

PUBLIC LAW BOARD NO. 4338

PARTIES) UNION PACIFIC RAILROAD COMPANY
TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM: Claim that discipline of ten working days suspension imposed on System Gang employee J. W. Orefice for alleged violation of Rule 607(1), 607(6) and 608 was arbitrary, capricious and unwarranted on the basis of unproven charges and in violation of the Agreement. That the claimant's record shall be cleared of the discipline and he shall be compensated for wages lost.

FINDINGS: This Public Law Board No. 4338 finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction.

In this dispute the claimant was notified to attend an investigation at La Grande, Oregon on July 28, 1987 to develop the facts and place responsibility for his involvement in an alleged altercation which took place on July 17, 1978 at approximately 1:40 p.m. at Kamela, Oregon which led to his personal injury, indicating a violation of Rules 607(1)(6) and 608 of Form 7908 Safety, Radio and General Rules for All Employees, effective April 1985 and revised April 27, 1986. Pursuant to the investigation the claimant was found guilty and was assessed ten days actual suspension.

At the outset of the investigation J. L. Larsen, Vice Chairman of the BMWE stated that he was representing the claimant but requested that separate investigations be held for the two employees involved. This request was based on his contention that he could not represent both employees if both investigations were being held in one hearing.

His request for two separate hearings was denied. The same objection was made regarding employee M. J. Tuel who was also charged. The Carrier rendered the same ruling, and Mr. Larsen represented both employees.

Roadmaster John C. Flynn testified that he made an investigation and learned that an altercation had taken place between the claimant and M. J. Tuel, Assistant Foreman of Gang 9014. He testified the altercation took place on Company property at approximately 1:40 p.m. while the employees were on duty.

Roadmaster Flynn testified that the claimant came into his office and submitted a report of personal injury which caused him to write a letter withholding both employees from service pending an investigation. He testified that he believed employees Steve Pfel,

Luke Schermerhorn, Carlos Torres and Dan McCoy witnessed this incident.

P. D. Aldrich, Track Supervisor on Gang 9014, testified that he made out an accident report. He testified that on the date in question the claimant was walking away from the outfit cars when he was grabbed on the collar by Mr. Tuel. He testified that this determination was made from talking to several individuals. He also stated that he talked to Mr. Tuel before he made out the report.

Supervisor Aldrich stated that R. S. Bennett, G. C. Arevalo and Silvario Arevalo said that they were there, and Mike just grabbed the claimant by the collar. This witness also stated that he believed Foreman Torres, Bob Logue and Gabe Garcia also witnessed the incident.

C. Torres, Extra Gang Foreman, testified that on the day in question he heard some words being exchanged between the claimant and Mr. Tuel and observed Mr. Tuel walk up and grab the claimant's coat. He testified that the claimant swung around to get away, and it just turned into an arguing match.

Foreman Torres testified that the conversation was loud, and he told both the employees to settle down. He stated that they split up when he told them to cool it, but it started up again when Mr. Schermerhorn got involved.

Gabriel Garcia, Compressor Operator, testified that Mr. Tuel and the claimant got off the bus, and Mr. Tuel grabbed the claimant by the back of his jacket and told him: "If I'm on your list, let's settle it now" or something like that.

This witness further testified that the claimant then swung around as if to knock Mr. Tuel's arm off his jacket and told Mr. Tuel to keep his hands off him, then swung like that and knocked his arm off the jacket. He stated that then the two employees started to argue back and forth.

Danny G. McCoy testified that he ran a speedswing on the gang and he observed the two employees hollering at each other, but he did not see any physical contact.

S. W. Pfel testified he heard some words being exchanged and then saw the claimant spin out of Mr. Tuel's grasp, but Mr. Tuel had hold of the claimant's coat for some reason, and he heard the claimant say: "What's going on, what's happening here, what the hell, man," and then they exchanged words back and forth. He stated he heard Mr. Tuel say: "If I'm on your list, let's get it over with, let's not carry it any further." He stated words were exchanged for about three or four minutes, and everyone went on their way.

Luke Shcermerhorn testified that he saw Mr. Tuel run out and grab the claimant at the back of the neck and then release him and then grab him a few seconds later and then let go of him, and they talked it out.

M. J. Tuel testified that he thought the whole incident was very minor except that the claimant's neck got hurt. He admitted that he grabbed the claimant by the collar. Mr. Tuel also testified that he believed the claimant was threatening his family, and he wanted to have the matter resolved.

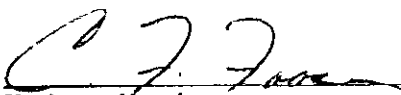
The claimant testified that he suffered an injury to his neck as a result of the incident. The doctor diagnosed the injury as a slight strain and instructed the claimant to go to therapy for a couple of weeks.

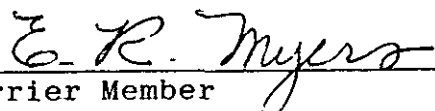
The Board has reviewed all of the testimony involved and finds there is insufficient evidence to find that the claimant herein was guilty of an altercation. The Carrier is directed to set the discipline aside and pay the claimant for all time lost.

AWARD: Claim sustained as per above.

ORDER: The Carrier is directed to comply with this award within thirty days from the date of this award.


Preston J. Moore, Chairman


Union Member


Carrier Member

Dated: November 10, 1987