

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 6986

BNSF RAILWAY COMPANY
(Former St. Louis – San Francisco Railway Co.)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 6986 Case No. 25
Carrier File No. 12-09-0028
Organization File No. B-2526-7
Claimant: Sean L. Hopkins

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on January 5, 2009, when Claimant Sean L. Hopkins was assessed a Level S 30-day record suspension with a three year probation period for violation of Maintenance of Way (MOW) Operating Rules 1.6 – Conduct and 1.9 – Respect of Railroad Company
2. As a consequence of the violation referred to in part (1) above, we request that the charges be removed from the Claimant's record.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant, Sean L. Hopkins, was assessed a Level S thirty-day record suspension with a three-year probation period for violation of Maintenance of Way Operating Rule 1.6 – Conduct and Rule 1.9 – Respect of Railroad Property following an incident on August 9, 2008, while he was working as a Maintenance of Way employee near Beardstown, Illinois. According to the Carrier, the Claimant emerged from his vehicle and intervened in a fight with a non-Carrier employee at Macomb, Illinois on August 29, 2008. The non-employee received a cut over his eye and a broken bone in his cheek. The Carrier further contends that the Claimant was “Not forthright about the other BNSF employees involved in this incident when the BNSF Special Agent asked Mr. Hopkins who else was involved in this incident and he would not reveal the other employees.”

The Organization contends that the discipline was excessive, as the Claimant was only marginally involved in the incident and was defending himself and a co-worker after the non-employee initiated the physical altercation.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was submitted to Public Law Board 6986 for adjudication.

FINDINGS AND DECISION

Public Law Board No. 6986 (the Board) finds that the parties herein are Carrier and Employee Organization within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and subject matter involved.

The Claimant is employed as a Tie Crane Operator and was assigned to Region System Gang TPO9, working in an area around Macomb, Illinois. After the end of the workday on Friday, August 8, 2008, the Claimant and several other BNSF employees visited several bars in the area. After the last bar had closed, the group of BNSF employees left the bar, purchased some food from a street vendor, entered a vehicle that had been rented by one of the BNSF employees, and returned to their hotel at approximately 1 a.m. on August 9, 2008. According to the investigation, one of the employees sitting in the back seat noticed a pedestrian walking behind their vehicle as the vehicle was backing out of its parking spot. The pedestrian was eating food with rice out of a bowl he was carrying.

According to the Claimant, this co-worker yelled at the pedestrian to “get out of the way before he got run over”, to which the pedestrian responded by throwing a large quantity of rice into the vehicle through the open window and then grabbing and punching the employee who had shouted out. The vehicle’s window was raised, causing the pedestrian to release the employee and move away. Instead of leaving the scene and returning to their hotel, the BNSF employees elected to exit the vehicle and to confront the pedestrian. This confrontation turned into a physical altercation during which the Claimant struck the pedestrian twice in the head, causing physical damage in the form of a cut over the pedestrian’s eye and a broken bone in his cheek.

The City of Macomb Police Department thereafter became involved investigating the incident. Detective Matt Gass of the Macomb Police Department contacted BNSF Special Agent Gerry Dale on August 19, 2008, and requested to interview the Claimant about the incident. The Claimant provided a verbal description and a signed statement describing the events. The Claimant was ultimately charged with assault for his actions.

The Carrier contends that the Claimant’s off-duty action brought the Carrier into disrepute, thus violating Maintenance of Way Rule 1.9, which provides that “employees must behave in such a way that the

Railroad will not be criticized for their actions.” The evidentiary record does not reflect that these employees caused any notoriety identifying the employees, including the Claimant, as BNSF employees in any public manner. Consequently, the Claimant is not demonstrably culpable for violating MOW Rule 1.9.

The Claimant was also disciplined for failure to cooperate fully with the BNSF Special Agent investigating the situation. The Claimant refused to identify the other employees in the vehicle who were involved in the altercation. The Claimant suggested to the investigators that the blame should rest entirely with him. While the Claimant contends that his actions were acceptable and that his behavior was reasonable, neither is the Claimant is not without blame in the instant case. Nevertheless, certain extenuating circumstances were described by the Claimant at the investigatory hearing.

According to unrefuted testimony, the pedestrian who was injured by the Claimant’s punches initiated the altercation by throwing rice through the open car window and “started throwing punches through the window and when we got out, he was throwing punches and threw a punch at me. After one guy tackled him so he would quit punching. He hit me and I hit him back twice. Then got up and left.” According to the Claimant, the person who threw the rice swung at him, grabbed his shirt

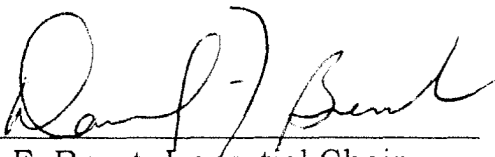
and grabbed his glasses, striking the Claimant before the Claimant punched him back.

To the extent that this description is accurate, the Claimant was not simply fighting. His actions, while not gentle, could reasonably be construed as going to the aid and defense of a co-worker who was being pummeled through an open window. Although the driver could have accelerated the vehicle and left the scene, the Claimant was not the aggressor in this fight, although the aggressor apparently ended up the worse for wear. The Claimant is culpable, however, for not identifying the other employees involved when asked by the BNSF special agent. For this reason, the Claimant did fail to fulfill his duty to cooperate fully with a Carrier investigation.

A better characterization of the instant case was that the Claimant was swept along into a physical altercation when a pedestrian dumped a bowl of rice on him after being provoked by the tone of a co-worker sitting next to the Claimant who told the pedestrian to get out of the way before he was run over. This impolitic remark was not attributable to the Claimant, who was apparently trying to regain his glasses when he struck the pedestrian with his fist. The Claimant's assertion of self-defense is sufficient to mandate that the penalty imposed be significantly reduced, especially as the evidentiary record established persuasively that there is no evidence of any public notoriety, including newspaper

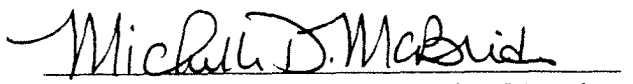
coverage of the incident. Nor is there any evidence that the Claimant was aware that a colleague whom he met for the first time that evening and who was not a member of the bargaining unit had rented the vehicle transporting them from the motel to the bar using a BNSF credit card.

As the misconduct did not involve fighting with co-workers or fighting on duty or on Carrier property, the Carrier reasonably determined not to terminate the Claimant's employment or to impose a lengthy actual suspension. The Level-S thirty-day record suspension was predicated on the Claimant becoming involved in this altercation, but ignored the self-defense or defense of others aspect of his conduct. Consequently, the Level-S thirty-day record suspension shall be sustained, but the three-year probation period shall be reduced to a one-year probation period. The Claimant is hereby admonished to moderate his actions in the future in order to avoid potentially subjecting BNSF or his co-workers to criticism or legal liability. We so find.


Daniel F. Brent, Impartial Chair

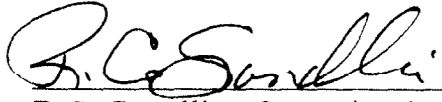
Dated: 12/30/09

() I concur. () I dissent.


Michelle D. McBride, Carrier Member

Dated: 1/11/2010

(☒) I concur. () I dissent.



R.C. Sandlin, Organization Member

Dated: 01/15/2010