

## PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES )  
and ) Case No. 114  
UNION PACIFIC RAILROAD COMPANY ) Award No. 120  
)

Martin H. Malin, Chairman & Neutral Member  
T. W. Kreke, Employee Member  
D. A. Ring, Carrier Member

STATEMENT OF CLAIM:

The Organization contends that the Carrier is in violation of Rule 48 of the Collective Bargaining Agreement. The claim requested that all charges, discipline, and correspondence in connection with a Rule violation that occurred on August 5, 2005 when Claimant, Freeland M. Long, was insubordinate, discourteous and quarrelsome to his Supervisor be dropped and removed from Claimant's record. They further request that Claimant be immediately returned to service and compensated for all time withheld from service since his removal from service and suspension on August 5, 2005.

Public Law Board No. 6302 upon the whole record and all of 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.

By letter dated August 5, 2005, Carrier notified Claimant to report for a formal investigation on August 17, 2005, alleging that on August 5, 2005, Claimant was insubordinate, discourteous and quarrelsome when his supervisor directed him to get on the crew bus in violation of Rules 1.6(3), (6), and (7), and 1.13. Neither Claimant nor an Organization representative appeared and the hearing proceeded as scheduled in absentia. On August 30, 2005, Claimant was advised that he had been found guilty of the charges and had been dismissed from service.

There is no question that Carrier proved the charges by substantial evidence. The Assistant Foreman testified that on August 4, Claimant refused to follow his direction to only

grind in the presence of two helpers who were prepared to extinguish fires that the grinding in dry conditions might cause and that Claimant had cursed at him. On August 5, at 7:00 a.m., after the job briefing, Claimant shouted obscenities at the Assistant Foreman. The Assistant Foreman reported the matter to the ARASA Supervisor who instructed the Assistant Foreman to have Claimant come to him. When the Assistant Foreman told Claimant to see the ARASA Supervisor, Claimant refused to go so the ARASA Supervisor called for Claimant. After Claimant confirmed his cursing the Assistant Foreman, the ARASA Supervisor directed Claimant to go to the bus. According to the Assistant Foreman, Claimant did not go to the bus but continued cursing him and threatened him with physical harm. The Assistant Foreman ignored Claimant but Claimant came down, dropped his lunch box, told the Assistant Foreman that if Claimant had to go down the Assistant Foreman would go with him and bumped the Assistant Foreman with his chest. The Assistant Foreman radioed the ARASA Supervisor who came over and told Claimant to go to the bus. Claimant started shouting at the ARASA Supervisor who then called for the Form B Assistant Foreman to escort Claimant from the job site in a truck.

The ARASA Supervisor testified that the Assistant Foreman radioed him and advised that there was a problem with Claimant. The ARASA Supervisor responded and asked Claimant to come over to speak with him. According to the ARASA Supervisor, Claimant refused to respond twice and on the third request came over and cursed the ARASA Supervisor. The ARASA Supervisor instructed Claimant to stand by the bus. Shortly thereafter, the Assistant Foreman again radioed and advised that Claimant had come down and was threatening the Assistant Foreman. The ARASA Supervisor responded and Claimant cursed him and threatened him with physical harm. The ARASA Supervisor removed Claimant from service and had the Form B Assistant Foreman escort him from the job site.

Two Work Equipment Supervisors testified and corroborated the testimony of the Assistant Foreman and the ARASA Supervisor. The record, thus clearly established that Claimant was insubordinate to the Assistant Foreman and ARASA Supervisor, cursed and threatened both men and made hostile physical contact with the Assistant Foreman. Given the serious nature of the offenses that were proven and given that the penalty of dismissal was in keeping with Carrier's UPGRADE policy, we cannot say that the penalty imposed was arbitrary, capricious or excessive.

The most significant issue is whether Carrier complied with Rule 48's notice requirements. Rule 48(c) requires that Carrier apprise the charged employee "of the precise nature of the charges sufficiently in advance of the time set for the hearing to allow reasonable opportunity to secure a representative of his choice and the presence of necessary witnesses. The General Chairman will be furnished a copy of the charges preferred against an employee." The notice of charges was dated August 5, 2005, but was not postmarked until August 9, 2005. The notice was sent certified mail, return receipt requested. Records from the Postal Service reflect that the Postal Service attempted delivery at Claimant's residence on August 16, 2006, and left a notice. Claimant picked up the letter on August 19. The Organization received a copy of the charges on August 12. The ARASA Supervisor testified that he attempted to telephone Claimant

but got no answer.

Initially, we observe that Rule 48 (c) does not specify a minimum number of days' notice that must be given. Rather, it requires sufficient notice to enable the charged employee to arrange for representation and necessary witnesses. *Compare* NRAB Third Division Award No. 22758 (Agreement rule required at least "[a]t least five (5) days advanced written notice of the investigation"). Carrier acted reasonably in mailing the notice of the August 17 investigation on August 9. It could not anticipate that the Postal Service would take a week to deliver a simple letter.

We further observe that Claimant had been removed from service on August 5. Thus, Claimant knew that he should expect to receive notice of an investigation. When Claimant received the Postal Service's notice of attempted delivery of a certified letter, he knew or should have known that it was the notice of investigation. Despite this, he waited until August 19 to pick it up at the Post Office. The record contains no explanation for Claimant's delay.

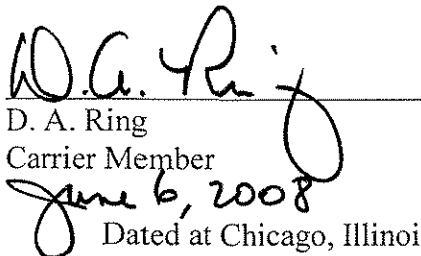
Significantly, the record also contains no evidence that Claimant, upon picking up the notice at the Post Office and realizing that the investigation had been conducted two days earlier, attempted to contact Carrier or the Organization to find out what had happened and to explain that he had just received the notice. We do not know whether, had Claimant done so and had he shown that the Postal Service did not even attempt delivery until the day before the hearing, Carrier would have reopened the hearing. We also express no opinion as to whether Carrier would have been obligated to reopen the hearing. However, all of the peculiar facts and circumstances, considered together, support a reasonable inference that Claimant was trying to avoid service and avoid the investigation. Under the circumstances, we conclude that Carrier did not violate Rule 48.

#### AWARD

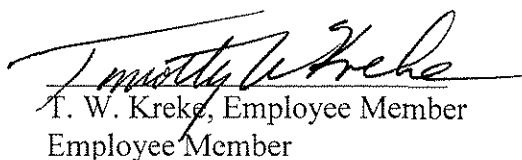
Claim denied.



Martin H. Malin, Chairman



D. A. Ring  
Carrier Member  
June 6, 2008



T. W. Kreke, Employee Member  
Employee Member

Dated at Chicago, Illinois, May 31, 2008