

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
and) Case No. 156
UNION PACIFIC RAILROAD COMPANY) Award No. 151
_____)

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

Hearing Date: March 23, 2009

STATEMENT OF CLAIM:

- (1) The discipline (Level 2) imposed upon Foreman Vincent M. Ortegon for violation of GCOR Rules 1.1.3 and 1.2.5 in connection with his August 14, 2007 failure to report a personal injury sustained by one of his workers is unjust, unwarranted and in violation of the Agreement (System File J-0748U-268/1489519).
- (2) As a consequence of Part 1 above, we request that the Level 2 for Mr. Ortegon be expunged from his employee records, as if the incident had not taken place. That is, Claimant's records shall reflect as if he had not been charged with the discipline as listed in the letter of charge.

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 September 5, 2007, Carrier notified Claimant to report for a formal investigation on September 12, 2007, concerning his alleged failure of August 14, 2007, to report a personal injury sustained by one of his employees. The hearing was postponed to and held on September 20, 2007. On October 10, 2007, Carrier notified Claimant that he had been found guilty of the charge and assessed discipline at UPGRADE Level 2.

The record reflects that on August 10-16, 2007, Claimant was assigned as Foreman on

Gang 6070. On August 10, 2007, a Laborer assigned to Claimant's gang apparently got a foreign object in his eye. The Laborer did not report the matter at that time. On August 16, 2007, Claimant observed the Laborer using eye drops and asked him if they were prescription drops. Upon learning that they were, Claimant questioned the Laborer further and learned that the eye drops were being used as a result of the injury the Laborer sustained on August 10. Claimant promptly had the Laborer report the matter to the Manager Track Maintenance.

The discipline imposed on Claimant is premised on Claimant's failure to report the injury sooner. Specifically, Carrier contends that Claimant became aware of or should have become aware of the injury on August 14 and reported it at that time. The only evidence concerning what specifically transpired on August 14 is Claimant's testimony.

Claimant testified that, on August 14, while working at the computer, he overheard a conversation between the Laborer and a coworker. The conversation was taking place 10 to 15 feet away from Claimant. Claimant testified that he heard the Laborer tell the coworker that the Laborer had not had a good weekend because he did not get to spend time alone with his wife and because he had to go to the hospital because he had something in his eye. Accepting Claimant's testimony, as we must because it is undisputed and there is no reason to doubt its credibility, we cannot find that a reasonable person overhearing that conversation would conclude that it was necessary to inquire as to whether the eye injury occurred on duty. Rather, a reasonable person would assume, from the context of the conversation, i.e. that the Laborer did not have a good weekend because he had to go to the hospital because he got something in his eye, that the eye injury occurred during the weekend while the Laborer was off duty.

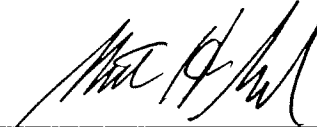
Accordingly, we hold that Carrier failed to prove the charge by substantial evidence. The claim must be sustained.

AWARD

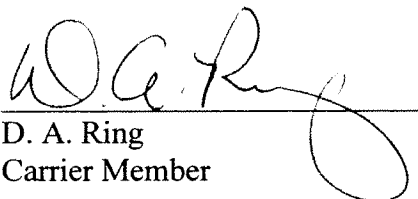
Claim sustained.

ORDER

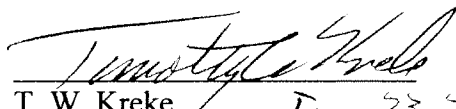
The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto



Martin H. Malin, Chairman



D. A. Ring
Carrier Member



T. W. Kreke
Employee Member

June 23, 2009

Dated at Chicago, Illinois, June 23, 2009