

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 6402**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES )  
and ) Case No. 83  
UNION PACIFIC RAILROAD COMPANY ) Award No. 72  
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Martin H. Malin, Chairman & Neutral Member  
D. D. Bartholomay, Employee Member  
B. W. Hanquist, Carrier Member

Hearing Date: March 20, 2007

STATEMENT OF CLAIM:

Claim that discipline assessed against E. James, Employee ID 0132822, in connection with the charge that he violated Rule 1.13 -- Reporting and Complying with Instructions issued on July 9, 2005, when he drove his personal vehicle to the tie up location of his machine, versus taking the company provided bus to that location as instructed by his Track Supervisor.

In addition to removing the charges and discipline in connection with this matter from Mr. James' record, the Organization seeks Carrier to compensate Mr. James for all lost time and personal expenses incurred while attending the investigation.

FINDINGS:

Public Law Board No. 6402 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 August 10, 2005, Claimant was notified to report for a formal investigation on August 23, 2005, concerning his alleged failure to follow instructions issued to him by his supervisor on August 9, 2005. The hearing was postponed to and held on September 8, 2005. On September 25, 2005, Claimant was advised that he had been found guilty of the charge and had been assessed discipline at UPGRADE Level 2, one day of paid alternative assignment to develop a corrective action plan.

The alleged failure to comply with instructions occurred on July 10, 2005, when Claimant

drove his personal vehicle to his work site. The Track Supervisor testified that he instructed all employees, including Claimant, that they were not to drive their personal vehicles to their work sites. Claimant testified that he received no such instruction. As an appellate body that does not observe the witnesses testify, we are in a comparatively poor position to evaluate relative credibility of the witnesses. Consequently, we defer to resolutions of conflicting testimony made on the property. In the instant case, we defer to the determination made on the property to credit the supervisor's testimony over Claimant's. We find that Carrier proved by substantial evidence that the instruction was given.

However, Claimant also testified that his Foreman instructed him to drive his personal vehicle because he would be working with two different gangs. The Organization also introduced a written statement from Claimant's Foreman that there were exceptions made to the general instructions and that Claimant was to drive. The Foreman was not called as a witness. Moreover, the Track Supervisor testified that he never checked with the Foreman to determine whether the Foreman had authorized Claimant to drive his personal vehicle. Thus, Claimant's testimony that the Foreman authorized him to drive his personal vehicle, as corroborated by the Foreman's written statement, is unrefuted. Given the state of the record, we are compelled to hold that Carrier failed to prove the charge by substantial evidence.

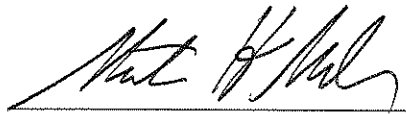
In addition to removal of the discipline, the claim seeks payment to Claimant for time and expenses of attending the hearing. However, the Agreement does not provide for such payments. Accordingly, the claim must be sustained except with respect to the claim for payment and reimbursement of expenses for attending the hearing.

### AWARD

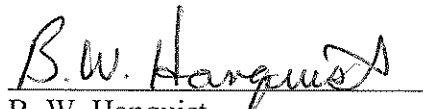
Claim sustained in accordance with the Findings.

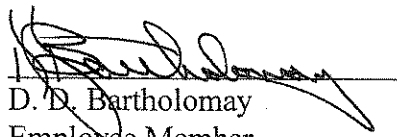
### ORDER

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

  
 B. W. Hanquist  
 Carrier Member 7/11/07

  
 D. D. Bartholomay  
 Employee Member

Dated at Chicago, Illinois, July 12, 2007