

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- “1. The Carrier violated the Agreement when on May 20, 2002, Mr. R. J. Eslinger was issued a Level S Suspension of thirty (30) days for allegedly violating Maintenance of Way Operating rules 1.6 and 1.7, effective January 31, 1999, including revision up to April 2, 2000, and ‘Violence in the Workplace’ Policy No. 90.4, effective August 1, 1995, including revisions up to July 1, 1998.
- “2. The Carrier violated Rule 13 and Appendix no 11 of Agreement between the parties dated January 1, 1984 as amended.
- “3. As a consequence of the Carrier’s violation referred to above, Mr. Eslinger should be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss commencing May 2, 2002, continuing forward and/or otherwise made whole.” [Carrier File No. 14-02-0130. Organization File No. 180-13A2-022E.CLM].

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, Mr. Raymond J. Eslinger, was hired by the Carrier on March 4, 1996, in its Maintenance of Way Department. On May 2, 2002, he was working as a Welder, constructing track panels near Los Angeles, California. He and another employee, Mr. Donald Brooks, became engaged in an altercation on that date, which resulted in a notice of investigation being served on both of them by the Carrier’s Division Engineer, Mr. D. L. Dill. They were charged with violation of several rules.

The investigation was held on May 13, 2002. Both charged principals were represented by the Organization’s Assistant General Chairman. A transcript of evidence and testimony was

recorded and transcribed by a Certified Shorthand Reporter, and is a part of the record before this Board.

The transcript contains the testimony of four witnesses and the two principals. Their combined testimony, not without some significant differences, recounts this series of events which led up to the altercation:

There were three welding crews engaged in construction of track panels at Mile 16 on the Harbor Subdivision on the morning of May 2, 2002. Each crew consisted of two Welders designated in the transcript as "teammates," and will be uniformly referred to as such in this Award. Each crew was assigned a truck. At about 10:30 a.m., Track Supervisor Greg Kirksey called Track Supervisor Brooks, by cellular telephone, and instructed him to have Welder Tomas Dominguez, one of those working at Mile 16, leave for Hobart Yard in Los Angeles by 12:00 noon, because he was needed for critical work at 1:00 p.m.

Mr. Brooks was inspecting track at Mile 14 at that time. He drove to Mile 16 and talked in person with Mr. Dominguez at about 10:45 a.m., instructing him as requested by Mr. Kirksey. At about 11:00 a.m., Mr. Kirksey paged Mr. Dominguez and directed him to be at Hobart Yard between 12:00 noon and 1:00 p.m.

At "a little after 11:00," according to Mr. Dominguez, he asked the Claimant to move his truck so he (Mr. Dominguez) could get his truck out for the trip to Hobart Yard, but the Claimant refused to move. (The Claimant testified that he was not asked to move until about 12:55 p.m.). The three welding crews' vehicles were parked in such a manner that Mr. Dominguez's vehicle, which arrived at the work site first, was unable to get past the other two trucks unless they were moved. The Claimant's truck was in the middle. The other welding crew agreed to move their truck, which was first out, when the Claimant was ready to move his.

About 12:15 p.m., Mr. Kirksey again paged Mr. Dominguez and instructed him to "Get over here now." Welder Edgar Fernandez, who was Mr. Dominguez's teammate, showed this paged message to the Claimant, according to Mr. Robert Dowell, the Claimant's teammate.

About 12:45 p.m., Mr. Kirksey called Mr. Brooks again, asking him why Mr. Dominguez had not yet arrived Hobart Yard. Mr. Brooks was about one mile from Mile 16, and he immediately drove there, arriving about 12:55 p.m. He asked Mr. Dominguez why he had not left yet, and Mr. Dominguez explained that his truck was blocked by the other vehicles. Mr. Brooks directed the Claimant to move his truck. This order initiated the events which were the subject of the charges against the Claimant and Mr. Brooks.

Roadmaster Adam Richardson, the Carrier's witness and the charged employees' immediate supervisor, testified first. He stated that the Claimant called him and reported an

altercation with Mr. Brooks. Mr. Richardson had both of them come to his office in Los Angeles, where he interviewed them and took the Claimant to the emergency room at a health care facility for attention to injuries sustained in the altercation. None of the injuries were deemed serious by the attending physician, who released the Claimant to return to work without restrictions.

Mr. Brooks and the Claimant each testified in turn, after which Mr. Dominguez, Mr. Dowell, and Mr. Fernandez testified. Not surprisingly, there are differences in their accounts of the events on May 2, 2002. Mr. Richardson could only testify as to what he was told by the two principals. Their testimony, in large part, put themselves in the best possible light, although both made admissions against their interests. The Board believes the testimony of the other three Welders, who had nothing at stake, is the most credible, even though their accounts are not congruent in all respects.

Mr. Dominguez said that after Mr. Kirksey paged him at about 11:00 a.m., he finished some welding he was then engaged in, loaded his truck preparatory to leaving, and attempted to pass by the other trucks, but was unable to do so, temporarily getting stuck in the effort. He then approached the Claimant and Mr. Dowell, who were working together, "a little after 11:00," he said, and told them he was instructed to leave for another job at Hobart Yard. The Claimant told him he was not going to move his truck. On cross examination by Mr. Brooks, Mr. Dominguez admitted that the Claimant had used a crude, dismissive vulgarity in his response. Mr. Dominguez then went to the other welding team and told them he had to leave. They said they would move their truck when the Claimant was ready to move his. They were engaged in making a weld at that time.

Mr. Dominguez said that he returned to his truck and told Mr. Fernandez what was going on. As they sat in the truck, they received a page from Mr. Kirksey. Although Mr. Dominguez did not say that he told Mr. Kirksey the precise cause of his delay, it is implied that he did so by the text of Mr. Kirksey's next communication: "Either burn his truck or move it over to the side, but get over here now."

Mr. Dominguez said he showed this message to the Claimant and again asked the Claimant to let him out, and was once more rebuffed. Although the record isn't crystal clear with respect to the time, Mr. Dominguez said that he made a third, unsuccessful attempt to get the Claimant to move his truck, after which he started to return to his own truck to await developments. Mr. Brooks drove up at that point, between 12:45 and 1:00 p.m., and asked Mr. Dominguez why he had not left for Hobart Yard. Mr. Dominguez explained that he had asked the Claimant three times to move — "It's your turn."

He observed Mr. Brooks approaching the Claimant and said he called in a loud voice, "Ray, move your truck so Tomas can get out of here." Mr. Dominguez continued walking toward his truck and did not hear a response from the Claimant. When he got to his truck, he said

he observed Mr. Brooks walking away from the Claimant, then turning and going back to him, at which point he saw Mr. Brooks grab the Claimant by his neck. Mr. Dominguez said he jumped from his truck and ran toward them. On cross examination by the Claimant's representative, Mr. Dominguez said that curses are not uncommon in the workplace.

Mr. Edgar Fernandez was Mr. Dominguez's teammate. He was aware that they were required to go to Hobart Yard. He was more specific about the time when the page came from Mr. Kirksey, reminding them to come to Hobart Yard, about 12:15 p.m. He and Mr. Dominguez loaded their truck preparatory to leaving. While Mr. Fernandez was still working in the truck, and did not overheard their conversation, Mr. Dominguez returned from talking with the Claimant and said, "I asked him to move. We're just going to wait here until he moves."

When Mr. Brooks arrived, he told Mr. Fernandez, "Get your truck ready to move. They need you guys out there." The truck was already loaded, so he got into the cab, ready to go when the other trucks were moved. He did not hear the words spoken between Mr. Brooks and the Claimant, but saw them talking, and the Claimant continued with the work he was doing. Mr. Brooks addressed more words to the Claimant, then walked to the Claimant's oxygen and propane tanks, and closed the valves. The Claimant said something to Mr. Brooks, who returned to confront the Claimant. They exchanged words and seemed to be arguing, judging from their body language. Mr. Brooks abruptly grasped the Claimant's neck with his left hand and placed his right hand on the Claimant's shoulder. Mr. Fernandez then dismounted from his truck to try to intercede, but Mr. Dowell, the Claimant's teammate, immediately broke them apart. Mr. Fernandez met Mr. Brooks as he walked away, and told him to calm down and get away from the site. He added that neither of them struck a blow at the other, but Mr. Brooks "grabbed him quick and just let him go." He estimated the duration of the grasp as three seconds at the most. Thereafter, Mr. Fernandez and Mr. Dominguez assisted the Claimant and his teammate in loading their truck, and the trucks were moved.

Mr. Robert Dowell was the Claimant's teammate. He said that when Mr. Brooks drove up to the work site, and approached them, he shouted, "Robert, Ray, you guys move your truck because Tom and them have to get out." At that point, the Claimant began to light his welding torch, and Mr. Brooks cut the gas off at the tanks. He returned to them and again told them they would have to move their truck to let Mr. Dominguez leave. The Claimant said, "Don, I need ten minutes. I can make this weld and then you guys can come out." Mr. Brooks replied, "No. The truck has to go to Hobart Yard now." Mr. Dowell started toward their truck, saying, "Let's move the truck." He said Mr. Brooks turned and started toward the third welding crew, when the Claimant told Mr. Brooks to move the truck himself, adding a vulgar personal aspersion. Mr. Brooks took several steps, then turned and came back to the Claimant, and grasped his neck with one hand, saying, "What did you say?"

Mr. Dowell quickly stepped in to separate them, and physically took Mr. Brooks by the hand, who then released the Claimant's neck. Mr. Dowell quoted Mr. Brooks as saying, "Man, I just lost it. I snapped." Mr. Dowell said that neither of them struck the other. He and the Claimant then loaded their truck and moved it out of Mr. Dominguez's departure route.

On May 20, 2002, the Division Engineer wrote the Claimant, advising that he was being issued a Level S suspension of 30 days for violation of Maintenance of Way Operating Rules 1.6 and 1.7, and the Carrier's "Violence on the Workplace" Policy, as the result of the investigation. He was additionally assigned a review period of three years, during which he would be subject to dismissal for another serious rule violation. He was further directed to attend Anger Management training through the Carrier's Employee Assistance Department, and to discuss the "Violence in the Workplace" Policy with a Director of Human Resources. His suspension began on May 3, 2002, the date he was withheld from service pending the investigation. The Rules referred to above read as follows:

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."

MWOR 1.7:

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

Violence in the Workplace Policy (in part):

"BNSF is committed to a non-violent working atmosphere. All necessary steps will be taken to ensure a work environment free from violence in all forms, including intimidation, threats and insults.

"No employee shall threaten, harass, or otherwise intimidate other employees. BNSF prohibits threats of violence and verbal harassment such as threats, vulgarities, disparaging or derogatory comments or slurs, or name-calling; visual harass-

ment, and actions such as making threatening gestures or destroying property. Harassment, intimidation, threats or any actions that would be interpreted by a reasonable person as having the potential for violence are cause for disciplinary action up through and including dismissal.

“Every employee who knows of incidents of violence or threats of violence has a duty to report it to appropriate supervision.

“Discipline, including termination, or removal from the work site, as well as criminal prosecution, may result from a violation of this policy.”

The Organization promptly appealed the Carrier’s disciplinary decision to its General Director - Labor Relations, who denied the claim. It therefore comes before this Board for review and a final decision.

The Organization argues that while the Claimant was in the process of making a thermite weld, he was asked to move his truck. He requested ten minutes to complete the task of preheating the weld. The Organization states that if this process was stopped, it would be necessary to cut in another rail and make two additional welds. Because he asked for additional time to complete this task, he was verbally abused and cursed, and when he made a verbal response to this abuse, he was assaulted, grabbed by the throat, and suffered injuries at the hand of the other employee.

The Organization further argues that the entire incident could have been prevented by preplanning on the Carrier’s part. The work at Hobart Yard was scheduled and did not constitute the emergency that it became. The Carrier placed extreme demands, pressure, and stress upon Mr. Brooks, a situation which resulted in the altercation.

The Carrier responds that four witnesses, including the Claimant’s own teammate, testified that Mr. Dominguez asked the Claimant to move his truck, but he would not do so. The Claimant admitted that he called Mr. Brooks, a supervisor, a vulgar name, and again refused to move the truck when Mr. Brooks directed him to do so. The Carrier states that the Claimant admitted that he created the confrontation, and that the Organization’s attempt to shift the blame onto the Carrier is misguided and not supported by the record.

The Carrier further argues that Mr. Dominguez attempted three times to get the Claimant to move his truck, and after repeated refusals, did not press the issue because he knew the Claimant was a confrontational person and he did not wish to provoke an incident.

The Carrier disagrees that the welding task being performed by the Claimant was at a point where it could not be stopped or suspended. In fact, the Claimant lit his torch when Mr.

Brooks asked him to move his truck, at which point Mr. Brooks closed the valves cutting off the gas supply.

The Carrier also responds that the work at Hobart Yard was never characterized as “emergency work,” except by the Claimant’s representative, in an effort to build a defense based on the assumption that Mr. Brooks was being subjected to undue stress. The entire incident arose, not from a lack of preplanning, but from the Claimant’s obstinate refusal to follow directions and move his truck.

The Board has carefully studied the lengthy transcript of testimony and evidence in the record. A salient issue is the Claimant’s allegation that he was at a critical point in the welding process, and only needed a few more minutes to complete his task. From the totality of the testimony, the Board concludes that even if the Claimant had been at a critical point in his task, which could not have been interrupted without inconvenience and unnecessary steps in the process, as the Organization argues, he had already had sufficient advance notice of the need to move his truck so that he could have arranged his work to let Mr. Dominguez out in time to leave for Hobart Yard as he was directed.

But the Board is not persuaded that the Claimant was at that critical point in his work when Mr. Brooks instructed him to move his truck. The Claimant testified that his torch was lit for about a minute and he was adjusting the flame when Mr. Brooks cut off the fuel supply. (Transcript page 51). Mr. Brooks testified that the Claimant lit his torch as he was walking up to him, even as he was calling to him to move his truck:

“ . . . And so I went over to Mr. Eslinger. As I walked up, I seen Mr. Eslinger lit his torch.

Q. The torch wasn’t lit prior to that?

A. No, sir. As he seen me walk up – and I’m calling him at the time. He was ignoring me.” [Transcript pp. 35-36].

Mr. Brooks said he cut off the fuel before the preheating process had begun, because he knew it could not be stopped once it had begun. (Transcript page 38). He estimated the torch was lit about five seconds. (Transcript page 40).

“Q. Mr. Brooks, is it possible that the – once the torch is lit it makes a pretty good noise. Is it possible because of the noise level, Mr. Eslinger didn’t hear you when you hollered at him?

A. I called Ray Eslinger before the torch was even lit. That’s when he took his shield, put it down over his face and lit the torch.” [Transcript p. 46].

Mr. Dominguez said that at the time he told the Claimant he was ready to go, he was not in the process of preheating:

“Q. When you actually got ready to move, was he in the process of – or deep in the process of shooting a weld?

A. No. See, according to the process, you can stop any time because those panels are not on the main line or anything.

Q. Right.

A. The only time you can't or shouldn't stop is when you're preheating.

Q. Was Mr. Eslinger in the process of preheating a weld?

A. No, not at that time.” [Transcript p. 70]

Mr. Dowell, closest to the scene at the time of the altercation, said that when Mr. Brooks told them to move the truck, the Claimant then lit his torch:

“Q. Did he call anyone by name? Did he say ‘Robert’ or ‘Ray’?

A. Yes. He said ‘Robert, Ray,’ you know, ‘you guys have to move the truck.’ And Ray began to light the torch and Don [Brooks] turned the gas off.

Q. So Ray had lit the torch?

A. Right.

Q. And did he just light it at that time or was it lit prior to Mr. Brooks coming?

A. He had just lit it, just lit the torch and Don turned it off.” [Transcript p. 78].

Mr. Dowell said the torch had been lit “only a couple of seconds,” as the preheating process was beginning. (Transcript pp. 82 and 92).

Mr. Dowell further testified that when Mr. Fernandez showed them the message from Mr. Kirksey – “Get over here now” – preheating had not begun:

“Q. And at that time were you guys in the process of packing a weld, shooting a weld?

A. Yeah, we were in the process of packing a weld.

Q. And so once you had the weld packed, then you started to preheat; is that correct?

“A. It wasn’t quite then, because Edgar said, ‘Well, I’m going to show you that this truck has to be moved.’ Edgar Fernandez showed Ray and myself that here was the e-mail from Kirksey saying, ‘Push or burn the truck, but move it out of the way. The truck has to come back to Hobart Yard.’ . . . I said, ‘You know what? We better move the truck.’ As soon as he showed us this, then Brooks pulled up. I knew something then was going happen. So Brooks proceeded. As we were getting ready – Ray was getting ready to get the torch, Ray turned around, put the torch up in the air and lit it and Brooks turned the air off.

Q. But the torch was in the mold?

A. It wasn’t lit then. It was not lit.” [Transcript pp. 91-92].

The only “emergency” in this matter was the consequence of Mr. Dominguez’s failure to begin his trip to Hobart Yard at the appointed time, and that failure is fully attributable to the Claimant’s recalcitrance. Although the Organization portrays him as the innocent victim of an aggressive fellow employee, the fact of the matter is that the whole issue arose from the Claimant’s pugnacious refusal to accommodate the need for Mr. Dominguez to get his truck out of its locked-in position. The Claimant had ample opportunity to move his truck. Had he done so there would not have been any need for Mr. Brooks to come to the job site to get Mr. Dominguez on his way.

The Claimant said that when he asked for ten more minutes to finish preheating, Mr. Brooks used an imperious vulgarism, and he responded in kind. Mr. Brooks denied using that kind of language. Mr. Dominguez and Mr. Dowell, both of whom overheard Mr. Brooks’s directive, testified that he used no profane or vulgar words.

This is not to say that Mr. Brooks was without fault. Certainly, there is no need for anyone to lay hands on another, except in self-defense. But the Claimant’s refusal to move his truck when he was told to do so, employing the profane epithet he used, constitutes insubordination, discourtesy, and being quarrelsome. (MWOR 1.6). The Violence in the Workplace Policy forbids insults, vulgarities, and name-calling.

Although the investigation was directed toward the altercation at approximately 1:05 p.m., the Board notices that the Claimant displayed a hostile, confrontational disposition in dealing with Mr. Dominguez’s first request to move his truck, perhaps an hour or two earlier. Additionally, there was testimony in the record (to which the Claimant’s representative objected) with respect to other indications of the Claimant’s belligerence. Taken all together, the record suggests that the Claimant has an emotional problem that requires adjustment. The Board hopes, sincerely, that he will obtain help in controlling his anger and that he will be able to continue his career without future problems of this nature.

The Board believes that the discipline assessed in this case is fully warranted. The claim is denied.

AWARD

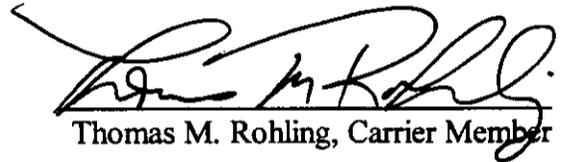
The claim is denied.



Robert J. Irvin, Neutral Member



R. B. Wehri, Employee Member



Thomas M. Rohling, Carrier Member

May 2, 2003
Date