

**PUBLIC LAW BOARD NO. 7008**

**PARTIES TO THE DISPUTE:**

BROTHERHOOD OF MAINTENANCE OF  
WAY EMPLOYEES DIVISION OF THE  
INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS

-and-

CSX TRANSPORTATION, INC.

**STATEMENT OF CLAIM:**

In connection with the objections raised during the hearing, the reasons stated in this appeal and furthermore violations of the Agreement, we hereby request Mr. Portmess, ID# \*\*\*\*\*, be exonerated from these charges against him and all matter relative thereof. We request Mr. Portmess immediately be reinstated as an employee with CSXT and his name will be placed back on any and all seniority rosters and compensated with all lost wages and benefits due to the carrier's action and violations of the provisions of Rules 24 and 25 of the June 1, 1999 CSXT/BMWED collective bargaining agreement, as so stated.

**OPINION OF BOARD:**

M. A. Portmess, ("Claimant") was hired by CSXT in the Engineering Department on April 7, 1980. At the time this case arose, October 17, 2005, Claimant was assigned as Machine Operator in the System Production Gang (SPG) 6XC5, working near Martinsburg, West Virginia. After the days' work, the crew stayed at the Carrier-provided lodging facility, a Quality Inn in Martinsburg. At approximately 10:30 pm that night, Claimant Portmess was sitting near the pool with some other employees while another Machine Operator, named Peter Ruggieri, was sitting in his nearby room playing music on his radio. At some point, Portmess knocked on the Ruggieri's door to speak to him about the music, but it is not entirely clear from the record whether it was a request to play the music

louder or less loud. There then occurred a verbal confrontation between the two men which ended with mutual posturing and name-calling; after which Ruggieri slammed his door and Portmess went back to his own room.

The record does not indicate who was the aggressor in that first phase of the incident but all of the eyewitnesses concur that Ruggieri came storming out of his room, renewed the verbal confrontation and began throwing punches at Portmess. The latter individual struck back and before the two pugilists could be separated by the other employees, Ruggieri was propelled through a sliding glass door and sustained injuries which required an emergency medical response and a trip to the hospital. Hotel management called the Berkeley County, West Virginia Sheriffs Department who investigated and charged Ruggieri with assault based on the eyewitness accounts that he had escalated the verbal argument to a physical confrontation and thrown the first punches. After the statements were gathered, Ruggieri was transported by ambulance to the local hospital to receive medical attention for his wounds.

Following due notice and a formal investigation at which the foregoing facts were developed, the Carrier rejected the Claimant's testimony that he was innocent of any wrongdoing. Based on the investigation record, Carrier terminated the employment of Mr. Portmess, finding that he had engaged in "conduct unbecoming an employee of CSX Transportation", and with violations of CSX Transportation Operating Rules-General Regulations GR2 and GR-2A, as well as CSX Transportation Policy Statement on Harassment and CSX Policy On Workplace Violence.

In perfecting the appeal, the Organization asserted a violation of due process because "[t]he carrier did not provide us our request for management records for the purpose of researching issues related to this investigation in order for us to not only prepare, but also provide Mr. Ruggieri with

*a fair and impartial hearing. A written response was never received as our letter requested. The proper objection was made on the record, but the hearing officer continued to proceed with the hearing over our objection. We have carefully considered that argument but must conclude that there is no fatal due process violation shown on this record. On the threshold issue of due process and "pre-investigation discovery", the language in Rule 24(i) does not require the Carrier to provide summaries of testimony or investigative materials to the Organization prior to the hearing. Consequently, we find no evidence of a fatal due process violation on this record.*

On the issue of Claimant's role in this incident of physical violence, the evidence plainly shows that Ruggieri threw the first punches, as shown in the following statement from an eye-witness:

I, Carlos Rios was sitting by the pool side with two other men drinking beer. One of the men named Mark heard music coming from another room. It was loud so Mark went up to the room 4 or 5 times to see if the person who was in the room would open the door so we could have some music to listen to while we sit and drink beer. So finally the music stops and Mark goes over again and knocks on the door the man that was in the room came out in his underwear and was yelling out 'come on, come on in the room.' So then Mark is making fun of him telling him to come on with his hands and then the dude that was in the room closes the door and Mark leaves to go back to his room to get everybody a beer. So as Mark comes back from his room with a handful of beer the dude that was in the room came out with pants on looking for Mark. So when Mark came out his room the dude runs to Mark and punches him and they begin to swing at each other and they grab each other and began to tussle around and they hit the glass window and fell to the floor hitting each other and that's when I grab one of them and broke it up.

Indeed, Carrier relied upon that evidence as well as the fact that Ruggieri was cited by the police for assault when it terminated Ruggieri's employment. In that regard, Carrier also relied on the written report of the Berkeley County, West Virginia Sheriff's Deputy, who concluded that Claimant Portmess was not the assailant but rather was the victim of a physical assault, as follows:

On Monday 17 October 2005 (I), Deputy S.D. Myers responded to the Quality Inn located in Martinsburg for a battery that had just occurred. Deputy Myers arrived and was met by

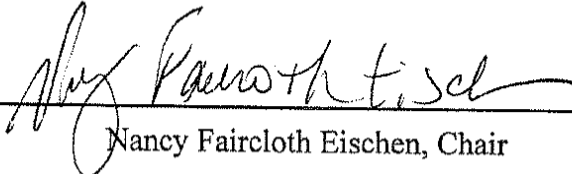
the suspect that was being treated by EWS already on the scene. Deputy Myers speaks to the victim a Mark Portmess who advised that he went over to the Peters room and ask if he would turn the music down. Mark advised that Peter would not answer the door so the Mark called the front desk for assistance. Mark knocked on the door again when Peter came out in his underwear yelling obscenities at Mark telling him to leave. Mark went over to the pool area to speak to friends and decided to go to his room to get some beer. Mark stopped and knocked Peter's door again asking him to turn the music down. Mark went into his room to get some beer, while walking back to the pool area Peter came out of room now with his pants on yelling and asking where Mark was Mark [sic]. Mark advised he kept walking towards his friends when Peter confronted Mark taunting him with name-calling telling him to come on. Mark advised that he and Peter starting fighting falling into a glass window in the motel. Mark advised that the friends sitting at the pool came over to break up the fighting. Peter was transported to the City Hospital for treatment from the glass cut.

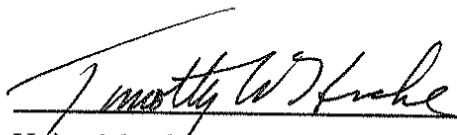
We are not persuaded that Claimant Portmess was completely without fault in this incident because the record shows that he participated fully in the verbal taunting and name-calling which apparently provoked Ruggieri's intemperate escalation to physical violence. Moreover, in response to Ruggieri's first punch, Claimant Portmess apparently went beyond self-defense to inflict injuries on his older and smaller protagonist which required EMT response and hospital treatment. Claimant's assertions of absolute innocence are not persuasive and some measure of discipline was appropriate for his role in the provocative prelude to the fist fight and for his over-zealous response when struck by Ruggieri. Based on the record evidence, however, it was unreasonable for Carrier to impose the discharge penalty in this case. Based on all of the foregoing, the discharge of Claimant Portmess is reduced to suspension without pay for time served.

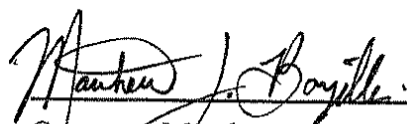
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AWARD

- 1) Claim sustained in part and denied in part, as indicated in the Opinion
- 2) Carrier is directed to reinstate the Claimant to employment, without back pay but with seniority unimpaired, conditioned on his successful completion of normal and necessary return to work examinations.
- 3) The Carrier shall implement this award within thirty (30) days of its execution by a majority of the Board.
- 4) Jurisdiction is retained for the sole purpose of resolving any disputes which may arise between the Parties regarding the application or interpretation of this remedy.

  
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Nancy Faircloth Eischen, Chair

  
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Union Member 2-29-08

  
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Company Member 2/29/08