

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees Division  
of the International Brotherhood of Teamsters  
and  
BNSF Railway  
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on July 15, 2005 when Claimant, C. D. Rael, was dismissed from service for an alleged violation of Maintenance of Way Operating Rules 1.6-Conduct; 1.7-Altercations; 1.9-Respect of Railroad Company; 1.12-Weapons; 1.15-Duty-Reporting or Absence; 1.19-Care of Property; and Maintenance of Way Safety Rule S-1.2-Rights and Responsibilities, when claimant was arrested for assault with a deadly weapon while on duty May 6, 2005.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately return the Claimant to service with seniority, vacation and all other rights restored, remove any mention of this incident from his personal record, and make him whole for all time lost commencing July 15, 2005 and continuing. [Carrier File No. 14-05-0158. Organization File No. 150-13A1-058.]

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant in this case, Mr. Casey D. Rael, entered the service of the Carrier in 1997. He was employed in the Carrier's Maintenance of Way Department. He was working as a Lead Welder, headquartered at Belen, New Mexico, on May 6, 2005, when an incident occurred which eventuated in his dismissal from the Carrier's service. On May 13, 2005, he was served a notice of charges and directed to attend an investigation on May 20, 2005. The purpose of the investigation was stated as follows:

... [T]o develop the facts and place responsibility, if any, in connection with possible violation of Rules 1.6, 1.7, 1.9, 1.12, 1.15 and 1.19 of Maintenance of

Way Operating Rules, . . . and Rule S-1.2 of Maintenance of Way Safety Rules, . . . concerning your alleged failure to devote yourself to assigned duties and absenting yourself from assigned work location without authority, alleged altercation while on duty including possession of deadly weapon, and alleged misrepresentation of the facts concerning same to Roadmaster Gomez, while operating company vehicle 16489 while on duty as Lead Welder, Dalies, New Mexico, at approximately 10:00 AM, May 6, 2005.

By mutual consent, the investigation was twice postponed and finally held on June 17, 2005. The Claimant was capably represented by the Organization's Vice General Chairman. A transcript of testimony and evidence was prepared and appears in the record before this Board. Direct testimony was offered by the Claimant and Welder Trainee Eleano Rivas, Sr., an eyewitness to the incident under investigation. Roadmaster W. Gary Gomez also presented direct testimony. Special Agent Nicholas C. Archuleta entered in evidence a police incident report prepared by a Police Officer in the Los Lunas, New Mexico Police Department. Mr. Archuleta stated that was the extent of his knowledge about the incident.

There is substantial conflict in the evidence and testimony. An altercation occurred which was the genesis of the entire incident. The description of the altercation given by the Claimant and Mr. Rivas is largely in accord. The other party in the altercation did not appear at the investigation. His testimony, and that of another witness, were spoken to the Los Lunas Police Officer, and appear in the incident report. Not surprisingly, the accounts given by the antagonists are at variance in several points. The statements of the other parties recorded in the incident report are clearly hearsay, and will be given little weight.

Mr. Rivas, who was with the Claimant when the altercation began, was asked to describe what he knew of the incident. His description is found at Transcript Answer No. 43:

. . . We, we started to drive towards Las [sic] Lunas, we was supposed to go to Isleta to work on a frog, and he [the Claimant] got a phone call. And we turned around, we went straight one block, just one block, and there was a white car. He just parked by and not knowing, he jumped off. I could not see anything but, the other guy started running towards Casey with the fists, getting ready to fight. So I jumped off, went around the truck and they were already fighting. And they were, as they were fighting I tried to tell 'em to, to stop. And at the time they were rolling around on the ground, which the other guy, I don't know his name but he, he tried to reach for his pocket for a knife and the knife just fell out. He tried to grab it again. That's when I hurried up and kicked the knife over and picked up the knife. And, and I got in the middle, that's when I got in the middle. I said hey, hey, calm down, calm down. So I was in the middle. They, they both stopped fighting and then the other guy, well Casey was upset about the guy yelling at his

kids. And that's what, the other guy, I remember the other guy saying well I can yell at them any time I want to. They're in my house. And they started fighting again. That's when I started, I, I heard the police sirens so I just backed off. As the police came about, all I saw was just guns flying around, you know, I just froze [sic] up and just stood there.

Upon further questioning, Mr. Rivas stated that the Claimant said nothing to him about the telephone call he had received. When the police officers arrived, Mr. Rivas gave them the knife that he had retrieved from the "other guy." He described it as a black, closed, pocket knife. He was asked if he ever saw the Claimant with a knife, and said he did not.

There is testimony in the record (which is confirmed by examination of a map) that Los Lunas is on the route and intermediate between the Claimant's point of origin and the destination work site on the day of the incident herein.

The Claimant's description of events differs little from that offered by Mr. Rivas. He was asked to give his version, and his response is found in the following testimony:

225. Q. Mr. Rael, could you tell me your version of this incident?
- A. All right. I got the call, my, my mom said that my ex-wife and her boyfriend are there and they're, they're yelling at her, 'cause they were supposed to pick up my son early. She gets him every other Friday from 5:30 to the next day at 8:00. I let her get him early. On this particular Friday when she got there he didn't want to go, so that's when my mom called and said well, he don't want to go, he's screaming not to go. I said well he don't have to go then, it's not even time anyway. So then that's when they started yelling at my mom and calling her a witch and a slut, bitch, everything, all this. So that's, I, I went over there and as soon as I got there, pulled up behind their car in that parking lot right next door to my mom's house and, and that's when that Carlos swung at me. We started fighting and then we kept fighting. When he started losing he wanted to talk and then I, I didn't talk I just kept hitting him. And then, I never seen the knife that, I didn't see him pull out the knife 'cause I was on top of him. I had him in a headlock and he was gonna stab me when I wasn't looking I guess, but and then my knife, I never pulled it out. I had it in my pocket. Put it in the truck later when the police came. I was gonna shut off the truck and I was paranoid so I put the knife in the truck. That's when they found it. Never opened it, never pulled it out, otherwise I, I would have pulled it out I woulda used it, and I didn't pull it out.

226. Q. You would've used it as far as, what do you mean by using it?  
A. What they're accusing me off [*sic*], that, to hurt him I guess. But I didn't. I didn't pull it out, I didn't do nothing with it. I didn't have to. I, I was winning the fight. And he's, he did swing first. I didn't go there to fight. I went there to see what was going on with my Mom. Why they were yelling at her, you know, something 'cause she was alone there with my son at her house.

The person identified as "Carlos" did not appear the investigation. His version of the events appears in the incident narrative prepared by the Los Lunas Police Officer, which is appended as an exhibit to the transcript. It states:

I asked the second subject, who was identified as Carlos R\_\_\_\_, what had happened and he stated he and his girlfriend, C\_\_\_\_ L\_\_\_\_, had gone over to Casey Rael's mother's residence in Los Lunas, in order to pick-up her son. Carlos stated he had parked his vehicle at the County Inn parking lot and C\_\_\_\_ had walked to the residence. He stated once they arrived at Casey's mother's she would not let C\_\_\_\_ take her son because he was with her. Carlos stated at that time Casey Rael pulled up in his work vehicle and advised him he was going to kill him and wanted to fight him. Carlos stated he tried to talk to Casey not to fight him. Carlos stated Casey was very upset and would not listen and came at him punching him with a closed fist in the face and chest area. Carlos stated they started wrestling with each other and went to the ground fighting each other. Carlos stated he was able to get free and at that time Casey pulled out a silver in color pocketknife and stated to him "I Should Kill You" and at that time the police showed up.

The Police Officer then interviewed the Claimant's former wife and entered the following in the incident report:

A short time later I spoke to C\_\_\_\_ L\_\_\_\_ and was able to learn the following information. C\_\_\_\_ stated she had spoken to her ex-husband, Casey Rael, and was told to come and pick up her son at his mother's residence located at \_\_\_\_ Street, Los Lunas. C\_\_\_\_ stated her along with her boyfriend, Carlos R\_\_\_\_, arrived in the area and Carlos had parked down the street at the County Inn Lounge parking lot. C\_\_\_\_ stated she went to Casey's mother's residence and was not allowed to pick up her son. C\_\_\_\_ stated she went back to where Carlos was parked and at that time Casey had pulled up in his work truck and Casey got out of the vehicle and approached Carlos and wanted to fight him. C\_\_\_\_ stated Carlos tried to talk to Casey and Casey was telling Carlos he was going to kill him and Casey started hitting Carlos and they started wresting [*sic*]



with each other. They went to the ground and Carlos was able to get free and then Casey pulled out a silver in color pocket knife and told Carlos "I should kill you." C\_\_\_\_\_ stated at that time the police arrived.

The Police Officer described the injuries suffered by both fighters: "Casey had cuts on both arms and nose area. Carlos had physical injuries on his right arm and left leg." Both the Claimant and Carlos were arrested, and both refused treatment for their injuries. They were each charged with Public affray, Assault, Assault-attempted battery, Aggravated assault-deadly, and Battery. Spacial Agent Archuleta described the meaning of these charges, at Answer No. 190:

Public affray is for fighting. The assault is where he was, for where, where they were actually having contact with each other. The assault and attempted battery, and the assault or the aggravated assault and deadly is with the knife which is, as you'll notice on the far right, it says Knife/Cutting instrument and then battery is physical contact with the subject.

Although Mr. Archuleta said his knowledge of the incident was limited to the Los Lunas police report, the Conducting Officer asked him for his opinion about the offenses in that report:

193. Q. . . Mr. Archuleta, if the, you know, Casey was just doing this under self-defense, would he have been arrested for, during, in the last paragraph of this police report, aggravated assault with a deadly weapon, assault, battery, public affray? Is that normal for somebody that's just out defending themselves? With your experience as a police officer with the railroad?
- A. Well, generally no, sir.

After the Claimant was arrested, he called Roadmaster Gomez from the jail to explain why he was not on the job, and to advise that he was in the process of arranging bail. Mr. Gomez was asked what the Claimant had said in explanation of the events:

106. Q. What did Mr. Rael tell you then that happened?
- A. That, he told me that his ex-wife and her boyfriend went to pick up the children at his mother's house. There was a confrontation between the mother and the girlfriend, and then with the boyfriend being there. And from my understanding his mother wanted him to go help with the altercation and that's why he went over there.
107. Q. What kind of altercation did he say they were having?
- A. That they were yelling at his mother, the ex-wife and the boyfriend were yelling at his mother.

As noted above in Answer No. 225, the Claimant said he put his knife in the truck. The incident narrative records what happened when the police officers arrived on the scene:

... Upon arriving at the scene I noticed two male subjects in the Country Inn parking lot standing heel to toe with their fists and hands in a fighting manner yelling at each other. I noticed one of the subjects to be a Casey Rael. Sgt. J\_\_\_\_\_ W\_\_\_\_\_ and I approached both subjects ordered both subjects to get on the ground and at that Casey Rael got into a Burlington Northern Railroad Company truck that was in the parking lot. Sgt. W\_\_\_\_\_ advised Casey to get on the ground. Both subjects had handcuffs placed on them for officer safety.

Roadmaster Gomez was called to the scene to take charge of the Carrier's truck. The incident narrative continued:

While on scene Paul [*sic*] Gomez a supervisor from Burlington Northern Railroad Company arrived and gave Sgt. W\_\_\_\_\_ verbal consent to search the work truck Casey was in and Sgt. W\_\_\_\_\_ found in the middle console a silver in color pocketknife with blood on the knife. The knife was tagged into evidence.

Mr. Gomez testified that he was called to pick up a welding truck in Los Lunas. When he arrived, the Claimant had already been removed from the scene. He said that a police officer wanted a witness as he removed a knife from the truck. He was questioned by the Conducting Officer:

94. Q. ... And why would the police officer search the BNSF truck?  
A. He said that when he got there he witnessed Casey walking to the truck and he got in the truck and he got down. That's all the cop, officer told me. He said he witnessed Casey walking, Mr. Rael walking towards the welding truck. Mr. Rael got up in the truck, and the officer had him get out of the truck. For what reason he searched the truck, I don't know. He didn't, the officer didn't tell me that.
95. Q. Was there anything abnormal about this knife?  
A. Not really. It, ...
96. Q. Did it have blood or anything on it like that?  
A. There was a, a little, there was this little spot of blood on the handle part of it.
97. Q. Was it fresh blood?

- A. I didn't really look like it.
98. Q. Okay.  
A. I couldn't, I can't answer that.
99. Q. You couldn't tell one way or another?  
A. No, I couldn't tell.
100. Q. Okay.  
A. I didn't, I didn't handle the knife.
101. Q. Did the police officer tell you any other thing, you know, about the incident?  
A. He said when he got there, they were, Mr. Rael and the other guy were fighting. And they started breaking it up. And Mr. Rivas told the officer that the guy Mr. Rael was fighting had a knife. It was my understanding Mr. Rivas gave that knife to the officer. And the other report was that, from the guy that Mr. Rael was fighting, that Mr. Rael had a knife also.

Mr. Gomez was questioned further about the knife, on cross examination by the Claimant's representative:

148. Q. You stated that there was a knife taken out of the company truck, is that correct?  
A. That is correct.
149. Q. Was this just a, like a Leatherman or a regular pocketknife, or?  
A. It, it was a, I know it was a, it was all silver. The handle was silver. It was a closed, folding knife, and it was in the console of the welding truck.
150. Q. Okay. Would the blade have been more than three inches long?  
A. I don't know. I didn't, I did not open the knife, I don't know.
- ...
170. Q. ... And you don't know if this knife was in the console, if it would, had any participation whatsoever in this fight? All you know it was in the console of the truck, correct?  
A. Right. It was in the console of the truck when I saw it.

On redirect examination:

171. Q. Why would the officer want to search the truck?  
A. Like I stated before, when the officer got there to break up the fight he witnessed Mr. Rael walking towards the truck. And he said he was acting suspicious when he was walking towards the truck and Mr. Rael had to get back out of the truck for the police officer. And he had a, the officer had a report from the person Mr. Rael was fighting that Mr. Rael had a knife.

The Claimant described the knife he possessed as one used to open boxes of welding materials at work, and he admitted that he placed it in the console, but denied that he had pulled it on his antagonist. He further testified:

272. Q. This knife is just a carrying tool?  
A. Yes, I cut open the Boutet boxes. That's the only reason it's carried. It's not.
273. Q. This knife, you've carried it every day, right?  
A. Yes.
274. Q. Nobody's ever taken exception to it or anything of that nature?  
A. No, I've seen roadmasters carry the same type knife.

On July 15, 2005, the Carrier's Southwest Division General Manager advised the Claimant the Carrier's decision on the investigation:

This letter will confirm that as a result of formal investigation held on June 17, 2005, concerning your failure to devote yourself to assigned duties, absenting yourself from assigned work location without authority, altercation while on duty, including possession of deadly weapon, while operating company vehicle 16489, and your misrepresentation of the facts concerning same to Roadmaster Gomez, while on duty as Lead Welder, Dalies, New Mexico, at approximately 10:00 AM, May 6, 2005, you are dismissed from employment for violation of Rules 1.6, 1.7, 1.9, 1.12, 1.15 and 1.19 of Maintenance of Way Operating Rules, in effect October 31, 2004, and Rule S-1.2 of Maintenance of Way Safety Rules, in effect January 31, 1999, as supplemented or amended.

The above disciplinary decision was promptly appealed to the Carrier's Labor Relations Department by the Organization, which points out that all criminal charges against the Claimant

have been dismissed. After reviewing the testimony offered by the Claimant and Mr. Rivas, the Organization notes that the Claimant was only a block away at the time his mother called him because she was being attacked. When he responded to his mother's call, he was attacked and an attempt was made to pull a knife on him. The Organization comments:

I don't know of one person who would not respond to such an attack on his mother and children, and the Principal's Supervisor also states that he would have responded to such an incident involving his family.

It further argues that the Claimant did not fight with another employee of the Carrier, nor did he pull a knife on another person. The Carrier has lost no business because of this incident, and the Organization points out that the Claimant was reinstated after the incident, only to be dismissed later because of the charges — later dropped — brought by the Los Lunas Police Department.

The Organization acknowledges that a knife was found in the truck, but it was used in his work, and there is nothing illegal nor against Carrier policy in carrying a pocket knife. It suggests that the Claimant is guilty of nothing except defending his mother and children against violent attack from another person. The Organization asks that its appeal be sustained.

The Carrier responds that during the course of the investigation substantial evidence was developed that the Claimant was in "gross violation" of all the cited Rules. It points out that the Carrier satisfied its burden of proof when the Claimant admitted to violation of the charged Rules in the following testimony:

228. Q. . . . Mr. Rael did you get into an altercation?  
A. Yes.
229. Q. While on duty?  
A. Yes.
230. Q. Were you driving a company vehicle?  
A. Yes.

The Carrier further argues that it is irrelevant whether the criminal charges were dismissed. It argues that responsibility for violating a Carrier Rule is independent of the state's court system. In this case, it asserts, dismissal is not harsh nor arbitrary. The claim was denied.

The Board has studied the transcript and accompanying exhibits, and considered the arguments of both Parties. Both have offered well-prepared positions. The Board has also given thoughtful regard to the Rules cited in the notice of charges and the disciplinary decision.

Maintenance of Way Operating Rule (MWOR) 1.6

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.

The Claimant was in violation of the above Rule when he left his assigned duties and went to the nearby place where he encountered his former wife's boyfriend. He was careless of his own safety and negligent of his duties.

MWOR 1.7

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

The Claimant violated the above Rule when he entered into an altercation while on duty. There was some conjecture in the record about whether this Rule addressed altercations with someone not an employee. The Board believes that although the Rule could perhaps be worded more comprehensively, it would be ridiculous to permit an on-duty employee to enter into an altercation with a non-employee, without consequences. A fight's a fight.

MWOR 1.9

Employees must behave in such a way that the railroad will not be criticized for their actions.

There is no evidence whatsoever that the Carrier suffered any criticism for the actions of the Claimant.

MWOR 1.12

While on duty or on railroad property, employees must not have firearms or other deadly weapons, including knives with a blade longer than 3 inches. Employees may possess these weapons only if they are authorized to use them to perform their duties, or if they are given special permission by the designated manager.

The Carrier has the burden of showing, independently of criminal charges, (as it argues), that the charged employee had in his possession a firearm or other deadly weapon, including knives with a blade longer than three inches. The record fails to indicate the precise length of the blade of the knife which the Claimant admittedly placed in the truck's console. His act in attempting to hide the knife was an impulsive, ill-conceived decision, and rightfully caused suspicion to fall on him, resulting in a search and disclosure of the object.

The blade was not measured, and although it apparently had a blood spot on the handle,<sup>1</sup> there is no testimony, not even in the police incident report, that the blade was opened to find out if the blade was bloody. The incident narrative, however, states that the Claimant had cuts on both arms and nose area, but the "physical injuries" suffered by "Carlos" are not described as cuts. The blood spot on the handle may have easily come from cuts on the Claimant, himself, and without further evidence that the blade was bloody, or that the blood spot on the handle was that of "Carlos," the Carrier has failed to carry its burden of proof that Claimant had a knife with a blade longer than three inches, nor any other "deadly weapon."

MWOR 1.15

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority. Continued failure by employees to protect their employment will be cause for dismissal.

The Claimant violated the above Rule when he left his assignment without proper authority, to intervene in the dispute taking place at his mother's residence. In doing so, of course, he was not spending his on-duty time "working only for the railroad."

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<sup>1</sup>The record contains no forensic analysis of the spot to indicate whether it was blood or some other substance.

MWOR 1.19

Employees are responsible for properly using and caring for railroad property. Employees must return the property when the proper authority requests them to do so. Employees must not use railroad property for their personal use.

The Claimant was driving a vehicle owned or leased by the Carrier. He put it to personal use when he drove off his route to the work site, toward his mother's home, notwithstanding the detour was a relatively short one.

Maintenance of Way Safety Rule S-1.2

We have the right and responsibility to perform our work safely. Our training, skills, work experience, and personal judgment provide the foundation for making safe decisions about work practices.

The Claimant placed himself in a place of danger when he left his assigned duties to enter a tense situation, one which resulted — as it turned out — in injury to himself.

The Board does not believe that the Claimant misrepresented the facts concerning the altercation and surrounding events, to Roadmaster Gomez, as the dismissal letter alleges. The record indicates that after the Claimant was arrested, he called Mr. Gomez (who already knew of his arrest, of course, having come to the site of the altercation after the Claimant was taken away), and told him what happened. After being bailed out of jail, he came by Mr. Gomez's office and discussed the matter further.

The Claimant did not obtain permission to divert from his intended route to the work site, to respond to the call from his mother. It almost goes without saying that no on-duty employee can just leave his place of duty, without the permission of a supervisor. Mr. Gomez was asked about this policy:

115. Q. . . . Does Mr. Rael have any means of communication to get ahold of you if need be, if he needs to leave him, leave from duty, leave his absence, leave his work location?
- A. The BNSF company radio and cell phone.
116. Q. .Okay. What type of policy do you have if somebody has to leave their duties or leave their work assignment?
- A. They're to contact me.
117. Q. Did Mr. Rael, again, ever contact you?



A. No, he did not.

Clearly, however, there are mitigating circumstances. The Claimant received a distressed call from his mother, apparently without a husband or other male figure present to act in her defense, confronted by an angry, estranged daughter-in-law, who was accompanied by a boyfriend. The Organization argues that even the Claimant's supervisor said he would have responded to such an incident involving his own family. That testimony is found in the record, Roadmaster Gomez questioned by the Claimant's Representative:

130. Q. . . . So let me ask you, would it be fair to say if you received a phone call from your mother that she was in an argument with somebody and needed your help, would you go over there? You, yourself? If it was your mother?

A. I would've went over there, but not in a company vehicle.

131. Q. But you would've went over?

A. Absolutely, I would've.

Mr. Gomez's candid response begs the question, however. "[N]ot in a company vehicle." He is correct with respect to the letter of the Rule, of course — a company vehicle may not be used for personal business without permission — but the exigent circumstances were that the Claimant's company vehicle was just a block or two from his mother's residence. His personal vehicle was, according to the record, some 15 to 20 minutes away, back at his point of origin. It would appear ridiculous to suggest that he drive all the way back to Belen to swap vehicles and return to the same neighborhood from where he had been. An alternative course of action was suggested when the Claimant was questioned by the Conducting Officer:

227. Q. Mr. Rael, did you, you know, and I know, I realize, I mean and I think any one of us in this room if, you know, our children would been, or, or parents, whatever would've been in any kind of danger would take what, whatever actions. But, I mean, in today's environment, and, and you stated earlier you had a cell phone. Why didn't you call the police? 911?

A. I don't know. 'Cause they wouldn't do nothing anyway. Never have and never will.

...

242. Q. Was it your best judgment to, to go there, to not call the police before you arrived?

A. It's my mom. I did the first thing. It was within a split seconds notice. I turned around, went over there. I don't, I didn't, police ain't gonna do nothing.

243. Q. Did you give them an opportunity? Did you call the police?

A. No. They always listen to the women more and she'll start screaming.

In retrospect, with the clear vision that leisurely consideration of all the facts gives us, the Claimant acted impetuously, angered by events, and without the luxury of time to weigh all available alternatives. His very proximity to the site of his mother's residence allowed little time to balance one course of action against another.

Turning to the Parties' arguments, the Board agrees with the Carrier's position that the dismissal of the criminal charges against the Claimant has no bearing on the charged violations of the Carrier's Rules. The quantum of proof in a criminal case is much greater — beyond a reasonable doubt — than in a disciplinary hearing, although we are inclined to demand a burden of proof greater than the customary arbitral quantum — either preponderance of the evidence or clear and convincing proof — when a claimant is dismissed and/or issues of moral turpitude are involved. In any event, a prosecutor may elect not to pursue a case for any number of reasons, including work load and higher priority cases.

The Neutral Member has given little weight to the statements given to the Los Lunas Police Officer by any of the parties. They all come into the investigation as hearsay statements, the Police Officer describing in an official document what he was told by others. Neither the Police Officer nor "Carlos" nor C \_\_\_\_\_ L \_\_\_\_\_ were present so they might be directly questioned and cross examined, and their credibility tested and judged in person. Their statements may be altogether accurate — the identification of the "silver in color pocket knife" possessed by the Claimant lends some credibility to their story (did C \_\_\_\_\_ L \_\_\_\_\_ know that her ex-husband habitually carried a silver knife?) — but without corroboration, the Board is not prepared to favor inconclusive hearsay testimony which conflicts with observed direct testimony.

The Claimant, certainly, does not have clean hands. Mr. Rivas, the only eye-witness whose credibility could be tested, said that "the other guy" advanced upon the Claimant, preparing to fight. After their initial exchanges of blows, however, the Claimant had an opportunity to de-escalate the situation. By his own words, in Answer No. 225, he admitted:

When he started losing he wanted to talk and then I, I didn't talk I just kept hitting him.

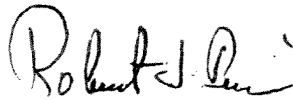
He thus bears some responsibility for the continuation of their fight. His self-defensive posture changed to one of offense at that point.

The Board is persuaded that permanent dismissal is an inappropriate disciplinary penalty. The mitigating circumstances have been discussed above, i.e., the emotional impact of a domestic confrontation involving closely related loved ones. The Board is not convinced that all the charges have been proven, also discussed above. Against those factors, we have examined the Claimant's disciplinary record. In 1999 he was given a formal reprimand for absence without authority. In 2004 he was assessed a record suspension for failure to provide sufficient sight distance when working on-track under lookout protection. That is not the record of an habitually quarrelsome employee.

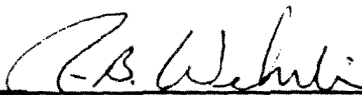
In consideration of all the issues discussed herein, the Board determines that the Claimant's dismissal should be reduced to a lengthy suspension. The Claimant shall be restored to service with seniority and other rights unimpaired, without pay for time lost, no later than fifteen (15) days from the date affixed below.

AWARD

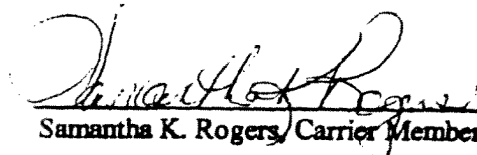
The claim is sustained in accordance with the Opinion. The Carrier shall return the Claimant to service within fifteen (15) days from the date affixed below.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Samantha K. Rogers, Carrier Member

3/3/06

Date