

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. D. F. Brooks was issued a Level S Suspension of thirty (30) days for allegedly violating Maintenance of Way 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. Brooks 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. 14-02-0129. Organization File No. 180-13A2-022B.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.

This is a companion case to this Board’s Case No. 289, Award No. 282. The Claimant in this case, Mr. Donald F. Brooks, was hired by the Carrier on November 5, 1993, in its Maintenance of Way Department. On May 2, 2002, he was working as a Track Supervisor, inspecting track on the Carrier’s Harbor Subdivision near Los Angeles, California. He and another employee, Mr. Raymond Eslinger, 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. 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 the Claimant, 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.

The Claimant 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 Mr. Eslinger to move his truck so he (Mr. Dominguez) could get his truck out for the trip to Hobart Yard, but Mr. Eslinger refused to move. (Mr. Eslinger 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. Mr. Eslinger's truck was in the middle. The other welding crew agreed to move their truck, which was first out, when Mr. Eslinger 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 Mr. Eslinger, according to Mr. Robert Dowell, his teammate.

About 12:45 p.m., Mr. Kirksey called the Claimant again, asking him why Mr. Dominguez had not yet arrived Hobart Yard. The Claimant 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. The Claimant directed Mr. Eslinger to move his truck. This order initiated the events which were the subject of the charges against the Claimant and Mr. Eslinger

Roadmaster Adam Richardson, the Carrier's witness and the charged employees' immediate supervisor, testified first. He stated that Mr. Eslinger called him and reported an altercation with the Claimant. Mr. Richardson had both of them come to his office in Los Angeles, where he interviewed them and took Mr. Eslinger 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 him to return to work without restrictions.

The Claimant and Mr. Eslinger 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 Mr. Eslinger 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. Mr. Eslinger told him he was not going to move his truck. Mr. Dominguez then went to the other welding team and told them he had to leave. They said they would move their truck when Mr. Eslinger 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 Mr. Eslinger and again asked him 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 Mr. Eslinger to move his truck, after which he started to return to his own truck to await developments. The Claimant 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 Mr. Eslinger three times to move — "It's your turn."

He observed the Claimant approaching Mr. Eslinger 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 Mr. Eslinger. When he got to his truck, he said

he observed the Claimant walking away from Mr. Eslinger, then turning and going back to him, at which point he saw the Claimant grab Mr. Eslinger by his neck. Mr. Dominguez said he jumped from his truck and ran toward them. On cross examination by the Claimant's representative, he 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 Mr. Eslinger and said, "I asked him to move. We're just going to wait here until he moves."

When the Claimant arrived, he told Mr. Fernandez, "Get your truck ready to move. They need you guys out there." The truck was already loaded, so Mr. Fernandez got into the cab, ready to go when the other trucks were moved. He did not hear the words spoken between Mr. Eslinger and the Claimant, but saw them talking, and Mr. Eslinger continued with the work he was doing. The Claimant addressed more words to Mr. Eslinger, then walked to his oxygen and propane tanks, and closed the valves. Mr. Eslinger said something to the Claimant, who returned to confront him. They exchanged words and seemed to be arguing, judging from their body language. The Claimant abruptly grasped Mr. Eslinger's neck with his left hand and placed his right hand on Mr. Eslinger's shoulder. Mr. Fernandez then dismounted from his truck to try to intercede, but Mr. Dowell, Mr. Eslinger's teammate, immediately broke them apart. Mr. Fernandez met the Claimant 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 the Claimant "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 Mr. Eslinger and his teammate in loading their truck, and the trucks were moved.

Mr. Robert Dowell was Mr. Eslinger's teammate. He said that when the Claimant 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, Mr. Eslinger began to light his welding torch, and the Claimant 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. Mr. Eslinger said, "Don, I need ten minutes. I can make this weld and then you guys can come out." The Claimant 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 the Claimant turned and started toward the third welding crew, when Mr. Eslinger told the Claimant to move the truck himself, adding a vulgar personal aspersion. The Claimant took several steps, then turned and came back to Mr. Eslinger, and grasped his neck with one hand, saying, "What did you say?"

Mr. Dowell quickly stepped in to separate them, and physically took the Claimant by the hand, who then released Mr. Eslinger's neck. Mr. Dowell quoted the Claimant as saying, "Man, I just lost it. I snapped." Mr. Dowell said that neither of them struck the other. He and Mr. Eslinger 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 in 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 the Claimant was subjected to extreme pressure and stress by his supervisor, characterized as a “continuous bombardment” of orders to expedite the movement of the welders and their vehicle, which resulted in the Claimant’s loss of temper and assault upon Mr. Eslinger, who was engaged in making a thermite weld when the Claimant ordered him to move his truck.

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’s Assistant Roadmaster mentally harassed the Claimant to the point that he physically assaulted the other employee.

The Organization also argues that the Claimant is a “model employee,” whose record is free and clear of discipline. The discipline in this instance is extreme, unwarranted, and unjustified. The discipline is also excessive, even if the charges were proven.

The Carrier 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 the Claimant was being subjected to undue stress. Further, the Carrier states that not once, but twice, the Claimant denied that he was under pressure or felt harassed.

The Carrier disagrees that the welding task being performed by Mr. Eslinger was at a point where it could not be stopped or suspended. In fact, he lit his torch when the Claimant asked him to move his truck, at which point the Claimant closed the valves cutting off the gas supply.

The Carrier agrees the Claimant is a good employee with a relatively good record, but it cannot allow one employee to physically assault another, and not take strong action. The 30-day suspension is warranted, it says.

The Board has carefully studied the lengthy transcript of testimony and evidence in the record. A salient issue is Mr. Eslinger's allegation that he was at a critical point in the welding process, and only needed a few more minutes to complete his task. The Claimant's demand that he move his truck without further delay seems to have triggered Mr. Eslinger's provocative comment, resulting in the Claimant's physical response. From the totality of the testimony, the Board concludes that even if Mr. Eslinger 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.

The issue in this case, however, is not really whether Mr. Eslinger was at a "point of no return" in the welding process, although that might have been significant in his mind. The record shows that he addressed the Claimant with a profane utterance, which was answered by the Claimant's physical response. While Mr. Eslinger was the *provocateur*, that does not excuse the Claimant's physical attack. Only in self-defense may one lay hands upon another.

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 Mr. Eslinger's recalcitrance. He had ample opportunity to move his truck. Had he done so there would not have been any need for the Claimant to come to the job site to get Mr. Dominguez on his way.

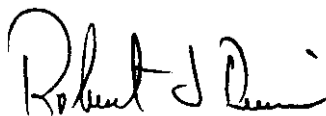
Mr. Eslinger said that when he asked for ten more minutes to finish preheating, the Claimant used an imperious vulgarism, and he responded in kind. The Claimant denied using that kind of language. Mr. Dominguez and Mr. Dowell, both of whom overheard the Claimant's directive, testified that he used no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

The Carrier points out that the two principals had had a previous verbal exchange. The transcript records, over the objection of their representative, that during a safety meeting, Mr. Eslinger had uttered an obscene and demeaning comment to the Claimant, who responded, he testified, "I don't curse at you. Don't curse me. . . . I don't disrespect you." The Carrier suggests that this previous event colored the Claimant's feelings toward Mr. Eslinger which caused the current incident. The Board cannot say whether the Carrier's conjecture is correct or not, but even if correct, it is not determinative. The record clearly indicates that Mr. Eslinger's vulgar personal invective on May 2, 2002, was the immediate cause of the Claimant's physical reaction.

The Board believes that the discipline assessed in this case is fully warranted. The Claimant violated MWOR 1.7 and the Violence in the Workplace Policy when he physically responded to Mr. Eslinger's provocation. The claim is denied.

AWARD

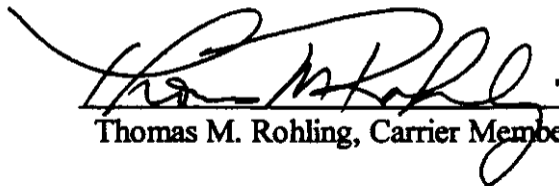
The claim is denied.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

June 13, 2003

Date