

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 10
)
) Award No. 5
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: January 21, 2002

STATEMENT OF CLAIM:

1. The discipline (Level One (1) including a letter of reprimand in his personal record) imposed under date of March 25, 1999 upon C. E. Nuells for allegedly violating Union Pacific Rule 1.6(7), effective April 4, 1994, in connection with a verbal confrontation allegedly occurring on February 10, 1999 at approximately 7:30 A.M. at Bloomington, Texas, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MW-99-183/1187959 MPR).
2. As a consequence of the violation referred to in Part (1) above, the Carrier shall remove all references of this discipline from Mr. C. E. Nuells' personal record and in connection therewith he shall be compensated for three (3) hours and thirty (30) minutes' pay at his respective straight time rate of pay for time lost in attending the March 2, 1999 hearing and for any incurred expenses in connection therewith.

FINDINGS:

Public Law Board No. 6402, 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.

On February 22, 1999, Carrier notified Claimant to report for an investigation on March 2, 1999, in connection with an alleged verbal confrontation on February 10, 1999, at approximately 7:30 A.M. at Bloomington, Texas. The hearing was held as scheduled. On March 25, 1999, Carrier informed Claimant that he had been found guilty of the charge and was assessed discipline at UPGRADE Level 1.

The discipline at issue arose out of an incident that occurred on February 9, 1999.¹ Certain facts regarding the incident are not in dispute. It appears that the Track Inspector instructed Claimant to pick up a switch point and a verbal argument ensued. During this confrontation, both individuals raised their voices. There is also no dispute that during the argument, Claimant suggested that he and the Track Inspector go across the street, off Carrier property, in Claimant's words, "to settle it like men . . . just settle in with hands and nothing else. . ."

It is apparent that Claimant sought to escalate the verbal confrontation into a physical one. Claimant's actions materially distinguish his behavior from that of the Track Inspector and account for the disparate treatment accorded the two employees. (The Track Inspector was not disciplined.)

The Organization contends that Claimant's statement that he and the Track Inspector go across the street to settle their dispute was provoked when the Track Inspector hit Claimant with a notebook/clipboard. Claimant so testified but the Track Inspector denied striking Claimant. A Trackman and a Driver testified that they observed Claimant and the Track Inspector exit the building where the altercation took place and heard Claimant tell the Track Inspector to keep his hands off Claimant. Their testimony indirectly corroborates Claimant's testimony that the Track Inspector struck him. On the other hand, Claimant testified that a Welder witnessed the altercation and saw the Track Inspector hit him, but the Welder testified that he did not see the Track Inspector strike Claimant. The Welder's testimony indirectly corroborates the Track Inspector.

We are thus faced with a classic conflict in the evidence. As an appellate body, we are unable to resolve such conflicts and, therefore, defer to the resolution made on the property, as long as it is supported by substantial evidence. Such is the case in the instant claim.

Before this Board, the Organization has argued that we should not defer to the determination made on the property because the hearing officer was not the Carrier official who sustained the charge and imposed the discipline. The Organization contends that where there is a conflict in the testimony, deference is due the decision of the hearing officer because he is the one who has observed the witnesses' demeanor and is in the best position to assess their relative credibility. In the instant case, however, according to the Organization, the record contains no indication that the hearing officer made any findings on credibility, deference is not due, and the decision reached on the property is not supported by substantial evidence.

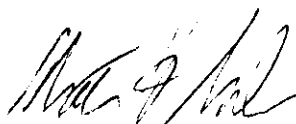
We have searched the record of handling of this claim on the property. We can find absolutely no objection raised to the hearing officer's failing to play a role in the decision to

¹The notice of charges indicated that the incident occurred on February 10, 1999. We agree with Carrier that this typographical error did not materially affect Claimant's right to a fair hearing. It is apparent that all involved in the hearing understood what incident was referred to in the notice and that Claimant and the Organization came prepared to present a defense.

sustain the charge and impose discipline. As an appellate body, we do not consider arguments raised for the first time before this Board. Because this argument was not raised during handling on the property, we do not consider it.

AWARD

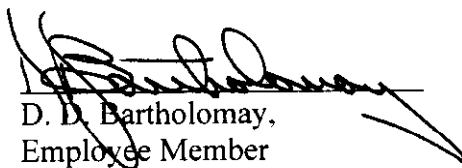
Claim denied.



Martin H. Malin, Chairman



C. M. Will,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, April 27, 2002.