

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 on March 18, 2004, when it withheld the Claimant, Mr. S. R. Herroz, from service and subsequently issued him a 41-day actual suspension for allegedly having an altercation with his foreman in violation of Maintenance of Way Operating Rules 1.1 (Safety), 1.6, (Conduct), 1.7 (Altercations), and Maintenance of Way Safety Rules S-1.2.9 (Horseplay), and S-1.3.1 (Requirements).
2. As a consequence of the violation referred to in part (1), the Carrier shall make the Claimant whole for all wages lost account of this violation and shall remove any mention of this incident from his personal record. [Carrier File No. 14-04-0112. Organization File No. 190-13A2-043.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 in this case, Mr. Samuel R. Herroz, was employed by the Carrier in its Maintenance of Way Department in 1996. He was working as a Machine Operator on the Carrier's Northern California Division when an event occurred on March 18, 2004, which resulted in his being held out of service pending the result of an investigation. Notice of the charges and investigation was served on him by certified mail on March 22, 2004. The notice, over the name of Division Engineer D. R. Gilliam (whose name appears in a font generated by a word processor which simulates a handwritten signature), reads as follows, in pertinent part:

This letter will confirm that you will remain out of service pending results of formal investigation scheduled in the General Manager's conference room, 1776 W. March Lane, Suite 400, at 1000 hours on March 31, 2004, to determine all facts and circumstances concerning your alleged altercation on SC-21 at Escalon, CA, on March 18, 2004, at about 2200 hours, which ultimately caused SC-21 to

lose their window; so as to determine the facts and place responsibility, if any, involving Rules 1.6 (Conduct), 1.7 (Altercations) and 1.1 (Safety) of the Maintenance of Way Operating Rules . . . and Rules S-1.2.9 (Horseplay) and S-1.3.1 (Requirements) of the Maintenance of Way Safety Rules . . .

You may arrange for representation in line with the provisions of agreement or schedule governing your working conditions; and you may likewise arrange for the attendance of any witnesses you desire, at your own expense.

The Rules which were referred to in the above notice 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.

MWOR 1.1

Safety

Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment.

Empowerment

All employees are empowered and required to refuse to violate any rule within these rules. They must inform the employee in charge if they believe that a rule will be violated. This must be done before the work begins.

Job Safety Briefing

Conduct a job safety briefing with individuals involved:

- Before beginning work
 - Before performing new tasks
 - When working conditions change
- The job safety briefing must include the type of authority or protection in effect.

Maintenance of Way Safety Rule (MWSR) S-1.2.9

Conduct yourself in a way that supports a safe work environment—free of horseplay, practical jokes, and harassment.

MWSR S-1.3.1

Be familiar with and wear personal protective equipment and clothing as required by your job. Any changes made in the recommended use or design of personal protective equipment or clothing must be approved by the manufacturer.

The investigation was held on the appointed date. A transcript of testimony and evidence was prepared and appears in the record before this Board. The Claimant was present and ably represented by the Organization's Assistant General Chairman. He offered testimony and he and his representative were able to question all witnesses who were present. Assistant Roadmasters Mark J. Ramirez and Jason R. Hill, and the Foreman of Gang SC-21, Mr. Gregory S. Jordan, appeared as witnesses for the Carrier. Mr. Hill submitted written statements prepared by four other employees on Gang SC-21, as well as a written statement by Foreman Jordan. The Claimant entered his own written statement which he had prepared for the Organization's officers.

Although there is substantial conflict in the statements and testimony, in summary the record shows that when Gang SC-21 was assembled on the night of March 18, 2004, a job briefing was held, as required by the Carrier's rules. During the course of that briefing, Foreman Jordan noticed that the Claimant, Mr. Herroz, was wearing tennis shoes. He directed the Claimant to change his footwear. Either preceding or following that, Mr. Jordan complained about communications the morning of March 18, at the close of the previous night's work, which caused the gang to be late clearing the track after the closure of their working window of time. He said that the Claimant had ignored his repeated requests for information about the progress of the Claimant's on-track machine, which had derailed — according to a written statement by Machine Operator Jimmy Flores — further delaying the gang's clearing the main track. The record indicates that as they discussed the communication issue, the voices of Mr. Jordan and the Claimant rose higher, in company with their anger, to the degree that harsh and vulgar words were used. As the consequence, Mr. Jordan called the two Assistant Roadmasters to come to the work site. After interviewing Mr. Jordan, the Claimant, and other gang members, Mr. Ramirez called an officer who was working in the place Division Engineer Gilliam, who was on vacation, and was directed to take the Claimant out of service pending an investigation.

The testimony of the two Assistant Roadmasters consists largely of what they were told. Neither of them were present until almost two hours after the altercation occurred. Mr. Jordan's testimony draws a picture of his reasonable efforts to direct that personal protective equipment be worn on the job by the Claimant, who had disregarded the need for such equipment on other occasions, and his expression of the need for better communications among the gang, spread out along the track for a considerable distance while they were performing their work. He had been subject to criticism because of their failure to clear the track on time the morning of March 18. He felt the Claimant's responses to these issues were insubordinate.

The Claimant's testimony depicts Foreman Jordan as a bully, exploiting his superior weight and height — 275 pounds, six feet-five versus 200 pounds, five feet-ten — to attempt intimidation and disrespect of those under his supervision. He further draws attention to the fact that although two persons were admittedly engaged in the altercation, only one of them — himself — was taken out of service and charged with rule violations. He testified that he felt threatened by Mr. Jordan and humiliated in the presence of the other workers.

The outcome of the investigation was the Claimant's receipt of a letter from Mr. Gilliam, (who had also conducted the investigation), dated April 28, 2004, reading as follows, in part:

This letter will confirm that as a result of formal investigation held on March 31, 2004, concerning your altercation on SC-21 at Escalon, CA, on March 18, 2004, at about 2200 hours, which ultimately caused SC-21 to lose their window; you are issued a Level S Suspension with a 3-year probation for violation of Rules 1.6 (Conduct), 1.7 (Altercations) and 1.1 (Safety) of the Maintenance of Way Operating Rules . . . and Rules S-1.2.9 (Horseplay) and S-1.3.1 (Requirements) of the Maintenance of Way Safety Rules . . . If you commit another serious rule violation during the tenure of this probation period, you will be subject to dismissal.

This suspension will consist of time served while being withheld from service for period March 19, 2004, through and including April 28, 2004.

In assessing discipline consideration was given to your personal record.

The Organization promptly appealed the Division Engineer's decision to the Carrier's Labor Relations Department. The Organization argues that the investigation and assessment of discipline were not handled in a fair and impartial manner. It points out that Division Engineer Gilliam issued the charges, conducted the investigation, determined who would be called to testify and what evidence would be presented, and then made the disciplinary decision.

The Organization further argues that the hearing Officer denied its request for the attendance of witnesses and further denied its representative's objection to the admission of

written statements. It also objects to the removal from service of one of the parties to the altercation, the Claimant, while the other party, Foreman Jordan, was not subject to discipline.

The Carrier rejoins that substantial evidence was developed proving that the Claimant engaged in an altercation with his Foreman on March 18, 2004, including the Claimant's own testimony. It adds that testimony in the record shows that the Division Engineer did not issue the notice of charges, but it was in fact issued by another officer, over the Division Engineer's name, while he was on vacation. Further, the Carrier argues that an officer acting in more than one capacity in a hearing is not evidence that the proceedings are prejudiced.

The Carrier further rejoins that the Hearing Officer did not ban the presence of any witnesses, but in fact their written statements corroborated the testimony of Foreman Jordan, and their presence would not have introduced any new information. Moreover, the Carrier adds, if the Organization felt these other gang members were key to its defense, it could have had them appear as Organization witnesses, but it failed to do so. The Carrier denied the claim and states that it rejects and denies all other objections, arguments, and claims raised in the appeal.

The Board has carefully considered the record in this case and the arguments of the Parties. The Organization's procedural arguments will be first addressed.

The performance of multiple roles by a Carrier officer in a disciplinary proceeding is not, in and of itself, a violation of employee due process rights. Boards have visited this question numerous times. When an officer appears as a witness, and then determines the credibility of his own testimony, or when an officer determines the disciplinary outcome, and then acts as the appeal officer from his own determination, disciplinary penalties have been reversed. Here, the Division Engineer did not personally issue the charges, which might suggest prejudgment. True, the charge letter was over his name, but he was not present and had nothing to do with the decision to hold the investigation, nor to remove the Claimant from service. The transcript shows he held a fair and impartial hearing, conducted courteously and with precision and thoroughness.

The record shows that three days before the investigation was scheduled to begin, the Organization requested in writing that the Carrier call Foreman Jordan, and Gang Members Lawrence Shells and Vince Harris as witnesses. This written request was submitted in evidence as an exhibit by the Claimant's representative. In response, the Conducting Officer required witness Assistant Roadmaster Ramirez to read into the record the provisions Rule 13 — the Discipline Rule — of the Parties' Collective Bargaining Agreement. Rule 13 - (k), in particular, reads, in pertinent part:

[E]mployees acting as witnesses at investigations for and at the request of other employees, will not be compensated by the Carrier for time lost and/or expenses incurred by reason thereof.

The Board finds that there is no provision in Rule 13 which requires the Carrier to have employees present as witnesses when they are requested by the charged employee. (The Carrier, however, may not prevent an employee from acting as a witness, when the charged employee demands his presence, but the Carrier is not obligated to pay the witness for lost time or expenses in such event.)

The above Rule gives little or no comfort to a charged employee who feels that evidence or testimony vital to his defense lies in the hands of a witness. There's no denying that he is at a disadvantage. The Carrier can require its witnesses' presence, under threat of discipline, while the charged employee has no such compelling force. But the Board cannot rewrite the Rule.

The Board notices, however, that Foreman Jordan was present, and was cross examined by both the Claimant and his representative. Written statements by Mr. Shells and Mr. Harris were submitted in evidence, and appear to be as favorable toward the Claimant as toward Mr. Jordan. The Board does not believe that the Claimant was substantively prejudiced by their absence from the investigation. The Board further notices that the Claimant made certain admissions in the record which make it unlikely that these absent witnesses could have changed the outcome had they been there.

Turning to the merits, the Board has discounted the testimony of the Assistant Roadmasters, not because they were not truthful — the Board assumes that they related events as told to them — but because they were not eyewitnesses to the altercation. The written statements of the gang members, the Claimant, and the Foreman are more persuasive, simply because they were composed when the event was fresh on their minds. These statements are here quoted, in edited form, with extraneous matter omitted, spelling corrected, and punctuation added, when required for clarity.

The Claimant's Statement

At 21:30 hours Foreman Jordan started the job briefing. Jordan stated how he had been on the phone, "Getting his ass chewed because of the overstay we had that morning." Jordan also explained he will not have that kind of behavior, it will not be tolerated. I explained to Jordan that I was on channel 60 of Maintenance of Way early that morning and was he trying to reach me on that channel? Jordan's response was "Not to act stupid." Jordan felt I did not respond every time he tried to reach me through radio that morning. The fact of the matter is, I responded every time I heard Jordan calling. Jordan went on to say no one is allowed to bring their personal vehicle to the job site and sit in them during BNSF time. At that point Jordan yelled at me as to where my work boots were and I told him they were in my grip. Jordan responded by saying, "Get your damn boots on," and I said o.k. At that point I smiled and walked away and started to get my boots out

of my grip. Suddenly Jordan moves aggressively toward me telling me, "You think that's funny?" The kind of body gesture he showed made me believe he was about to hit me. Jordan immediately made me feel defensive and I warned him to get back from me. Jordan is twice the size I am and I was not taking any chances so I made my warning loud and clear to him. At this point Jordan crossed the line with me coming towards me so aggressively. I told him take a swing at me so he would realize I was ready and aware of what his intentions were. At this point Jordan is in my face yelling, "You need to show up with your boots on and let's get it straight I'm the Foreman and you are the operator." Which I have never had a problem with. At this point we are both trying to yell over each other. The last thing I remember telling Jordan was that I took the machine out and did the job to the best of my ability. I was as safe as possible and did not destroy any equipment or get anyone hurt, so I think I did my job. At that point Jordan yelled, "I'm gonna send your ass home." So I cursed at him at that point. Then I waited for Mark [Ramirez] and Jason [Hill] to show up and I was sent home.

Facts: I showed up without my boots. Jordan showed up with no vest on, no hard hat on, and no safety glasses on. Jordan is upset because we did not respond immediately when he called us on the radio the morning of 3-18-04 and yet we responded at the safest and most prompt time we could. Jordan tells me not to act stupid after I ask a question. After Jordan humiliates me in front of the whole gang I go get my boots.

So to be humiliated and approached by a foreman the way I was and just sent home while the foreman is still working is disappointing. I feel to get respect you need to give respect.

Foreman Jordan's Statement

I started my job briefing talking about leaving the O-9 [a track machine] in the hole. I told Sam [the Claimant] and Shells that they were going to stay and work on the O-9 because there was no reason to leave the hole with broken tamping tools like they did the night before. Then Sam started arguing with me about that. Then I noticed he didn't have his boots on so I asked where they were. From there it got heated. Sam cursed me out and challenged me to fight. I asked him to back up because he was right in my face. But he continued and I had no choice but to call for help. (Hill and Ramirez.) I don't see where I should have to come to work and deal with something like that.

Mr. Lawrence W. Shells's Statement

At approximately 9:30 P.M., Jordan said, "Listen up, Sam, where are your boots?" Sam answered, "They're in the car." Jordan said, "Get your boots and put them on." Sam replied, "OK," chuckling as he walked to the car, and got his boots.

Jordan said, "Oh, you think this is funny, huh?" Jordan made a quick move toward Sam as he said this. Sam backed up and said, "Hit me you m____ f____, I'm not your f____ child." Jordan then said, "I can send you home." Sam replied, "Go ahead and send my ass home, don't be treating me like a child."

Jordan said, "Don't curse me, and don't use that kind of language." They were both loud and angry. At that point I stepped between them and took Sam aside and talked to him to calm him down.

Jordan decided to make a phone call, and later Jason Hill and Mark Ramirez arrived.

Mr. Vincent Harris's Statement

Job briefing at 2130, Foreman Jordan asked Sam where his work boots were. Sam told him in the truck. Jordan told him to put them on. Then he told Sam that the communication was not enough when you have a problem with the machine. Sam said he gave him all he had, the buggies had derailed and they [were] trying to get them up. Jordan told him in a little louder voice, "When I have the dispatcher and everyone calling, he needs more information." Sam got loud back with Jordan, and said some profanity. We were instructed to start up the machines, and Jordan was informing the Roadmaster.

Mr. Mark Simpson's Statement

On March 18th at the beginning of our job briefing, Foreman Jordan reminds Machine Operator Sam Herroz to put on his safety boots. As Sam is laughing and walking over to the truck to get his boots Foreman Jordan confronts Sam on another issue about ignoring his request for a response over the radio.

Sam denies the allegation. Foreman Jordan also confronts Sam about his attitude towards authority, and at this point in the job briefing Sam loses all self control and lunges at Foreman Jordan raising his hands toward Foreman Jordan and starts screaming profanities and encouraging Foreman Jordan to fight. Foreman Jordan repeatedly tells Sam to "Back off!"

But Sam ignores his request and continues to call him a "M____ F____ White Boy!"

By this point in time Foreman Jordan realizes he has no choice in the situation but to call in a Roadmaster. At this point Sam decides he will just walk away but Foreman Jordan reminds him that he has not been released.

Mr. Jimmy Flores's Statement

Jordan had a good point about shoes. Sam Herroz did comply not saying anything other than "O.K., O.K." We were all standing in a circle between two pickups. Sam then opened the back door of the truck and was in the process of getting the boots on. But if P.P.E. [personal protective equipment] was part of the issue at the beginning of the job briefing then something should have been mentioned to the whole group. Everybody was missing at least one piece of p.p.e.

Jordan then wanted to talk about how he got his ass chewed out on an overstay from the night before. Jordan then focused more attention to Sam. Jordan was asking Sam why he blew Jordan off on the radio. Sam replied, "I didn't." At that point Jordan's emotional level started to rise. Jordan told Sam that he left him hanging and made him look like a fool. At that point Jordan's voice started to go up. Sam [was] standing in the doorway of the truck getting his boots. Sam turned around and said, "I'm not a little kid so don't talk to me like I did something wrong." And then Jordan raised his voice a little more and told Sam that this is his (Jordan's) gang and that if anything bad happens on the track he is to be told immediately so he can take the next step in helping to solve the problem. Sam told him, "What did you want me to tell you? I was in the cab of the O-9." Then Jordan, getting more worked up, told Sam, "Don't get smart with me. You better show me respect!"

Sam, still calm at this point, told Jordan that he was not disrespecting his authority as the Foreman.

Jordan walked up aggressively towards Sam, getting within one foot and raising his hand above Sam's shoulders, and told Sam that showing up without his boots on is disrespectful and that he (Jordan) demands respect and that he better get it!

Then Sam raised his voice and told Jordan, "Get out of my face!" Jordan responded by raising his voice more and told Sam, still with his hand above Sam's shoulders, "No, you get out of my face."

Sam then moved from the doorway of the Ford and started walking backwards.

Jordan, maintaining about a foot of space between him and Sam, started to tell Sam that he was insubordinate and that he was going to send him home.

Sam had stepped back, about the distance from the back door of the back seat of the Ford to about the front of the truck, with Jordan within one foot of him. Jordan threatening to send [him] home, repeating that he demands respect.

This is when Sam and Jordan's voices got extremely loud!

Jordan was shouting out loud that he wants respect.

Sam was shouting out loud, "F___ you."

While this was happening Sam was still backing up, with Jordan still within a foot distance of him.

Sam shouted to Jordan, "What are you going to do, hit me, huh, m___ f___?"

At that point Jordan shouted to Sam that he crossed the line and wanted to take him to investigation.

Sam shouted back to do what he had to do.

Then Jordan stopped advancing towards Sam, stepping back about 20 feet. Pulled his phone and made the call.

Sam stepped away in another direction and nothing more was said to each other.

The picture is clear, despite the discrepancies in these statements (as well as the testimony of the two antagonists in the investigation), that a combination of adverse events and circumstances set the stage for the altercation. The Foreman had been stung by criticism from his superiors because of overstaying the gang's work window the morning of March 18. Two witnesses used the same expression — "Got his ass chewed out" — and that fact may have caused him to be more sensitive than on an ordinary day. The Foreman spotted the Claimant's footwear. He testified that it was not the first time the Claimant had reported without his safety boots on. When the Claimant was directed to change footwear, he either chuckled, or laughed, or smiled. This would convey to the Foreman, already in a foul mood, that the Claimant was making light of his demand that protective equipment be worn.

For his part, the Claimant felt that he was being humiliated in the presence of his fellow workmen. The footwear issue might have been better handled in private. The communication problem during the overstay that morning came to the forefront of their escalating anger, and then they moved on to the issue of the Foreman's authority to supervise. It is abundantly clear from the totality of the testimony and written statements that both the Foreman and the Claimant completely lost their tempers and both of them raised their voices. The Foreman reportedly advanced on the Claimant in a threatening manner, and was dared to "take a swing at me." But another statement says that the Claimant "lunged at" the Foreman. Each of them reportedly told the other to "get out of my face." Profanity and vulgar expressions were used by the Claimant, according to all accounts, including his own testimony. Then, there are the racial overtones expressed by the Claimant's choice of words, according to one of the witnesses' written statement, "M_____ F_____ White Boy."

The Organization objected to the Claimant's removal from service, pending the investigation, while his adversary, Foreman Jordan, was continued in service. While Foreman Jordan acted in a provocative manner, and clearly was himself angry, his inappropriate conduct did not rise to the level of the Claimant's, as shown by the testimony and statements in the record. The Claimant was insubordinate; the Foreman was overbearing. Both were quarrelsome, but the degree of their unbecoming conduct was not the same.

Nevertheless, although the degree of their participation in the altercation is not the same, the Board is persuaded that both the Foreman and Claimant acted in a quarrelsome manner, and the Organization's complaint that they were not treated evenhandedly is understandable and not without some merit.

Notwithstanding the disparate handling given these two employees, the Board is not prepared to expunge the discipline in this case. A soft answer by either of them, less assertive, and without aggressive terminology and gestures, could have attenuated the heightened anger of the other.

The Board notices that the Claimant frankly admitted non-compliance with certain of the charged rules:

"I cursed at [Jordan]." [Transcript page 78]

"I did not show up with my boots on." [Transcript page 82]

"I was quarrelsome." [Transcript page 83]

He further admitted that he invited the Foreman to hit him and that he engaged in an altercation. [Transcript pages 83 and 86]. These admissions preclude the Board from any finding that discipline was not warranted.

The Board also notices that part of the charge and disciplinary determination was that the Claimant's altercation ultimately caused the gang to lose their window on March 18, 2004. Assistant Roadmaster Hill offered testimony about that part of the charges:

Q. Do you know anything about them losing their track window?

A. Yeah.

Q. Could you –

A. They have scheduled windows roughly, scheduled windows each night for their production. With this situation happening, the remainder of the gang didn't feel adequate or in the right state of mind to get out on the track with authority or any kind of protection.

Q. Okay. And who made the decision not to take the gang out on the track?

A. It was Mark Ramirez.

Q. All right.

A. It was actually both of us but ultimately – [Transcript pages 69-70]

The Board is persuaded that the Claimant's acts were not the proximate cause of the gang's loss of its window of time. Nor was the Claimant essential to the night's work, since Foreman Jordan testified that he planned to leave the Claimant and another employee to work on the track machine which had derailed that morning, while the rest of the gang went about their work. See Mr. Jordan's statement at page 7, above.

In this Board's Award Nos 282 and 284, two employees engaged in an altercation which, unlike the instant case, involved physical contact. Each of those employees was assessed a 30-day suspension and a three-year review period. The Organization's claims for remission of these disciplinary penalties were denied. A similar penalty in the instant case is appropriate. However, in view of the lack of physical contact, and the fact that, unlike the evenhanded discipline assessed in those other cases, only one of the principals here was taken out of service and subjected to an investigation, the 41-day suspension will be reduced to a 25-day actual suspension.¹ The three-year probation will stand.

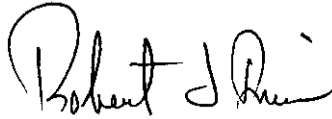
The Parties are advised that this decision is based upon the grounds outlined in the preceding paragraph, and the Board's conclusion that the altercation was not the direct cause of the gang's loss of its window of time. The verbal expressions used by the Claimant are not acceptable under any circumstances, and no provocation, regardless of how egregious, provides any excuse for a response with words of that sort. If he was treated unfairly by his Foreman, he

¹Disparate disciplinary penalties have been adjusted by the National Railroad Adjustment Board. See, e.g., Third Division Awards 24483, 25275, and 33607.

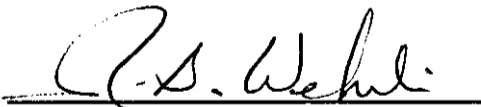
had other recourse than complete loss of self control and utterance of tasteless obscenities. Furthermore, his failure to wear proper protective footwear — not for the first time, according to Foreman Jordan — opened the door for the Foreman's criticism.

AWARD

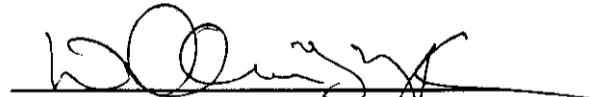
The claim is sustained in accordance with the Opinion. Any compensation due for lost wages shall be paid within sixty (60) days from the date of this Award.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member

Sept 24, 2004
Date