

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
 and) Case No. 137
)
) Award No. 136
 UNION PACIFIC RAILROAD COMPANY)
)

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

Hearing Date: February 7, 2008

STATEMENT OF CLAIM:

- (1) The discipline assessment (a 5-day suspension) issued to Mr. Allen G. Thornhill in connection with a violation of Rule 70.3 for allegedly failing to have a proper job briefing which resulted in the DC-30 detector car attempting to set on the track in front of a train was based on unproven charges and in violation of the Agreement.
- (2) As a consequence of the violation referred to in Part (1) above, the Organization requested that the discipline be stricken from Claimant's personal record and that he be returned to his status under Behavior Modification. It was requested that the Claimant be made whole as if there had been no discipline issued and no suspension enforced. It was specifically requested that Mr. Thornhill be paid for all hours that he would have worked absent the suspension, including overtime and he be compensated for his time not paid on the day of the hearing on August 16, 2006.

FINDINGS:

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.

On June 30, 2006, Carrier notified Claimant of an offer of discipline. The notice charged

that Claimant, while working on June 23, 2006 in the vicinity of MP 746 on the Rawlins Subdivision, failed to have a proper job briefing, resulting in the DC-30 attempting to set on the main track in front of the UP 5469 West. The notice offered discipline at UPGRADE Level 3, and advised Claimant of his right to a formal hearing or of the option to elect participation in the Behavior Modification Program. On July 12, 2006, Claimant elected to exercise his right to a formal hearing. On July 26, 2006, Claimant was directed to report for an investigation on August 1, 2006, concerning the charges previously set forth and reiterated in the July 26 notice. The hearing was postponed to and held on August 16, 2006. On August 25, 2006, Claimant was advised that he had been found guilty of the charges and assessed discipline at UPGRADE Level 3, a five day suspension.

Initially, Carrier urges that the claim be dismissed for lack of jurisdiction. Carrier contends that “[t]he Organization has fatally neglected to advise the Carrier how the agreement was allegedly violated by citing any provision of the current UP BMWED Agreement which they allege the Carrier had violated and/or allegedly would support Claimants’ (sic) contentions in this case.” (Underlining in Carrier’s submission). We do not agree. The letter setting forth the Organization’s claim expressly alleged that Claimant “was not granted a fair and impartial hearing,” that “discipline as proposed in the letter of charges was excessive,” and that “Carrier failed to prove the serious charge of violating Rule 70.3.” Although the letter did not expressly include the magic words, “in violation of Rule 48 of the Agreement,” there is no question that the claim advised Carrier of how the Agreement was allegedly violated and there is no question from Carrier’s responses on the property that Carrier understood this.

The record reflects that on June 23, 2006, Claimant was the Foreman on Gang 5497 at MP 748.3. The DC-30 was at MP 746. They had been waiting all day for track and time. At 1:00 p.m. the dispatcher notified Claimant that they would not be able to get track and time that day. Shortly thereafter, the ARASA Supervisors on the DC-30 were notified that they would get track and time after the UP 5469 had passed. One of the ARASA Supervisors notified Claimant on the radio but Claimant, unable to hear the radio transmission clearly, drove his personal vehicle to the DC-30, where one of the ARASA Supervisors notified him that they would get track and time from the time the two westbound trains passed until 3:00 p.m.

Claimant then moved his car to park it by the Interstate. Meanwhile the ARASA Supervisor saw a westbound train go by. He called the train but got no answer and could not tell the train’s number. The ARASA Supervisor then radioed the Assistant Foreman of Gang 5497. The content of their conversation is in dispute. The ARASA Supervisor testified that he asked the Assistant Foreman which train number had passed and the Assistant Foreman replied UP 5469 West. The Assistant Foreman testified that the ARASA Supervisor asked him which train they were waiting on and he replied UP 5469 West.

After Claimant parked his car, the DC-30 picked him up and drove him to his gang at MP 748.3. The ARASA Supervisor advised Claimant that the Assistant Foreman had stated that UP 5469 West had passed the gang. Claimant called the dispatcher and obtained track and time. The DC-30 began to set on the main track when they saw a headlight about two miles down the

track. They got in the clear and observed the UP 5469 pass by.

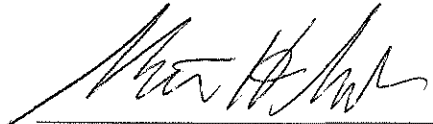
The record fails to reveal what job briefing Claimant failed to conduct. The near miss between the DC-30 and UP 5469 West resulted from faulty communication between the ARASA Supervisors on the DC-30 and the Assistant Foreman of Gang 5497. Claimant was not a party to that conversation. Claimant relied on advice from the ARASA Supervisors that the Assistant Foreman had reported that the UP 5469 had passed the gang. There is no evidence that Claimant acted unreasonably in so relying. Indeed, the Manager Track Maintenance testified that after the incident, he required that all employees involved be drug tested and that the other employees were charged but he "was told . . . that it was handled at a higher level, and I was instructed to dismiss the charges." Thus, Claimant appears to have been the only employee involved in the incident who was disciplined. Yet, the record reveals no justification for singling Claimant out for discipline when he appears to be the least culpable of any of the employees involved.

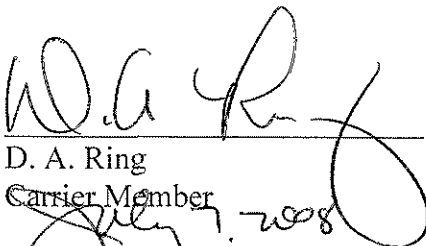
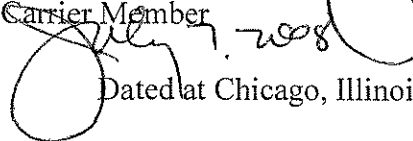
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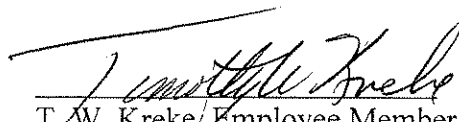
Claim sustained.

ORDER

The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto


Martin H. Malin, Chairman


D. A. Ring
Carrier Member

Dated at Chicago, Illinois, June 25, 2008


T. W. Kreke, Employee Member
Employee Member

July 7, 2008