

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7048

AWARD NO. 48, (Case No. 48)

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
David D. Tanner, Labor Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing August 25, 2009, when Claimant, Bill E. Westley (6590731), was dismissed for entering into an altercation on August 24, 2009. The Carrier alleged violation of MOWOR Rule 1.6 Conduct.**
- 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 August 25, 2009, continuing forward and/or otherwise made whole."
(Carrier File No. 14-09-0194) (Organization File No. 170-13A2-094.CLM)**

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board had jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

The undisputed facts are that on August 24, 2009, Claimant was involved in a physical altercation with co-worker N. A. Sullivan while boarding a company bus at Alma, WI, on or about 1720 hours while assigned as a Machine Operator on Rail Gang RP02 and because of that incident he was removed from service pending an Investigation. On August 25, 2009, Claimant and Mr. Sullivan were directed to attend a formal Investigation on September 2, 2009, which was mutually postponed until September 10, 2009, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged entering into a altercation, while boarding the bus at Alma, Wisconsin, on or about 1720 hours on August 24, 2009, while assigned as Machine Operators on RP02."

On September 30, 2009, Claimant was notified that he had been found guilty as charged and he was dismissed.

It is the Organization's position that the Carrier erred in its dismissal of the Claimant. It asserted that the facts reveal that the Claimant and employee Sullivan were not getting along and Claimant felt as if he had been harassed and intimidated. It argued that the Claimant had approached his supervisors on several occasions about the alleged harassment and on one occasion Foreman Dorrell told Claimant to try to get along, or settle their problems after hours and on the same morning of the incident Dorrell again told him to settle it like men. According to the Organization that was the same as telling the two employees to settle their differences in a physical manner instead of dealing with the situation. It pointed out that Foreman Dorrell recognized there was a potential problem and chose not to do anything except to tell them to settle it like men, he made no attempt to make sure they were separated for a day or two on the rides to and from the lodging facility nor deal with the situation in any manner. It closed by stating that the Carrier did not meet its burden of proof and requested that the dismissal be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the record substantiates that the Claimant entered into an altercation with a co-worker in violation of Rule 1.6 - Conduct when he struck that employee in the back and instigated the fight. It argued that type of behavior cannot be tolerated in the workplace as it creates a dangerous environment which other employees should not be subjected to. It concluded that based upon the seriousness of the charges the discipline was appropriate and it asked that it not be disturbed.

The Board has thoroughly reviewed the record and found that the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11. The Board further notes that this is a companion case to Award No. 47, Case No. 47 of this tribunal as both cases involve the participants (Westley and Sullivan) in the incident that transpired on August 24, 2009, which is in dispute.

There is no disagreement between the parties that the Claimant entered into an altercation with Mr. N. A Sullivan on August 24, 2009. Claimant argued that Sullivan had harassed him and he felt intimidated which was the causal effect of the altercation. On pages 12 and 13 of the Transcript, Senior Special Agent M. Moody was questioned about the incident wherein he read from his prepared narrative involving his investigative work. He stated in pertinent part the following:

"...Mr. Westley admitted to having a confrontation with Mr. Sullivan at the door of the bus and stated that he attempted to hit Mr. Sullivan and missed and ended up on the ground and that was all he remembered."

Moody went on to testify that earlier in the day Sullivan reported to his Foreman, Mr. Dorrell that Westley intentionally bumped into him and that Foreman Dorrell talked to both employees and told them to stay clear of each other and behave as adults. Moody's narrative of the events of August 24th were confirmed by Foreman Dorrell during his testimony. Officer Moody further testified on page 13 of the Transcript as follows:

"At the end of the day while the crew was boarding the bus Mr. Sullivan and Mr. Westley approached the door of the bus at about the same time. Mr. Sullivan enters first and Mr. Westley strikes him in the center of the back. Mr. Sullivan turns around and Mr. Westley is in a fighting stance. Mr. Westley throws a punch at Mr. Sullivan missing him and ends up on the ground. Mr. Westley then gets up again taking a fighting stance and Mr. Sullivan punches him on the right side of the face and Mr. Westley again goes down." (Underlining Board's emphasis)

On page 19 of the Transcript Moody testified regarding Westley's behavior as follows:

"...he was the instigator of the incident and from what I could tell from the information that I had seen and that I had taken Mr. Sullivan was defending himself." (Underlining Board's emphasis)

Ken Hughes, the Bus Driver who witnessed the altercation wrote in his statement the following:

"Viewing the incident from the driver's seat, Norris and Bill were attempting to get on the bus at the same time. Neither of them gave way to get on first. They then bumped into each other and Norris continued onto the bus. Bill then hit Norris (with a stabbing motion) in the back. Norris then turns around. Bill swings misses, and falls to the ground. Bill then gets up and swings at Norris again. Norris hits Bill and Bill falls to the ground." (Underlining Board's emphasis - and the Board notes for the record that Bill is the Claimant and Norris is co-worker Sullivan)

Employee, Leigh Orvis, was another witness of the incident and he wrote in pertinent part the following:

"I saw Bill & Norris meet at the bus door, Norris proceeded onto the stair, Bill nudged into Norris like kids cutting into a lunch line with his forearm and elbow. Norris now had both feet onto bus stairs, facing into the bus. I saw Bill assault

Norris in the middle of his back with his forearms and closed fist 'hammer style'.
(Underlining Board's emphasis)

Witness, Sam Sportsman, offered a similar statement as the two above confirming that Westley was the aggressor.

Contrary to the Organization's inference there was no showing that Foreman Dorrell suggested to Claimant or Sullivan that there disagreement should be settled with fisticuffs, but instead the record substantiates that he told them to behave as adults, do their work and leave each other alone. Witnesses Hughes and Orvis probably summed it up best that Claimant and Sullivan behaved childish when one would not give way to the other or the other tried to cut in ahead. The Claimant suggested that because Sullivan cut in ahead of him he became infuriated and threw the first punch. He did not admit that he struck Sullivan in the back, but instead argued he threw the first punch after Sullivan turned around and stepped to the ground despite the fact that everyone who testified or offered a written statement verified that the Claimant struck Sullivan in the back while they were getting on the bus and then threw the first punch while they were on the ground. Even assuming for the sake of argument that the Claimant's testimony was accurate it is evident that he attempted to strike the first blow, thus he was the instigator of the altercation. It is clear that substantial evidence was adduced at the Investigation that the Claimant entered into an altercation on August 24, 2009, and the Carrier met its burden of proof that he was guilty as charged.

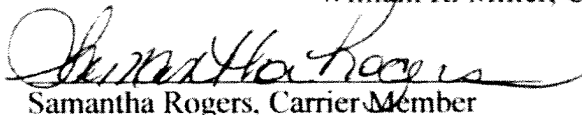
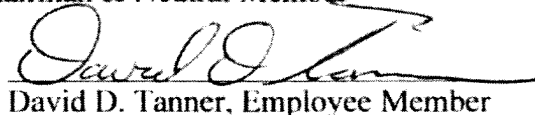
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had 15 years service with a good work record, unfortunately he was guilty of a serious infraction wherein he was the instigator of workplace violence. The Board has determined that there was no grounds for mitigation of the discipline, therefore, we find and hold that the discipline will not be rescinded as it was not contrary to the Carrier's Policy for Employee Performance Accountability (PEPA).

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

Award Date: 3/18/11