

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 7048

BNSF RAILWAY

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 7048 Case No. 19
NMB Case No. 106
Carrier File No. 14-08-0124
Organization File No. 210-13A2-086.CLM
Claimant: L. Jacobs

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing May 29, 2008 when Claimant, L. Jacobs (1734516), was issued a Level S Thirty (30) Day Actual Suspension with a Thirty-Six (36) month review period for alleged BNSF Violence in the Workplace and Maintenance of Way Operating Rule 1.6. The Claimant returned to work on June 30, 2008 from his suspension. The Claimant was allegedly involved with an altercation and argument with a co-worker while on duty; and
2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing May 29, 2008, 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 30 Day Actual Suspension with a thirty-six month review period for alleged violation of the BNSF Violence in the Workplace Policy and Maintenance of Way Operating Rule 1.6. According to the Carrier, the Claimant “argued and fussed” with co-workers in a manner that escalated into a volatile attack. The Carrier cited the Claimant’s admitted involvement in moving welding buckets of a co-worker several times and turning off the co-worker’s truck.

The Organization contends that the discipline imposed in the instant case was excessive and not for just cause. According to the Organization, the Claimant was assaulted by a co-worker on May 29, 2008 at Fort Worth, Texas milepost 7 on the Wichita Falls Sub-Division, but did not retaliate in any manner that could be construed as violating the Carrier’s policy against workplace violence or MOW Operating Rule 1.6.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was submitted to Public Law Board 7048 for adjudication.

FINDINGS AND DECISION

Public Law Board No. 7048 (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.

On May 29, 2008, the Claimant was working with co-worker and fellow Welder Sam Whittington welding rails near milepost 7 at the Wichita Falls Subdivision outside of Fort Worth, Texas. The Claimant became involved in an incident involving Mr. Whittington. According to the testimony of a trainee on the site, the Claimant was allegedly pushed or punched by Mr. Whittington, causing the Claimant to fall, or at least for his hard hat to fall to the ground. This description of the incident is insufficient to justify a conclusion that the Claimant engaged in actual physical violence at the work place. Furthermore, the description provided by the objective eye witness specifically refuted any allegation that there was a physical altercation or striking with a fist or scuffling in connection with this incident.

The essence of the instant dispute is that Mr. Whittington would move Mr. Jacob's bucket whereupon Mr. Jacobs would return his tools to the weld on which he was working. Both employees were involved in

this interaction. In sorting the conflicting claims of Mr. Whittington and Claimant Jacobs, it seems that both employees behaved in a puerile manner, shifting each other's buckets back and forth the length of track segment because they had a dispute as to who would be welding which end of the track segment.


In addition, the Carrier contends that the Claimant created a dangerous situation by disconnecting a hydraulic hose hooked up to a profile grinder while the hose was under hydraulic pressure. If this aspect of the allegation had been established convincingly, then the Carrier's determination that the Claimant had created a dangerous work condition could be sustained. However, the proofs are inconclusive regarding the Claimant's role in this altercation. The Claimant denied having disconnected the hydraulic hose while it was pressurized, acknowledging that such action would create a dangerous condition.

The Claimant testified that Mr. Whittington punched him. This act of workplace violence was not established persuasively by a preponderance of the evidence, as the only eyewitness account of the incident described seeing the Claimant's hard hat fall to the ground. Therefore, a substantial reduction in the penalty imposed is appropriate.

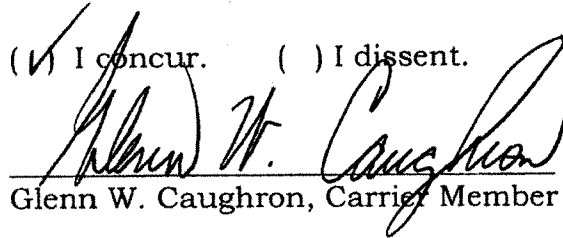
The Claimant is still liable to discipline because, although the Claimant denies having shut the grinder off while the Claimant was grinding because such action would "mess up the rail", he acknowledged having moved Mr. Whittington's bucket and having turned off Mr. Whittington's truck. Ultimately, the Claimant acknowledged (Tr. Page 69) that he not only shut off the truck, but he also disconnected the hose. However, the claimant contended he did so when the pump shut off. Nevertheless, the Claimant's admission that he shut down Mr. Whittington's truck and removed a hydraulic hose without telling Mr. Whittington that the pump had been turned off constituted grounds to impose corrective discipline.

Based on the evidence submitted, the instant claim is hereby sustained in part and denied in part. The penalty imposed by the Carrier shall be reduced from a Level S Thirty Day Actual Suspension with a thirty-six month review period to a Level S Ten Day Actual Suspension with a one year review period commencing on the day of the incident. The Claimant shall be made whole for any lost wages or benefits attributable to the reduction in penalty.

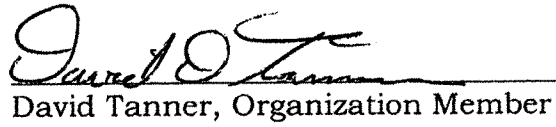
We so find.


Daniel F. Brent, Impartial Chair

Dated: October 14, 2009

(☒) I concur. () I dissent.

Glenn W. Caughron, Carrier Member

Dated: 11-23-09

(☒) I concur. () I dissent.

David Tanner, Organization Member

Dated: 11-12-09