

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 204
AWARD NO. 189

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1531872

AND

ORGANIZATION

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

System File

J-0948U-255

STATEMENT OF CLAIM

1. The Carrier's discipline (Level 5 dismissal) of Mr. James C. Wilson issued by letter dated December 4, 2009 in connection with alleged violation of Rule 1.7 (Altercation) as contained 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, Mr. Wilson shall have all charges against him dropped, any mention of this incident removed from his personal record with seniority and all benefits restored and compensation paid for all time he was unjustly withheld from service.

STATEMENT OF BACKGROUND

The facts and circumstances surrounding the events that eventually resulted in Claimant's dismissal are not in dispute. Claimant entered service of the Carrier on February 14, 2005 and subsequently established and held seniority as a Sectionman. On October 20, 2009 Claimant was assigned to Gang #4886 at Sutherland, Nebraska. At approximately 1300 hours (1:00 p.m.), as part of the crew's work of lining rail on a switch being built at approximately Milepost 292, Claimant, using a track jack handle (also known as a lining bar) was engaged in marking where the rail needed to be

pushed in or pulled out. The weather condition was such that it was raining at the time Claimant was engaged in this activity. As Claimant was performing the work of marking the rail, he felt something strike the back of his head. The something was a waded up ball of duck tape that his friend and co-worker, Michael Peterson had thrown at him in an act of playful horseplay. According to Claimant, 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 wet hand, then hit the ground and bounced up and hit his co-worker Peterson, fracturing a forearm. Another version of Claimant's reaction after being struck by the waded up ball of duck tape was that he flipped/threw the jack handle in Peterson's direction also in an act of playful horseplay. Regardless of which version is the more accurate portrayal of what actually occurred, the fact is, the horseplay resulted in a personal injury to co-worker and friend Peterson.

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 track jack handle at that employee which hit him on the arm resulting in a personal injury to him. 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 from service. 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 against him. Accordingly, Carrier apprised Claimant he was being assessed a Level 5 discipline and dismissed from its service. At the time of his dismissal, Claimant had accrued seniority of approximate three (3) years, ten (10) months.

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.

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 posed to him: *"Do you feel you violated any rules that you've been charged?" Claimant answered, "Well, yes, the horseplay".* In further testimony, Claimant answered in the affirmative when asked, *"so basically, what developed here is something that took place out of just basically horseplay that was going on that day".*

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 engaged in 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 reach and consider the merits.

First, while the Organization concedes that under the provisions set forth in Rule 48 (o) the Carrier has the right to suspend an employee from service pending the investigation and issuance of the decision following the close of the hearing, nevertheless, 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 jack handle at a co-worker Peterson who happens to also be a friend with absolutely no intent to inflict bodily harm on him and not done out of any anger, rancor, or malice toward Peterson, 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 required under the standard of review of discipline cases established by Third Division Award 27867, 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 extant in this instant 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 where 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 also his friend, Peterson, by having let loose the jack handle from his hand and directing it in Peterson's direction. That being established, the Organization submits that Claimant's action falls squarely within the ambit of playful horseplay which, if addressed by the assessment of any discipline only warrants imposition of the least severe degree of discipline.

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

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 commonly defined meaning of any of these terms can reasonably be construed 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 his co-worker friend Peterson that was in evidence on the date in question, October 20, 2009. Although the horseplay initiated by Peterson was altogether playful in nature, it nevertheless resulted in the unintended consequence of inflicting injury on him and no doubt had the potential to injure Claimant 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 Peterson, the jack handle could very well have hit both himself and Peterson or just himself.

What occurred here in the initiation of horseplay by Peterson was horseplay of a playful nature not covered by 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 held out of service and end on the date of his reinstatement to his employment with Carrier. 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 Carrier going forward, Carrier will be well within its managerial rights to impose the harshest of disciplinary actions without regard to strict adherence to the 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.

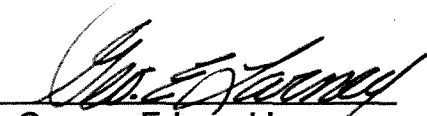
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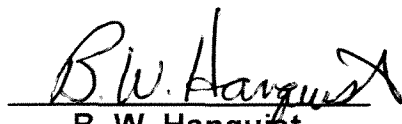
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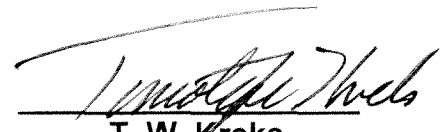
This Award is to become effective within thirty (30) days from the date signed by the Parties.

AWARD

Claim Sustained as Per Findings


George Edward Larney
Neutral Member & Chairman


B. W. Hanquist


T. W. Kreke

Chicago, Illinois

Date: July 20, 2011