

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
and) Case No. 106
UNION PACIFIC RAILROAD COMPANY) Award No. 80
_____)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: January 7, 2008

STATEMENT OF CLAIM:

- (1) The Level 5 UPGRADE discipline assessment (dismissal) to Mr. J. C. Wasson for violation of Rule 1.6 conduct, when on August 10, 2006, while employed as a Trackman at Wagner, Oklahoma, he was quarrelsome and discourteous with the foreman and assistant foreman by cursing, hollering and walking off the job was in violation of the Agreement.
- (2) As a consequence of the violation referred to in Part (1) above, it is requested that the charge letter dated August 16, 2006 be removed from all company records. It is also requested that the Claimant be reinstated with all back pay, seniority unimpaired, all vacation rights, and all other rights due him under the collective bargaining agreement.

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 16, 2006, Claimant was notified to report for a formal investigation on August 28, 2006, concerning his allegedly being quarrelsome and discourteous toward the foreman and assistant foreman and allegedly walking off the track and away from the foreman on August 10, 2006. The hearing was held as scheduled. On September 8, 2006, Claimant was advised that he had been found guilty of the charges and had been dismissed from service.

The Organization contends that Claimant was denied a fair and impartial hearing. We do not agree. However, we feel compelled to comment on two actions of the hearing officer.

The Organization sought to introduce a written statement from an employee who allegedly witnessed the incident under investigation. The hearing officer refused to allow the written statement into evidence because it was hearsay, i.e. because of the inability to cross-examine a written statement. The hearing officer was technically correct, but we note that the formal rules of evidence do not apply in these hearings and such written statements are routinely admitted into evidence. But, the hearsay nature of such statements mean that they generally are entitled to minimal, if any, probative weight. Accordingly, we conclude that although it would have been better had the hearing officer admitted the statement, its exclusion does not provide a reason to overturn the discipline.

The hearing officer also cross-examined Claimant as to why Claimant did not cross examine the foreman and assistant foreman when they testified. Such examination was clearly irrelevant to the issue of Claimant's guilt or innocence with respect to the charges under investigation. We note that Claimant's representative vigorously cross-examined all witnesses against Claimant and any issues of strategy as to who would cross-examine whom and to what extent are beyond the bounds of appropriate inquiry and shed no light on the underlying issue of what in fact occurred during the incident under investigation. However, we note that neither Claimant's representative nor Claimant initially objected to the questions and when Claimant's representative did object, the hearing officer moved on to another line of inquiry. The hearing officer did return to the subject and Claimant's representative objected again. Although the hearing officer defended his line of questioning (incorrectly in our view), he did not return to it following the objection. Accordingly, we find that this line of questioning does not provide a basis for overturning the discipline.

The Assistant Foreman testified that Claimant was walking too close to him and, as a result, came in contact with the Assistant Foreman's gabby stick. When the Assistant Foreman, who was also the Safety Captain, cautioned Claimant to maintain the safety zone which had been discussed in the morning's job briefing, Claimant became belligerent, cursing the Assistant Foreman. The Assistant Foreman then instructed Claimant to accompany him to the Foreman. When the Foreman sought to get each employee's version of events, Claimant cursed the Foreman and walked off the track. The Foreman instructed Claimant to return but Claimant disobeyed the instruction. The Foreman's testimony corroborated that of the Assistant Foreman with respect to the portion of the incident involving the Foreman.

Claimant testified and denied cursing either the Assistant Foreman or the Foreman. Claimant also denied walking off the track and disobeying the Foreman's instructions. Instead, Claimant testified, he told the Foreman that he was going to see the Supervisor. Claimant maintained that the Assistant Foreman came within Claimant's zone of safety and poked him with the gabby stick and that the Assistant Foreman was the aggressor in the incident.

As an appellate body that does not observe the witnesses testify, we are in a

comparatively poor position to evaluate witness credibility and resolve conflicts in the testimony. Instead, we defer to credibility determinations made on the property as long as they are reasonable. In the instant case, we find that the decision on the property to credit the testimony of the Foreman and the Assistant Foreman over the testimony of the Claimant was reasonable and supported by the record. Accordingly, we defer to that decision and hold that Carrier proved the charges by substantial evidence.

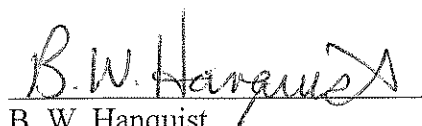
The infractions that Claimant committed were extremely serious. Moreover, Claimant had less than one year of service at the time of his dismissal. Considering these circumstances, we cannot say that the penalty imposed was arbitrary, capricious or excessive.

AWARD

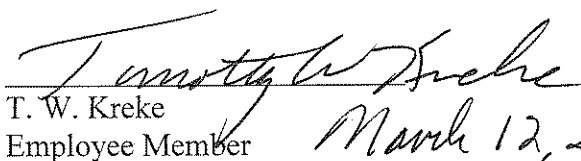
Claim denied.



Martin H. Malin, Chairman



B. W. Hanquist
Carrier Member



T. W. Kreke
Employee Member

March 12, 2008

Dated at Chicago, Illinois, February 29, 2008