

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 203

AWARD NO. 188

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1531871

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

System File

J-0948U-251

STATEMENT OF CLAIM

1. The Carrier's discipline (Level 5 dismissal) of Mr. Michael Peterson issued by letter dated December 4, 2009 in connection with alleged violation of Rule 1.7 (Altercation), as compared in the General Code of Operating Rules (GCOR) effective April 3, 2005 was unjust, capricious, based upon unproven charges and in violation of the Agreement.
2. As a consequence of the violation referred to in Part 1 above, Claimant Peterson shall have all charges against him dropped, any mention of this incident removed from his personal record with seniority and benefits restored and compensation paid for all time that he was unjustly withheld from service.

STATEMENT OF BACKGROUND

The facts and circumstances involved in this case are not in dispute. On October 20, 2009, Claimant, was employed as a track laborer and assigned to Gang #4886, at Sutherland, Nebraska. At approximately 1300 Hours (1:00 p.m.), during a lull in the crew's work of lining rail on a switch being built at approximately Milepost 292, Claimant wadded up duck tape into a ball and threw it at his friend and co-worker, James C. Wilson which struck Wilson in the back of his head. Claimant asserted that before the duck tape ball struck Wilson he called out Wilson's name. At the time Wilson was

struck with the duck tape ball, he was using a track jack handle (also known as a lining bar) to mark location for the 360 speed swing to move the rail in order to ready the rail for welding. At the time Wilson was engaged in marking where the rail needed to be pushed in or pulled out, the weather condition was such that it was raining. According to Wilson, after being struck, he, in turn, in kind of a knee jerk reaction spun around and as he did so the jack handle slid out of his hand, then hit the ground and bounced up and hit Claimant. Another version of Wilson's reaction was that he flipped / threw the jack handle in Claimant's direction. Instead of quickly moving out of the jack handle's trajectory to avoid being hit, Claimant instead raised both his arms to protect his head and, instead of striking him in the face, the jack handle struck one of his forearms and fractured it. Unaware immediately after being struck by the jack handle, Claimant responded to Wilson's inquiry as to whether he was alright by assuring Wilson he was okay and, at that, Claimant continued to perform his duties and finished out the day.

On November 2, 2009 Carrier issued Claimant Notice of Investigation advising he was to report for investigation to be held at North Platte, Nebraska on Wednesday, November 18, 2009, on charges to develop the facts and place responsibility, if any, that he was allegedly involved in horseplay with another employee when he threw a wad of duct tape at the employee and the employee threw a track jack handle at you hitting your arm and breaking it. Carrier apprised Claimant that if the allegations were to be substantiated, it would constitute a violation of Rule 1.7 (Altercation) as set forth in the General Code of Operating Rules (GCOR), effective April 3, 2005. Carrier further apprised Claimant that if he were to be found in violation of the alleged charge, the discipline might be a Level 5, and under its UPGRADE Discipline Policy might result in permanent dismissal. Pending the decision of the investigation, Claimant was informed he was being withheld from service.

Following the Investigation, Carrier, by Notification of Discipline Assessed dated December 4, 2009, informed Claimant it found by more than a substantial degree of evidence presented at the investigatory hearing to warrant sustaining all charges brought against him. Accordingly, Carrier apprised Claimant, he was being assessed a Level 5 discipline and dismissed from its service. It was noted in the record evidence that Claimant had entered the service of the Carrier on May 22, 2006. Thus, at the time of his dismissal Claimant had accrued seniority of a little more than three and a half (3 ½) years.

GCOR Rule 1.7 reads in whole as follows:

1.7: Altercations

Employees must not enter into altercations with each other, play practical jokes, or wrestle while on duty or on railroad property.

AWARD NO. 188

The Organization filed the subject claim contesting Claimant's dismissal and, as a result of the inability to reach a mutually acceptable resolution of the claim on the property, the claim comes now before the Board for its consideration.

CARRIER'S POSITION

Carrier submits there can be no doubt as to Claimant's culpability in having violated GCOR Rule 1.7 as Claimant admitted to the charged violation in his testimony at the investigation. In response to the question to describe in detail his involvement and knowledge of the event in question, Claimant gave the following answer:

On 10-20-09, we the gang was building a switch around 292 and the duct tape was laying on the ground and I under threw it a Jim, not out of anger but playing around and next thing I know I looked to my right then looked up again, then Jim had the jack bar over his head with both hands and threw the bar up and instead of jumping out of the way, I put my arm up and it hit my arm instead of my face.

Carrier asserts that Claimant's admission of guilt coupled with eye-witness testimony proffered by co-workers present at the work site in corroboration of the facts substantiating the act of horseplay committed by Claimant more than meets the substantial evidence standard of proof required to support the allegation Claimant violated GCOR Rule 1.7.

Accordingly, Carrier maintains there is no basis for the Board to overturn the discipline imposed of dismissal as provided for by its UPGRADE Discipline Policy that has been found by numerous Boards to be fair and reasonable. Thus, Carrier requests the Board to deny or dismiss the subject claim in its entirety.

ORGANIZATION'S POSITION

The Organization submits that because Carrier committed several procedural violations that denied Claimant certain due process rights that the claim should be disposed of on procedural grounds with no need for the Board to consider the merits.

First, while the Organization agrees that under the provisions set forth in Rule 48 (o) the Carrier has the right to suspend an employee from service pending hearing, Carrier is only permitted to do so where the alleged acts for which an employee is charged with committing are of a serious and /or flagrant violation of Company rules or instructions. Clearly, the Organization maintains, Claimant's having thrown a wad of balled up duck tape at a co-worker who happens to be a friend with no intent to harm the co-worker and not done out of any anger or rancor toward the co-worker, cannot be deemed a

violation of Company rules or instructions so serious and/or flagrant as to warrant withholding Claimant from service pending the outcome of an investigation. The Organization submits that by Carrier's withholding Claimant from service due to his having engaged in nothing more than a playful act, Carrier violated Rule 48 (o) and should be held accountable for its wrongful action. As such, the Organization argues Claimant is entitled to the requested relief sought by the subject claim dating back to his initial removal from service.

As to the merits if the Board should find it necessary to address the merits, the Organization submits that even assuming arguendo Carrier met its burden of substantial proof to justify the imposition of discipline, which the Organization maintains it did not nevertheless, the quantum of discipline imposed of dismissal was excessive under all the facts and circumstances prevailing in this case. In support of this position, the Organization cites a passage from the book, Discipline and Discharge in Arbitration by Arbitrator Norman Brand (BNA, Inc. 1998, pp.286 & 287) wherein he stated;

Arbitrators often distinguish horseplay from misconduct, based upon intent. Horseplay is generally characterized as conduct that is without malice, is playful, childish, or impulsive. * * * Where horseplay is intended to injure a fellow worker, however, it is misconduct. Horseplay has the potential for physical injury or property damage. It becomes misconduct when there is injury or damage as the result of an intentional act of wrongdoing. It is rare for an employee to be discharged for horseplay that has resulted in unintentional injury, embarrassment, or damage to property. Employees are readily discharged for fighting or other intentional acts resulting in damage.

The Organization submits that this distinction between horseplay and misconduct is applicable here as there was no intention on Claimant's part to inflict physical injury on his co-worker by throwing the wad of duck tape at him. That being established, the Organization submits that Claimant's action of throwing the wad of duck tape at his co-worker squarely places his actions within the ambit of horseplay which if addressed by the imposition of any discipline only warrants imposition of the least severe discipline.

Accordingly, the Organization requests the Board to sustain the claim in its entirety

AWARD NO. 188**FINDINGS**

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

The Board is persuaded there is a valid case to be made based upon the Organization's position that Rule 1.7 covers only those incidents of horseplay that involve intentional acts of aggression as to constitute misconduct as opposed to horseplay of simply a playful nature with no intention on the part of the participants to inflict physical injury or damage to property. The Board is so persuaded not only by the argument advanced by the Organization but also by the common dictionary definition of the word, "altercation" which is the title word of Rule 1.7. That definition is, "a heated argument, quarrel, or confrontation". The Board notes that some synonymous terms for altercation are squabble, clash, disagreement, and row. Thus horseplay of a nature free from the meaning of any of these terms can be viewed as not falling within the ambit of Rule 1.7.

Though some horseplay may fall outside the ambit of an altercation as we find here, there is the recognition that adherence to safety and safety practices and procedures is of paramount importance in the Railroad industry and that even horseplay of a playful nature has the potential when it occurs to result in physical injury and/or damage to property even though such result(s) was/were unintentional. It is this aspect of horseplay engaged in by Claimant and co-worker friend Wilson that was in evidence on October 20, 2009. Although the horseplay initiated by Claimant was altogether playful in nature, it nevertheless resulted in the unintended consequence of inflicting physical injury to himself and no doubt had the potential of injuring Wilson as well, since in turning around as abruptly as he did in weather conditions of rain, assuming the jack handle did slip from his hand as opposed to his throwing the jack handle at Claimant, the jack handle could very well have hit both Wilson and himself.

What occurred here in the initiation of horseplay playful in nature as it was, was not a violation of GCOR Rule 1.7 but rather horseplay that had ramifications of a serious breach of safety that never can or should be tolerated at any time on any Railroad property. To underscore the seriousness of this breach of safety we find to convert Claimant's dismissal effected under Rule 1.7 as misapplied here to a suspension the length of which shall begin from the date Claimant was withheld from service and end on the date of Claimant's reinstatement. Claimant shall not be entitled to any back pay or other benefits but shall be reinstated with seniority unimpaired.

The Board admonishes Claimant for engaging in horseplay and warns him that should he be charged with committing a similar act of horseplay anytime during his employment with the Carrier going forward, Carrier will be well within its managerial rights to impose the harshest of disciplinary actions without regard to adhering to the


AWARD NO. 188

principle of progressive discipline. Claimant should consider himself to be among the luckiest people on the planet to have regained his employment with the Carrier given the present state of the economy and the very high and persistent rate of unemployment in the nation.

This Award is to become effective within thirty (30) days from the date signed by the Parties.

AWARD

Claim Sustained as Per Findings


George Edward Larpey
Neutral Member & Chairman


B. W. Hanquist
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois

Date: July 20, 2011