

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NUMBER 7048

BNSF RAILWAY
(former ATSF property)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 7048 Case No. 7
Carrier File No. 14-06-0194
Organization File No. 170-13A2-063.CLM
Claimant: Jack Segay, Jr.

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing May 24, 2006 when Claimant, J. Segay, Jr., was issued a Level – S Forty-Eight (48) Day Suspension for an alleged violation of HR-90.2-Workplace Harassment, HR-90.4 Violence in the Workplace and Maintenance of Way Operating Rules 1.6-Conduct, and Rule 1.7-Altercations when the claimant and another employee were involved in a physical altercation on the job site May 24, 2006; and
2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate all seniority, vacation, all rights unimpaired and pay for all wage loss commencing May 24, 2006, continuing forward and/or otherwise made whole.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant was issued a Level-S 48-Day Suspension for an alleged violation of H -90.2, Workplace Harassment; HR-90.4, Violence in the Workplace; and Maintenance of Way Operating Rule 1.6 - Conduct and Rule 1.7-Altercations for allegedly engaging in an altercation with a co-worker on a Carrier jobsite on May 24, 2006. The Claimant was advised to appear at the Division's Office in San Bernardino, California on Friday, June 2 for an Investigative Hearing. The hearing was postponed to June 13, 2006. The Claimant appeared at the hearing, and was offered an opportunity to offer testimony and to cross-examine witnesses called by the Carrier regarding the incident that occurred on May 24, 2006. The parties were unable to resolve their dispute, and the matter was appealed for adjudication to Public Law Board 7048.

FINDINGS AND OPINION

The Claimant is employed by the Carrier as a Crane Operator, RP14. On May 24, 2006, he was working at Milepost 77 on the Cajon Subdivision as part of the RP14 Gang. The Claimant was issued a forty-eight day suspension for violating applicable Carrier rules prohibiting horseplay, fighting, violence in the workplace, discourtesy and

harassment of co-workers because of his involvement in an altercation at the job site on May 24, 2006. The grievance acknowledges having an interaction on May 24, 2006 with a co-worker, Marvin Begay, a Trackman also assigned to the RP14 Gang, but characterizes the interaction as jesting. The Organization contends that this discipline was without just cause, as Claimant Segay was a victim of an attack, rather than a participant in the physical altercation justifying any discipline, much less a lengthy suspension.

The transcript of the investigative hearing held on June 13, 2006 at the Carrier's offices in San Bernardino, California established persuasively that the Claimant was sitting in a passenger seat of a Carrier van during a break when Mr. Begay entered the van and began eating his lunch. A short time later, Claimant Segay advised Mr. Begay that the machine he was working behind had started to move. After a few minutes, as Mr. Begay began to exit the vehicle to return to his duties, Mr. Segay reached toward the door in order to conserve the cool air in the vehicle, whereupon Mr. Begay pushed the door open again.

The two began tapping each other's hands until Mr. Segay turned away, but

Mr. Begay continued touching his hand with greater force.

As Mr. Segay turned his head, Mr. Begay punched him with a closed fist, whereupon Mr. Segay exited the vehicle and, in the ensuing altercation, Mr. Begay hit Mr. Segay twice in the face, causing Mr. Segay's nose to bleed. Mr. Segay then walked away from the altercation and sought assistance.

This description, which is consistent with the written statement submitted by Mr. Segay on May 24, 2006, persuasively established that Mr. Segay was not the instigator of violence, but rather the victim of an unanticipated escalation of horseplay that resulted in his nose being bloodied by a punch with a closed fist. Although Mr. Segay then exited the vehicle and attempted to swing at Mr. Begay, all witnesses agree that Mr. Segay was unsuccessful as a pugilist, and was unable to land any punches on Mr. Begay. Mr. Segay admitted that he desisted in trying to punch Mr. Begay only after his nose had been bloodied, whereupon he sought to speak with the Roadmaster and the Foreman immediately after the incident ended.

By his own admission, Mr. Segay violated Maintenance of Way Operating Rule 1.7, which provides that "Employees must not enter into altercations with each other, play practical jokes, or wrestle while on duty or on Railroad Property." Moreover, Maintenance of Way Rule 1.6 provides that "Employees must not be: quarrelsome or discourteous."

The evidence does not indicate that Claimant Segay was being quarrelsome or particularly discourteous to Mr. Begay before the altercation escalated. However, Mr. Segay engaged in horseplay once he touched Mr. Begay's hands prior to the escalation of the incident. Thus, the Carrier had cause to impose discipline upon Mr. Segay.

At issue in the instant case is the severity of discipline that is appropriate. Mr. Begay's description of the events is far less credible than Mr. Segay's version. In his written statement, Mr. Begay claims that Mr. Segay started to bother him by talking nonsense "...which I didn't like. So I told him to shut up." Mr. Begay testified that he closed the van door, and then Mr. Segay jumped out after him, and all Mr. Begay could do was defend himself. This account is inherently less credible than the description offered by Mr. Segay and corroborated by an impartial eyewitness. The Board concludes that Mr. Begay was the aggressor who escalated horseplay into violence. Thus the penalties imposed on both these employees should not be identical.


Moreover, even if Mr. Segay had been pestering or kidding Mr. Begay, which is not entirely clear from the testimony and documentary evidence in the record, this pestering and kidding was not pervasive enough to constitute harassment or create a hostile work environment as contemplated by the Carrier's Workplace Harassment Policy. The instant

case constitutes horseplay that got out of hand. Thus, the Carrier's Workplace Harassment Policy is not implicated as to Claimant Segay. Claimant Segay cannot, however, avert all discipline simply because he was unable to land a punch while participating in an altercation after he had been struck on the hand and before his nose was bloodied.

A crucial distinction of instigation focuses on the credible testimony that Mr. Begay reached into the van to strike Mr. Segay. However, the better interpretation of the evidentiary record is that Mr. Segay's nose was bloodied after he emerged from the van and engaged in an altercation with Mr. Begay. Although Mr. Segay may be construed as a victim, he was not the totally innocent victim of an unprovoked attack.


Therefore, based on the evidence submitted, the Carrier's determination that Mr. Segay violated rules prohibiting altercations in the workplace, particularly Maintenance of Way Rule 1.7, must be sustained. However, the penalty of a forty-eight day suspension is excessive. The one-year probationary period shall be rescinded, and the length of suspension shall be reduced from forty-eight days to ten working days. The Claimant shall be made whole for any lost wages or benefits attributable to the thirty-eight day reduction in the suspension.

We so find.


Daniel F. Brent, Impartial Chair

Dated: 9-29-08

(☒) I concur. () I dissent.


Carrier Member

Dated: 10/3/08

(☒) I concur. () I dissent.


Organization Member

Dated: 10/13/08