

PUBLIC LAW BOARD NO. 5606

**PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
TO)
DISPUTE) SPRINGFIELD TERMINAL RAILWAY COMPANY**

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- 1. The sixty (60) day suspension assessed Trackman F. J. Michaud for his alleged harassment of a fellow employee was without just and sufficient cause, based on an unproven charge and in violation of the Agreement.**
- 2. As a consequence of the violation referred to in Part (1) above, Trackman F. J. Michaud shall be compensated for all wage loss suffered and have his record cleared of the incident. (Carrier File MW-03-19)**

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

On January 16, 2003 Claimant was directed to report for an investigative hearing in a charge that reads as follows:

The Complaint of fellow Brotherhood of Maintenance of Way Employees member Joseph J. Blanchard of an alleged violation of company "Policy Against Harassment and Intimidation." Also to be investigated are any possible violations of the Springfield Terminal Safety Rules, specifically but not limited to Rules GR-C and GR-L

Scheduled for January 23, 2003, the hearing was subsequently postponed by mutual agreement to February 13, 2003. Hearings commenced on February 13, 2003 and continued over to March 18, 2003. Claimant was present for the hearing and assisted in a defense against the charge by Vice President Henry Wise, General Chairman Stuart Hurlburt, Jr., and Representative Joel Myron, all of the Organization. Mr. Blanchard, who filed the complainant against Claimant, was permitted by the Carrier hearing officer to have his personal attorney sit in on the

hearing as an observer for only that portion of the hearing when Mr. Blanchard was called to testify as a Carrier witness.

Carrier determined Claimant to be guilty as charged, and by notice of April 2, 2003, it assessed the discipline here on appeal, a 60-day calendar day suspension.

The charge and discipline arise out of a complaint made by Mr. Blanchard relative to what was alleged to have been profane and vulgar comments made about him by Claimant on three different dates, namely, January 4, 7 and 8, 2003. The remarks allegedly made by Claimant were said to have been related to the fact that Mr. Blanchard had been permitted by the Carrier, over the objections of the Organization's General Chairman and the Claimant (a Vice General Chairman for the Organization), to displace an employee more senior on the seniority roster to Mr. Blanchard from a trackman's position.

The complaint, as recorded in a memorandum by Track Supervisor Steiniger under date of January 9, 2003, who was also the charging officer at the company hearing, reads in full as follows:

On January 8, 2003 around 12:15 pm I received a phone call from the Rigby Track Supervisor Dave Landry. Dave explained to me he had received a phone call from his I&R Trackman Joe Blanchard. Joe told Dave, "He is being harassed by a fellow employee – Maintenance Trackman Frank Michaud!" Joe says, "he is sick of it and shouldn't have to put with this at work!" I then took this information to the Railroad Police and Captain Miller said he would handle it from here.

Following his investigation of the complaint, Captain Joseph Miller of the Carrier Police Department prepared a Report of Possible Harassment, the body of which Report reads:

January 9, 2003

John Steiniger notified me that there was a possible harassment of one employee to another at Rigby Yard in Portland Maine. Joseph Blanchard had complained to his supervisor David Landry that he felt Frank Michaud was harassing him.

January 10, 2003

I called Joseph Blanchard by phone and set up an appointment to meet with him at the Railroad Police Office in Rigby Yard.

January 14, 2003

I met with Blanchard and asked him to give me a written statement of the events that took place that he had complained about to his

PLB 5606

supervisor. Blanchard declined to give a written statement until he consulted with his attorney. However he did give me a verbal statement of some of the things that took place. Blanchard was visibly shaken and upset when he was talking about these events (SEE ATTACHED STATEMENT) Blanchard stated that due to these events he was under a doctors care.

January 16, 2003

I returned to Rigby Yard and met with Dave Landry who gave me a written statement from both Joseph Blanchard and Michael Lamb. I then asked Landry to have Frank Michaud come speak with me. I explained to Michaud that Blanchard had lodged this complaint. Michaud declined to give me a written statement but did give me a verbal statement. Michaud stated that the only thing he may have said was that Blanchard was in with Ralph Hall. Michaud was very upset that he was being accused of harassment and stated that he was sick about it and he was under the care of a doctor. Michaud stated that it was just railroad banter that was being exchanged between the workers. Michaud stated that he had a friendly conversation with Blanchard about each other's families just recently and couldn't understand what this was all about.

Although the above Report states that Mr. Blanchard gave Captain Miller a verbal statement, and directs attention to an attached statement, the record as presented does not include any documentation that relates what Mr. Blanchard purportedly told Captain Miller. The Report does, however, include a one and one-half page statement containing the signature of Mr. Blanchard that is dated January 14, 2003, a written statement Captain Miller says was given to him on January 16, 2003 when he met with Track Supervisor Landry.

The Board finds the Report of Captain Miller significant because it was testimony of the charging officer, Mr. Steiniger, that the basis for calling the company hearing was the information contained in that Report.

In his January 14, 2003 written statement, Mr. Blanchard identified employees said to have been present when Claimant was alleged to have made vulgar and profane comments about him and to whom he made a complaint. The individuals named as witnesses were: Richard Steele, John Tracy, and Michael Lamb. Other persons named as individuals to whom he had reported the alleged remarks of Claimant, or where present when he made such reports were: David Landry, Gerald "Beetle" Bailey, and Frederick Gallant. Nothing in the Report of Captain Miller shows that he had interviewed any of the purported witnesses. The Report included only a written statement from Mr. Lamb that was provided Captain Miller when he met

PLB 5606

with Track Supervisory Landry on January 16, 2003, together with the January 14, 2003 statement of Mr. Blanchard.

The statement of Mr. Lamb is the only supporting statement of a purported witness to remarks that were alleged to have been made by Claimant to or about Mr. Blanchard that were a part of the Report as filed with the Carrier by Captain Miller. Moreover, as subsequently brought out at the hearing, Mr. Lamb and Claimant do not get along, and have not gotten along in the past. In any event, a written statement of January 14, 2003 by Mr. Lamb, with emphasis added, reads:

On the morning of Wed 1/8/03 at approximately 8:00 A.M. Joe Blanchard and I were trying to start the loader 32827 in the employee parking lot with John Tracy present. Frank Michaud arrived to pick up John so they could travel together for negotiations meeting in Billerica, MA. When Frank arrived in the parking lot got out of his car and yelled to John don't talk to Joe Blanchard because he was in bed with Ralph Hall. Joe was visibly upset by Frank's remarks.

At the company hearing Mr. Lamb acknowledged his written statement, including that he heard Claimant make the above referenced comment to Mr. Tracy, adding: "You know, it's all—that's all it was—that transpired." In questioning by the hearing officer, Mr. Lamb said that he did not know what was meant by the statement attributed to Claimant, albeit he knew that it visually upset Mr. Blanchard.

When questioned by Claimant at the hearing as to when he wrote his statement, Mr. Lamb was adamant in stating that he wrote it on January 8, 2003, offering that he did so in order not to forget something. In redirect examination by the hearing officer, Mr. Lamb again said that he had written the statement on January 8, 2003, but on further questioning said it was actually on January 14, 2003, adding that he was asked to rewrite it onto a separate piece of paper.

Claimant denied having made the aforementioned remark attributed to him by Mr. Lamb, albeit Claimant offered that he might have asked Mr. Blanchard if he was "up tight" with Mr. Hall. Claimant's denial is supported by testimony of Mr. Tracy, who was present along with Mr. Lamb when the above referenced remark about being in bed with Ralph Hall was alleged to have been made about Mr. Blanchard on January 8, 2003.

When the hearing resumed on March 18, 2003, the hearing officer presented into the record an undated written statement of Mr. Steele, another witness named by Mr. Blanchard. The statement was provided to a Carrier Sergeant of Police who interviewed Mr. Steele upon the latter returning to work on February 14, 2003, the

PLB 5606

day after the opening of the hearings in this case. This statement by Mr. Steele reads:

I heard Frank Michaud holler from truck window, Go to work! Do something! These statements were directed at Joe Blanchard. At this time I can't remember any other remarks aimed directly at Joe Blanchard.

At the reconvened company hearing, Mr. Steele testified that except for having heard Claimant make the above mentioned remark about going to work and doing something to Mr. Blanchard, that he had no recollection of having heard Claimant make the derogatory remarks that Mr. Blanchard asserts were made by Claimant in his presence.

It is evident in study of the record that the above mentioned remarks and other more personal profane statements that Mr. Blanchard attributed to Claimant as the basis for his complaint are not supported by witness testimony of record. Actually, as the Organization submits, all witnesses called by the Carrier whom Mr. Blanchard identified as either being present when the alleged statements were made or reported to Carrier supervisory officials by Mr. Blanchard, with the exception of Mr. Lamb, testified that the incidents asserted by Mr. Blanchard did not occur or they were not able to recall Mr. Blanchard having reported the alleged remarks in the manner stated by Mr. Blanchard. Further, witnesses called by the Carrier, namely, Messrs. Steele, Landry, Bailey and Tracy, stated that they had never heard Claimant use profanity in the whole length of time they had worked with him over a number of past years.

As boards have held on numerous past occasions, a carrier has the right to protect itself and its employees from harassment in the interests of maintaining a safe and efficient workplace and in assuring that its employees are able to perform their assigned duties free from a display of abusive, insulting and hostile conduct. At the same time, a carrier is obliged to show that discipline assessed an employee for harassment is based upon substantial and conclusive proof, and not mere inference or conjecture of a wrongdoing.

In the instant case the Board finds that it is faced with conflicting versions as to what was or was not said by the Claimant to or about Mr. Blanchard. In this respect, the Board will note the following excerpt from Award No. 20129 of the First Division, NRAB, SUNA v. IC RR, Referee Jacob Seidenberg:

It is not, as has been stated in many prior awards, the function of this Division to reconcile conflicting versions, but the Division does have the responsibility of determining whether the evidence upon which the carrier based its disciplinary action is so credible and so substantial

PLB 5606

that the Division is ineluctably drawn to and must accept the conclusions urged upon it by the respondent.

In the judgment of the Board, without in any way derogating the right of the Carrier to have called for an investigation to review the complainant made against Claimant, the Board is not convinced in a careful reading of the lengthy transcript (235 pages of single spaced type) that the record as presented and developed at the company hearing is sufficiently clear and convincing to conclude, as the Carrier does, that the version of the incident as given by Mr. Blanchard necessarily overcomes that of Claimant and other witnesses who gave testimony at the hearing.

Furthermore, even if it was to be assumed, *arguendo*, that Claimant had at least made a remark about Mr. Blanchard being "in bed" or "up tight" with a Carrier supervisory official, it seems to the Board that such a remark is generally recognized as nothing more than shop talk suggesting an affiliation where an individual is "in cahoots" with somebody in order to receive most favored treatment over others. It appears that Mr. Blanchard, on the basis of unproven statements of a subsequent and profane nature allegedly made by Claimant, took the remark to imply engagement in an intimate physical relationship, having testified that in a conversation with Claimant that he (Mr. Blanchard) said:

I told him that it was none of his business who I'm in bed with or who I'm sleeping with. And no, I'm not sleeping with Ralph Hall. And I don't sleep with Ralph Hall. And I told him that Ralph Hall would personally be the one to tell him this. And I told him I had filed a grievance on him. And he looked at me and he said, good, I hope you did. I said I did. He said good. Like I say, I take it personal for being in the position he's in. He represents the union. Union employees, brothers. And he's got no respect for them.

It well may be, as the Carrier says: "The Claimant, a staunch union advocate, was incensed by the fact that a junior union member was attempting to displace, not only a senior Trackman, but also an individual who worked closely with the Claimant and was a companion of his on the railroad." At the same time, it must be borne in mind that as a local union representative, reason existed for Claimant to question how Claimant came to be allowed by Carrier supervisory officials to displace a more senior employee.

Seniority has long been recognized as essentially inviolate. It is not a gift of management, but a collectively bargained right that increases in economic value over succeeding years of service. Mr. Blanchard had been told by the union officers that agreement rules did not extend to him a right to displace a more senior employee. The Carrier initially agreed with the union officers, but some weeks

PLB 5606

later, over objections of the union officers, permitted Mr. Blanchard the seniority displacement.

A claim in challenge of the Carrier decision allowing the aforementioned exercise of seniority by Mr. Blanchard was docketed to this Board in Case No. 27. In its Award No. 27 the Board found the record to support the conclusion that the Carrier decision allowing Mr. Blanchard a seniority displacement over a more senior employee constituted a violation of applicable agreement rules.

As concerns the existence of a community of interest responsibility as concerns seniority, this matter was succinctly addressed in the following excerpt from Award No. 15510 of the First Division, NRAB, BRT v. C&W, Referee A. Langley Coffey, as the Board also noted in its Award No. 27:

Although frequently spoken of as a property right in which the individual employee has a vested interest, seniority is something which all employees enjoy in common. At most it is community property. Therefore the organization for the protection of all employees and not as much in the interest of any one employee, insists on being heard by the carrier on the matter of administrative seniority. It is not uncommon for it to step in as was done in the instant case and assert what it considers to be the proper application of a rule in the community interest against the individual's asserted right.

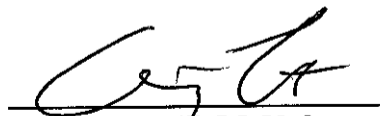
Lastly, the Board notes that Claimant has over 34 years of service. There is no indication of record whatever that Claimant had been involved in any previous incident of a like or similar nature of alleged harassment. Nor does the record show any past discipline having been administered Claimant for any prior incident.

Based on the foregoing considerations and overall study of the record, the Board will hold that the claim be sustained.

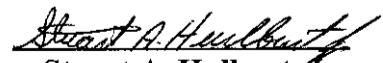
AWARD: Claim sustained.



Robert E. Peterson
Chair & Neutral Member



Timothy W. McNulty
Carrier Member



Stuart A. Hulburt, Jr.
Organization Member

North Billerica, MA

Dated Sept-30, 2004