less credible than the description offered by Mr. Segay and by an impartial eye witness. Mr. Begay's description of the manner in which Mr. Segay exited the vehicle as menacing was unable to overcome the thrust of the more credible testimony offered by Mr. Segay. Thus, Mr. Begay was properly deemed by the Carrier to be the aggressor in this physical altercation. The Board also concludes that Mr. Begay was the aggressor who escalated horseplay into violence. Consequently, a far more severe penalty is appropriate for Claimant Begay than for Mr. Segay. Therefore, the imposition of a lengthy suspension was entirely appropriate.

Although the testimony by both participants established that they enjoyed a friendly relationship until their interaction on May 24, 2006 unexpectedly escalated to a physical altercation, and thereafter resumed their friendly relationship without further incident, the Carrier cannot be

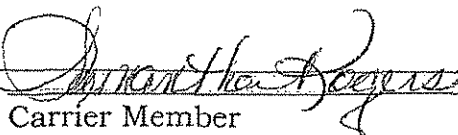
expected to ignore this misconduct. Physical altercations pose a danger to all employees, whether or not they previously or subsequently maintain a friendly relationship. Although the Board may have imposed a shorter suspension, perhaps twenty-one to thirty days, the length of the suspension imposed by the Carrier is not so arbitrarily or capriciously excessive as to be invalid.

Therefore, based on the evidence submitted, there was just for the suspension imposed on Marvin Begay for his conduct on May 24, 2006. His grievance is hereby denied.

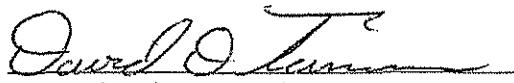
We so find.

 Dated: 9-29-08
Daniel F. Brent, Impartial Chair

(☒) I concur. () I dissent.

 Dated: 10/31/08
Carrier Member

(☒) I concur. () I dissent.

 Dated: 10/13/08
Organization Member