PUBLIC LAW BOARD NO. 4244

Award No. 359
Case No. 366

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes 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 August 2, 2005 when Claimant, S. C. Brown, was dismissed from service for an alleged violation of Maintenance of Way Operating Rules 1.6-Conduct, and 1.7-Altercations, and Maintenance of Way Safety Rule S-7.7-Correct Tool Use when claimant threw a shovel at a machine and its operator, and threatening an employee on June 10, 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 June 30, 2005 account of this incident. [Carrier File No. 14-05-0160. Organization File No. 10-13A2-052.]

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. Shannon C. Brown, was employed by the Carrier on August 6, 1996. He was working as a Section Foreman in the Carrier's Maintenance of Way Department on June 10, 2005, headquartered at Galesburg, Illinois. Certain incidents occurred on that date which resulted in the Claimant later being removed from service on June 30, 2005, pending an investigation scheduled for July 8, 2005. The purpose of the investigation was set forth in a letter sent the Claimant on July 1, 2005, reading in part as follows:

> Attend investigation . . . to ascertain the facts and determine your responsibility, if any, in connection with an alleged workplace violence altercation, when you allegedly threw a shovel and allegedly threatened an employee with a knife, at

approximately 1700 hours on June 10, 2005, at MP 168.6, Ottumwa Sub, while assigned as Foreman. This office was made aware of this incident on June 30, 2005.

The investigation began on the scheduled date, testimony was taken from the Claimant and several witnesses, and exhibits were made a part of the record. Because of the absence of one of the Carrier's witnesses, a recess was agreed upon by the Parties, and the investigation resumed and was completed on July 18, 2005. The Claimant was ably represented by one of the Organization's System Federation officers. A transcript of testimony and evidence was prepared and appears in the record before this Board. The charges had their origin in the events described below.

On June 22, 2005, Track Inspector Michael E. Scott telephoned the Carrier's toll-free number, commonly called the "Hotline," established for reporting such incidents as rule violations, workplace violence, harassment, dishonesty, etc. The following incident description was recorded by the unidentified person who took Mr. Scott's call:

Caller, SCOTT, reported that on 6/10/05 at around 5:00pm, he witnessed Shannon BROWN, Foreman, throw a shovel at Machine Operator Greg LANHOLM while LANHOLM was operating a backhoe on a job site, post 168.8. The long-handled shovel hit the cab of the backhoe, not LANHOLM.

Per SCOTT, there were five or six employees, including Brad RALSTON, Track Foreman, Jason BROWN, Truck Driver, Randy WALTERS, Truck Driver and John BAINTER, Roadmaster, performing repairs to the Railroad Crossing.

BROWN did not agree with the way LANHOLM was operating the backhoe. BROWN was standing in front of the backhoe, yelling instructions up to LANHOLM as he was operating the machinery. SCOTT stated that BROWN has a hot temper, but he could not recall any specific times that he lost his temper in the past.

After BROWN threw the shovel, he (BROWN) walked around the backhoe, picked up the shovel and returned to his spot in front of the backhoe. LANHOLM stayed in the backhoe the entire time. He resumed work, filling in the hole with rock that holds the Railroad Crossing, after BROWN settled down.

On 6/16/05 or 6/17/05, LANHOLM told SCOTT that BROWN had come to him later that day, 6/10/05, and pulled a small knife from his pocket. BROWN told LANHOLM, "I should just gut you." SCOTT said LANHOLM told him this

statement when they arrived for work at the Cokeville job site around 7:30 am, shortly after they began work on 6/16/05 or 6/17/05.

SCOTT requested that someone in Management, higher than the Roadmaster and Division Engineer, investigate this matter. He feels his workplace is sometimes violent.

The Carrier's record of Mr. Scott's telephone call to the Hotline was entered as an exhibit. Mr. Scott also appeared as a witness.

The Board will address a threshold issue arising from a procedural objection entered at the beginning of the investigation, and which became a part of the Organization's appeal of the Carrier's disciplinary decision. Rule 40.A. of the Parties' Agreement, captioned "Investigations and Appeals," reads as follows:

> An employe in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employes of the Security Department) and except as provided in Section B of this rule.

The Organization argues that the investigation was not timely held, in that the alleged incidents reported by Mr. Scott became known to the Carrier on June 22, 2005, and the investigation was not held within 15 days thereafter. The Carrier responds that when Mr. Scott's call was received on June 22, it was forwarded to Internal Audit for review, and when determined to have merit, was sent to the Division Engineer on June 30, 2005, that Company officer's first knowledge of the incidents.

Rule 40.A. has an exception to the 15-day time limit, in that "personal conduct cases" are subject to the 15-day limit "from the date information is obtained by an officer of the Company." Excluded specifically are employees of the Security Department. Without further evidence that an "officer of the Company" had knowledge before June 30, 2005, the Board is persuaded that the investigation was timely scheduled..

It is undisputed that the incidents reported by Mr. Scott actually occurred, although based upon the totality of the testimony, the circumstances are not quite so stark and vicious as he depicted. Because the Claimant readily admitted that the reported incidents took place, we need not examine the motives of Mr. Scott in reporting them, his admitted dislike of the Claimant, nor the dispute as to whether a supervisory officer, Roadmaster John M. Bainter, was present when a

shovel was thrown by the Claimant on June 10, 2005. While Mr. Scott's purposes are suspect, it's not denied that the reported incidents occurred, although details may differ.

On the early afternoon of June 10, 2005, the Claimant approached Machine Operator Gregg M. Lannholm, while they were awaiting an opportunity to resume work on the track. The Claimant offered this account of what happened, at Answer No. 187 in the July 8 transcript:

> . . . We were waiting around, just kind of talking about this and that. We had been talking about fishing, deer hunting and etcetera. And, and I had a small nail file in my hand that I use for cleaning out my fingernails, you know, cutting fingernails, so on. And I had it in my hand. We were talking about deer hunting and, and Mr. Lannholm had said something to me, which I can't recall. That's just how serious the conversation was. I, I don't even recall what he had said to me. And, and I said, and he was joking with me, and I said, I said, "I'll gut you like a deer." And, and I just had a file in my hand, was not a knife, it was a fingernail file. And, and, and his response to that was "They'll find you buried in the corn field." And, and we laughed and joked about it, and it was, it was not out of anger or it was not threatening. It was, it was good fun between the guys at work. And, and, and at no part, point in time, did any, did anybody feel threatened. It was, it was something that we laughed about. We work with each other on a daily basis, and I would say we have a pretty good relationship as far as colleagues.

Mr. Lannholm was present at the July 18 investigation, and was extensively questioned about his part in the incident, and his impressions: He characterized the exchanges between himself and the Claimant as "joking." Although he referred to a "small knife" in the Claimant's hand in a voluntary statement given on June 30, 2005, he said it could have been a fingernail clipper, "something with a point sticking out" between his thumb and fingers.

The issue of the "knife" was pressed by the Claimant's Representative on cross examination. Mr. Lannholm admitted that he at first felt threatened, but then realized that the Claimant was joking. He said he did not think there was anything about the incident which should have been reported.

He went on to acknowledge that the Carrier doesn't like horseplay on the job, but insisted that he and the Claimant were "just joking." In that context, he was asked further, by the Conducting Officer:

> 95. Q. I understand that you guys were just kidding. But, when, when Mr. Brown produced a knife at first were you scared in any way?
> A. Well not really cause looking at that small thing I thought well he was going to come at me I could probably knock it out of his hand

before or maybe one of the other two gentlemen who was at the time would maybe stop him.

The testimony of one of the eyewitnesses, Truck Driver Jason Brown,[1] was congruent with that of the Claimant and Mr. Lannholm. He offered his view of the exchanged words between them in the July 18 part of the investigation. He said, at Answer No. 164:

They were laughing and joking. Everybody knew it was a joke.

He said that he saw a pointed object in the Claimant's hand, but could not "guarantee" it was a knife. He did not feel that either the Claimant or Mr. Lannholm were threatening each other. On cross examination he said that sort of talk went on "every other day" and he saw nothing which should have been reported.

Another eyewitness, Trackman Robert B. Harr, viewed the incident a bit differently, according to his testimony in the July 18 transcript:

200. Q. Was, when Mr. Brown and Mr. Lannholm got into it was it confrontational?
A. I would say at the time, yes it was.

201. Q. Was there, was there any threatening gestures made or was there any tone in somebody's voice that would led [*sic*] you to believe that somebody was upset?
A. Well, no.

202. Q. So that, so you thought that these guys were kidding?
A. You, there's a fine line there, Mike. You know I mean it was said. So apparently something was there.

Mr. Harr's impressions of the Claimant's and Mr. Lannholm's demeanor was further developed in cross examination:

222. Q. They, were they, but could you tell whether either one of them, was upset or?

[1]The record does not indicate whether or not Jason Brown is a relative of the Claimant, Shannon Brown.

A. Well I knew Yakie [a nickname for Mr. Lannholm] did, Gregg didn't like being told that. I mean yeah he was kind of visibly upset, yeah.

223. Q. But you could not be (inaudible), or could you be (inaudible) with either one? You thought that either one of them was serious?
A. No I wouldn't, no. They weren't serious.

Mr. Harr said such play was not uncommon, but was aware it should not be:

226. Q. And this is a common part of the workplace?
A. Well it shouldn't be but sometimes it is, yeah.

227. Q. People josh each other regularly don't they?
A. If you can call it that, yeah.

The second incident with which the Claimant was charged, throwing a shovel, was the subject of some dispute in the record, although the act was not denied by the Claimant. In the July 8 transcript Mr. Scott's attention was directed to the Hotline call he had made, and he acknowledged that he had witnessed the "shovel" event[2]. He characterized the Claimant as angry, and said the shovel was thrown at Mr. Lannholm, and struck the cab of the backhoe, where Mr. Lannholm was seated.

The Claimant denied throwing the shovel at either Mr. Lannholm or the backhoe he was operating, but said he "tossed" the shovel to the side of the backhoe to attract Mr. Lannholm's attention. Asked whether it is acceptable to throw tools to get someone's attention, he offered the following explanation in the July 8 transcript:

166. Q. So, when is it acceptable to throw tools at employees to get their attention?
A. It is never acceptable to throw tools at employees, never acceptable to do that. I never intended to throw a shovel at Mr. Lannholm. I tossed my shovel. I was trying to give Mr. Lannholm directions on dumping rock. His machine was in movement. He was dumping rock with the bucket. I did not want to get foul of his machine, and he was not paying attention to me and my directions, my hand

[2]Although Mr. Scott said, in the Hotline report, that the "knife" incident occurred "later that day," the record indicates that the "knife" incident preceded the "shovel" incident by several hours.

> motions. So I tossed the shovel to the side of his machine only to get his attention, because I did not want to get foul of his machine and risk injury to myself.

He said he was using hand signals, being unable to communicate with Mr. Lannholm by radio because his batteries were dead. The record indicates that while Mr. Lannholm was operating the backhoe, its motor was running, his cab door was closed, and the air conditioner blower was turned on, making verbal communication difficult, if not impossible. The Claimant said that the shovel struck the ground exactly where he intended, to get Mr. Lannholm's attention.

Mr. Lannholm believed that the shovel might have struck the backhoe. He agreed that under the conditions, he could not hear a verbal communication. He also said that two employees were giving him conflicting hand signals and he was confused., but the tossed shovel did catch his attention.

Foreman Bradley W. Ralston was the only disinterested witness who observed the thrown shovel. In a voluntary statement taken on July 7, 2005, he stated:

> He took the shovel he was using & through [*sic*] it on the ground next to the backhoe.

In his testimony given at the July 18 hearing, he again said that the shovel was thrown to the ground, in a direction toward the backhoe, but it did not strike the machine. He characterized the Claimant's demeanor as "aggravated" and added "I'd say we kind of all were," because of a long day in hot weather, and additionally having to shovel ballast by hand, because Mr. Lannholm had dumped too much ballast on the track structure. These questions and answers ensued:

115. Q. Do you know why he threw the shovel?
A. Probably aggravated cause Gregg wasn't following instructions.

116. Q. Did you feel that this was an attempt to communicate with Mr. Lannholm?
A. Or at least get his attention.

117. Q. So it was an attempt to get his attention?
A. I believe so.

118. Q. Is throwing shovels an acceptable way to get somebody's attention on the BNSF, Mr. Ralston?
A. No.

Maintenance of Way Safety Rule (MWSR) S-7.7

> Use tools only for what they are designed to do. If unsure about a tool's correct use, ask your supervisor.

The Organization promptly appealed the Division Engineer's disciplinary decision to the Carrier's Assistant Director - Labor Relations. It argues that if there was an "altercation" as the Carrier asserts, it takes two to have an altercation, and no second employee was charged in the matter, nor assessed any discipline.

It further argues that there is no conclusive evidence that an altercation even existed. Two employees were "kidding," and neither was angry. The two are friends and the Organization states they have played golf together, after the incident in question. Furthermore, it argues, no knife was produced, but rather a fingernail clipper.

With respect to the "shovel" incident, the Organization argues that a Roadmaster was present and took no action. The shovel was thrown to attract the attention of the Machine Operator, who was in an enclosed cab. The shovel was not thrown at either the machine or its operator. The Organization argues that it did not strike the machine.

The Organization also argues that the investigation was not timely held, a threshold issue which the Board has already addressed, above. The Organization also objects to the continuance of the investigation from July 8 until July 18, 2005, however, which it says "gives the allusion that the Carrier had already found the Principal guilty and was merely attempting to provide written statements to prove this fact."

Finally, the Organization argues that the Conducting Officer has presided over "numerous hearings" with the Claimant, "does not care for the Claimant," and has been overly zealous at times to prove the Claimant's guilt. It concludes the hearing was not fair and impartial.

The Carrier responds that the investigation was held within the time limits, and the Division Engineer's first knowledge was on June 30, 2005. It further asserts that there was an act of wrongdoing by the Claimant, who admitted throwing the shovel and making remarks to the Machine Operator which were discourteous and quarrelsome, and could be construed as threatening behavior under the Carrier's Violence in the Workplace Policy.

The Carrier further contends that the discipline assessed was warranted, based on the seriousness of the particular situation. It argues that the Claimant was afforded a fair and impartial hearing in accordance with the Agreement. The claim was denied.

The Board has studied the two transcripts of evidence and testimony, and considered the arguments submitted by the Parties. Their respective arguments will be addressed herein, first with respect to the "knife" incident, and then the "shovel" event.

The Board was also struck by the fact that only one of the antagonists in the "altercation" was charged and disciplined. Typically, when two employees fight, threaten, or exchange angry words, both are charged in the matter, without regard to who struck the first blow or said the first word. See, for example, the incident discussed in this Board's Award Nos. 282 and 284. Although in the instant case the first remark was made by the Claimant, Mr. Lannholm's response was equally chilling, unless they were — as it's been said — merely joking. The fact that Mr. Lannholm was not charged with threatening violence, also, does not diminish the impact of the Claimant's comments, but does suggest disparate treatment for comparable offenses.

It is not reasonable to suppose that the Claimant is so foolhardy as to seriously threaten another employee with felonious assault, in the presence of two or more witnesses. The record characterizes the comments of both men as "joking," "good fun," (the Claimant); "just joking," "good natured," "boisterous talk," "horseplay," (Mr. Lannholm); "joking around," "laughing and joking," (Mr. Jason Brown); and "confrontational," "kidding," "upset," (Mr. Harr).

The very fact of this dispute demonstrates why the Carrier prohibits practical jokes in MWOR 1.7, and discourtesy, being quarrelsome, or hostility in MWOR 1.6. Actions intended as jokes or "kidding" by one person may be perceived as insulting or threatening by another. Although the Board's Neutral Member believes no actual harm was intended by the Claimant, the testimony of both Mr. Lannholm and Mr. Harr indicate that their initial perceptions were of apprehension about the Claimant's intentions. See Mr. Harr's Answers Nos. 200 and 202, on page 5, above. He noted the "fine line" between a joke and a threat, and said, "So apparently something was there." Mr. Lannholm concluded that the Claimant was joking, and he responded in kind, but his first thought when he saw the pointed object was how its use might be countered, as expressed in his Answer No. 95, above: "I could probably knock it out of his hand."

With respect to the "shovel" incident, there is noticeable dispute in the testimony as to whether a Roadmaster was present. The Organization argues that one was present and he took no action. Mr. Scott said in his Hotline report that Roadmaster Bainter was present. Roadmaster Bainter was a witness at the investigation, and introduced written voluntary statements that were given by Messrs. Lannholm, Ralston, and Jason Brown. He was asked on cross examination if he was present when any of the incidents took place, and said he was not, and that he had no first hand information.

Mr. Scott, however, when he was asked to whom workplace violence should be reported, stated "you're supposed to notify your supervisor." That triggered the following questions and answers on cross examination, in the July 8 transcript:

122. Q. Did you do that?
A. He was standing right beside me.

123. Q. Did he witness this?
A. I don't see how he couldn't have.

124. Q. Which, which supervisor are we talking about?
A. John Bainter.

That response was followed by redirect questions and answers, in which Mr. Scott contended that when the "shovel" incident occurred, Mr. Bainter "kind of laughed."

Mr. Bainter was recalled and said he was not present and did not observe the shovel being thrown, but if he had seen it, he would have taken the Claimant out of service.

The Board is unable to reconcile these conflicting statements. It is clear, however, that the Carrier chose to believe Mr. Bainter and to disbelieve Mr. Scott with respect to this detail, while at the same time accepting the word of Mr. Scott with respect to every other detail of the incident. And, again at the same time, the Organization finds Mr. Scott's account of Mr. Bainter's presence at the shovel-throwing incident credible, while discounting Mr. Scott's truthfulness and motives in other respects.

The Board is persuaded that the Claimant acted improperly when he threw or tossed the shovel, for whatever purpose. Only Mr. Scott asserted that the shovel was thrown at Mr. Lannholm, and his verity and motives are already suspect. Nevertheless, the Claimant acted impulsively and unwisely when he threw — he says "tossed", a distinction with little or no difference — the shovel. Whether intended or not, it might have struck a person or damaged equipment. He justified it as the only way to gain Mr. Lannholm's attention, but the record does not show that getting his attention constituted an emergency. It may be that in the case of a real emergency, to prevent accident, injury, or damage to property, any means necessary, including a thrown object, might be utilized. Although the Claimant asserted more than once that the situation "could have been an emergency," his testimony and that of others who witnessed the event indicates that no real emergency existed at the moment.

The Organization objected to the continuance of the investigation from July 8 until July 18, 2005. The record shows that Mr. Lannholm was on scheduled vacation on July 8. When his absence from the investigation was noted, Mr. Bainter offered a written voluntary statement taken from him on June 30, 2005. After examining the statement, the Claimant's Representative stated in the record,

> I'm going to have to ask for this investigation to be recessed until Mr. Lannholm can be here personally, because he has information pertinent to Mr. Shannon's defense. [Transcript page 5.]

The Conducting Officer said that Mr. Lannholm could not be present on that day, because he was on scheduled vacation, but the Carrier would make him available on a later date. The Parties then agreed to continue the investigation until reaching the point when Mr. Lannholm's presence would be required. At the close of the proceedings on July 8, the Conducting Officer and the Claimant's Representative agreed on a date to resume, and at the Organization's request, other witnesses would be called by the Carrier — Mr. Ralston, Mr. Jason Brown, and Mr. Harr.

The Organization suggests a sinister purpose in the recess from July 8 until July 18, 2005, but the Board finds that the recess was agreed upon, due to Mr. Lannholm being on scheduled vacation. Furthermore, if the Carrier had scheduled the investigation to begin after his vacation ended, it would indeed have been outside the 15-day time limit prescribed in Agreement Rule 40.A. Therefore, the Board finds that the recess was entirely proper, and it was agreed upon by the Claimant's Representative.

The Board believes the investigation was held in a fair and impartial manner. While it may be true that the Conducting Officer "does not care for the Claimant," and that he has held "numerous hearings," with the Claimant, the record does not reflect any denial of the Claimant's due process rights. The Organization has not pointed to any particular acts to support its opinion of the Conducting Officer's lack of impartiality.

The Carrier has borne its burden of proof that the Claimant was discourteous when he engaged in what can only be described as "horseplay," as one of the witnesses characterized the "knife" incident, although it has not proven that the Claimant held a knife in his hand. The object, evidently a fingernail clipper, could have and in fact did appear to be a knife. We have discussed above how one man's joke might be construed by another as an insult. Indeed, in society, many an insult has masqueraded as a joke. "Hey, I was just kiddin'" will mask a latent insult which cannot be safely voiced in plain words, as sociologists have often observed. That's the reason practical jokes and the like are forbidden in the workplace.

As discussed above, the Board believes that the shovel was not thrown at Mr. Lannholm nor the backhoe, but the impulsive act of throwing it, without an emergency calling for such action, violates MWSR S-7.7.

The only issue that remains is whether these infractions warrant permanent severance of the employment relationship. If the Board were persuaded that the Claimant had held a knife in his hand and seriously threatened Machine Operator Lannholm with evisceration, we would not hesitate to uphold his dismissal. We do not believe his words actually anticipated such an

outcome, nor do we believe that Mr. Lannholm purposed the Claimant's interment in a corn field, but such juvenile comments are best toned down or left for off-duty play.

Similarly, if the Board were persuaded that the Claimant threw a shovel at Mr. Lannholm in a fit of anger, for the purpose of inflicting bodily harm, we'd not hesitate to uphold the penalty assessed.

The Board has considered the Claimant's personal record. It is not a good one. He has been disciplined twelve (12) times in nearly nine years of employment, including two dismissals. None of the previous disciplinary entries reflect actions such as those in the instant case, however. Under different circumstances, such a poor record over a short span of time would not likely warrant modification of this penalty.

The Carrier did not choose to charge Mr. Lannholm for "threatening" to bury the Claimant in a corn field, however. This is a manifestation of disparate treatment, and if for no other reason, would warrant modification of the Carrier's disciplinary decision. The Claimant's conduct, while far from exemplary, does not warrant permanent dismissal under all the circumstances discussed herein. He will be restored to service, with seniority and other rights unimpaired. His conduct in this matter, while not as egregious as the Carrier implies, nevertheless will not be rewarded with any back pay.

AWARD

The claim is sustained in accordance with the Opinion. The Carrier shall return the Claimant to service within thirty (30) days from the date affixed below.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

Samantha K. Rogers, Carrier Member

April 27, 2006
Date