

NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD 7048

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BNSF RAILWAY

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 7048 Case No. 17  
NMB Case No. 106  
Carrier File No. 14-08-0125  
Organization File No. 210-13A2-086.CLM  
Claimant: Sammy Whittington

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STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing May 29, 2008 when Claimant, S. Whittington (1734565), was dismissed from service for argument with a co-worker, resulting in pushing or striking of the co-worker. The Claimant was found in violation of BNSF Violence in the Workplace Policy and Maintenance of Way Operating Rule 1.6; and
2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing May 29, 2008, continuing forward and/or otherwise made whole.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant was dismissed from service for engaging in an altercation with a co-worker, during which the Claimant allegedly pushed or struck the co-worker. The Carrier relied on the co-worker's claim and on testimony by an apprentice who observed the altercation as the basis for its decision to terminate the Claimant's employment

The Organization grieved the discipline as being without just cause, contending that the Claimant did not engage in any physical altercation. According to the Organization, the Claimant did not engage in a fist fight or other act of violence. Rather, the Claimant pushed his co-worker's hands aside to prevent the co-worker from creating a dangerous circumstance by disconnecting a pressurized hydraulic hose, an action that could have resulted in imminent injury to nearby employees. Thus, the Organization asserted, no discipline was justified in the instant case.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was submitted to Public Law Board 7048 for adjudication.

### FINDINGS AND DECISION

Public Law Board No. 7048 (the Board) finds that the parties herein are Carrier and Employee Organization within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and subject matter involved.

This case is a companion case to Public Law Board 7048 Case 19, in which L. Jacobs was issued a Level S Thirty Day Actual Suspension with thirty-six month review period for violating the BNSF violence in the workplace policy and Maintenance of Way Operating Rule 1.6. The Claimant was involved in the same altercation, for which he was dismissed from all service. The Carrier concluded that the Claimant was the instigator of the physical violence, and thus imposed a more stringent penalty upon the Claimant than upon Mr. Jacobs.

On May 29, 2008, the Claimant was working with co-worker and fellow Welder Leonard Jacobs welding rails near milepost 7 on the Wichita Falls Subdivision outside of Fort Worth, Texas when the Claimant became involved in an incident involving Mr. Jacobs, who reported to management that the Claimant had punched him in the face. According to the testimony of a trainee on the site, the Claimant pushed or punched Mr. Jacobs, causing him to stumble backwards or to fall, or

at least for his hard hat to fall to the ground. This description of the incident was insufficiently detailed or precise, however, to justify a conclusion that the Claimant engaged in actual physical violence at the work place. Furthermore, the description provided by the objective eye witness specifically refuted any allegation that there was a physical altercation or striking with a fist or any prolonged scuffling by the two Carrier employees involved in this incident.

The instant dispute began with a series of interactions during which Mr. Whittington would move Mr. Jacob's bucket to the opposite end of a length of rail, whereupon Mr. Jacobs would return his tools to the weld on which he was working and move the Claimant's bucket. Both employees were involved in this series of interactions. In sorting the conflicting claims of Claimant Whittington and Mr. Jacobs, it seems that both employees behaved in a puerile manner, shifting each other's buckets back and forth the length of track segment because they had a dispute as to who would be welding which end of the track segment.

In addition, the Claimant admits at least to having touched his co-worker's hands, purportedly to defuse a potentially dangerous situation that Mr. Jacobs created by disconnecting a hydraulic hose hooked up to a profile grinder while the hose was under hydraulic pressure. This descriptive testimony notwithstanding, the proofs are inconclusive

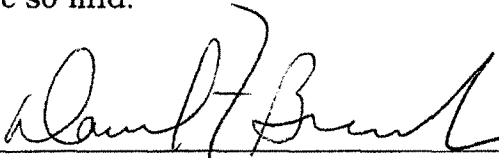
regarding the Claimant's role in this altercation or his justification of his assertive physical intervention.

The evidentiary record does not establish persuasively and with sufficient clarity that the Claimant punched his co-worker, the primary distinguishing factor in the different levels of discipline imposed on the two participants. Nor do the proofs demonstrate persuasively that the Claimant engaged in the kind of assault or prolonged physical altercation that clearly justifies summary discharge. Nevertheless, given the Claimant's admission that he vigorously pushed the co-worker's hands aside and intervened physically, purportedly to prevent the co-worker from disconnecting a hydraulic hose that the Claimant thought was pressurized, substantial discipline is appropriate. Although it was uncontroverted that such an action involving a pressurized hydraulic hose could pose a significant and immediate risk of physical harm, Mr. Jacobs' claim that Mr. Whittington punched him was not established persuasively by substantial credible evidence, as the only eyewitness account of the incident described seeing the Claimant's hard hat fall to the ground. Thus, a substantial reduction in the penalty imposed on the Claimant is appropriate. Therefore, the Claimant's dismissal from all service for the May 29, 2008 incident shall be reduced to a Level S Thirty Day Actual Suspension.

In a companion case, PLB 7048, Case 18, this Board determined that the Claimant violated Carrier policy when the Claimant tested positive for marijuana after a "for cause" test precipitated by the incident described in the instant case. The violation of the Carrier's prohibition against using a controlled substances constituted a separate offense, as his use of marijuana undoubtedly occurred before the altercation addressed in the instant case. Thus, even if the Claimant were otherwise eligible for referral to the Carrier's Employee Assistance Program for his first positive drug test, his commission of two serious offenses resulting in Level S penalties within a three year period render the Claimant ineligible for referral to the Employee Assistance Program.

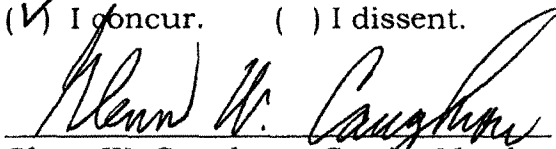
Based on the evidence submitted, the instant claim is hereby sustained in part and denied in part. The Claimant shall be made whole for any wages and benefits he may have lost in excess of thirty days that are attributable solely to this reduction in discipline, rather than attributable to his violation of the Carrier's substance abuse policy, which resulted in his dismissal on other grounds.

We so find.

  
Daniel F. Brent, Impartial Chair

Dated: October 14, 2009

☒ I concur.      ( ) I dissent.

  
Glenn W. Caughron, Carrier Member

Dated: 11-23-09

( ) I concur.      ( ) I dissent.

  
David Tanner, Organization Member

Dated: 11-12-09