

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
	)	Case No. 1
and	)	
	)	Award No. 1
UNION PACIFIC RAILROAD COMPANY	)	

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: November 12, 2008

STATEMENT OF CLAIM:

1. The dismissal of machine Operator Raymond Williams for violation of GCOR Rule 1.6 Parts 6 and 7 (Conduct) in connection with becoming insubordinate, quarrelsome and discourteous on March 23, 2007 is unjust, unwarranted, based on unproven charges and in violation of the Agreement (Carrier's File 1480168 SPW).
2. As a consequence of Part 1 above, '**** we respectfully request that Claimant Williams be immediately reinstated to the service of the Carrier to his former position with seniority and all other rights restored unimpaired and that the letter of dismissal also be expunged from his personal record. In addition, Claimant Williams shall also be compensated for net wage loss both straight time and overtime and benefit loss suffered by him since Claimant's wrongful and unwarranted removal from service and subsequent dismissal.' (Emphasis in original) (Employees' Exhibit 'A-3').

FINDINGS:

Public Law Board No. 7258 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 March 28, 2007 Claimant was notified that he was being held out of service and should report for an investigation concerning an allegation that he violated Rule 1.6 parts 6 and 7 on March 23, 2007. The hearing was held as scheduled on April 10, 2007 and on April 27, 2008

Claimant was notified that he had been found guilty of the rule violation and as a result was dismissed. The Organization filed its initial claim on Claimant's behalf on June 18, 2007 citing Carrier's failure to develop sufficient evidence to support the alleged violation of Rule 1.6 and that claim was denied on August 8, 2007. An appeal was filed on October 3, 2007 and that appeal was denied on December 1, 2008. The claim was subsequently discussed in conference without resolution.

On the date in question, the record shows, Claimant was operating a speed swing crane. Testimony at the Investigation reveals that it was Claimant's crew's last day at this location and the gang was loading out their equipment onto a group of flat cars located on a siding. When the initial engagement occurred Claimant was just entering the work zone where his fellow employees were tying down equipment to rail cars on the siding. As Claimant came through a crossing, the record reveals, he activated the siren on his crane and proceeded through the crossing.

The Manager of Maintenance of Way ("manager") was present in the work zone as was a Work Equipment Supervisor ("supervisor"). As Claimant came through the crossing the manager and supervisor looked up and allegedly saw Claimant proceeding through the work zone in what they testified they thought to be an excessive speed and allegedly failed to sound his horn intermittently as a warning to other employees of his presence. The supervisor testified that at that point he grabbed a radio from a fellow employee and radioed Claimant to slow down and to sound his horn.

Some 20 -30 minutes later, the supervisor testified, the manager and supervisor got into supervisor's truck and drove to where Claimant was tying his machine down to a flat car at the far end of the string of cars being loaded. Supervisor testified that he had the intent of entering the warning for Claimant to slow down and sound his horn into a safety database as a safety contact. Such entry, supervisor testified is not a form of discipline, but merely a record that contact was made concerning safety.

The record reveals that as the manager and supervisor approached Claimant who was on the flat car securing his machine, supervisor asked Claimant for his employee ID Number. Manager testified that Claimant was quarrelsome when he was asked for his ID Number and he became very loud and belligerent, jumped off of the flat car and approached manager belligerently, hollering and screaming. Moreover, manager related, Claimant was discourteous in his mannerisms, his vocalizations, his belligerent attitude and his indifference to the manager's and supervisor's request for his ID Number.

Claimant's supervisor corroborated the manager's testimony when he testified that Claimant did raise his voice and that the supervisor knew that Claimant was upset. When asked whether he felt that Claimant was being rude, supervisor testified that, yes, he felt that he was. Supervisor further testified that Claimant was yelling and was quarrelsome when he didn't want to cooperate with giving him his employee ID Number. When asked: although it might have seemed that he appeared upset, does that mean that his conduct and behavior was unwarranted? The supervisor responded: yeah, I think so.

Claimant, on the other hand, testified that he did sound his siren as he approached and traveled through the crossing and into the work zone. Claimant maintains that he was traveling in his machine at a safe speed within the rules and that he was intermittently sounding his horn in warning. He acknowledged receiving the warning from supervisor over the radio and recalls responding to supervisor by telling him that he had sounded his horn and was traveling at a safe speed. In regard to the alleged confrontation between Claimant and his manager and supervisor, Claimant related that as supervisor approached him and asked for his ID Number he realized that he had earlier taken off his coveralls and placed them in his car with his wallet containing his ID card in the wallet. Claimant testified that he thought that he knew his number, but that as he began to recite it to the supervisor, that he couldn't remember it and therefore told the supervisor that supervisor would have to look it up. Claimant denied jumping off of the flat car and stated that he sat down on the car and lowered himself to the ground to speak with supervisor. Claimant disclaimed being loud or belligerent and stated that after the fact he apologized to supervisor for anything supervisor may have construed to be aggressive or out of line.

The Organization contends that the Investigation in this matter was conducted for the sole purpose of assuring that Claimant received discipline. The Organization points out that at least seven (7) people were potential witnesses but were not called to testify at the Investigation. The Organization avers that only managers and supervisors who were in agreement that Claimant should receive discipline were called. Carrier, the Organization claims, has an obligation to develop all of the facts and to present all witnesses with pertinent knowledge of the incident under investigation. This, the Organization asserts, Carrier failed to do and in so failing to do so, the Carrier has deprived Claimant of a fair and impartial investigation contrary to the Agreement.

The Organization further maintains that Carrier failed to provide sufficient evidence to prove that Claimant was either quarrelsome or discourteous. The Organization avers that Claimant was merely in a defensive posture that the manager mistakenly perceived as quarrelsome and discourteous. The Organization contends that although Claimant's supervisor testified that Claimant appeared mad, that mad does not necessarily equate to being quarrelsome or discourteous. Finally, the organization opines that the ultimate penalty of dismissal is unwarranted given the circumstances of this case,

Carrier argues that it has met its burden to produce substantial evidence to demonstrate that Claimant did violate the Rule with which he is charged and that the discipline imposed was in no way arbitrary or capricious, but was instead in accordance with the Carrier's well-established UPGRADE program.

The Carrier contends that it considers the particular offense involved in the instant matter to be a very serious violation and a breach of the relationship between the Carrier and its employees and that by permanently dismissing the Claimant, the Carrier is deterring other employees from engaging in such future conduct.

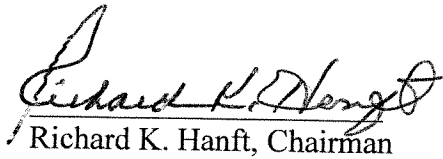
Carrier asserts that the standards of review of disciplinary cases by this Board falls into three areas of concern: procedure, guilt or innocence of the Claimant and the assessment of discipline. Carrier avers that the record supports a finding that it presented substantial evidence to support

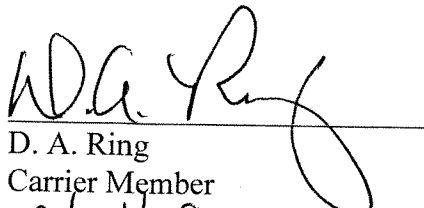
the conclusion that Claimant was quarrelsome and discourteous with his managers as charged and that therefore, a finding of guilt was reasonable. Moreover, the Carrier maintains, Claimant was afforded a fair and impartial hearing with proper time to develop his defense and Claimant was in no way prejudiced by any of the Carrier's actions. Finally, Carrier contends that the assessment of discipline was neither arbitrary, capricious nor an abuse of Carrier's discretion given Claimant's egregious behavior in violation of Rule 1.6 and that conduct warranted a Level 5 Discipline.

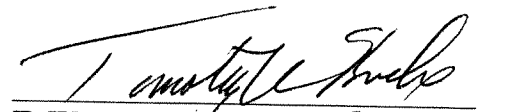
Our function as an appellate body is not to find facts de novo. We must sustain the charges if they are supported by substantial evidence and are not otherwise arbitrary or capricious. In the instant case, the Carrier has come forward with substantial evidence demonstrating Claimant's violation of Rule 1.6. Manager's and supervisor's testimony was corroborated by each other with no credible evidence in rebuttal. While the Organization complains that the Carrier only produced witnesses to prove their case, our review of the record indicates that the manager, supervisor and Claimant were the only ones present during the critical time frame from which the charges are based. Although Claimant states that there were at least seven other witnesses who had knowledge of pertinent information concerning the incident, review of the record shows only those three involved in the intercourse for which Claimant was accused. Moreover, although the Organization contends that the discipline imposed is excessive and unwarranted it was neither arbitrary nor capricious and was in line with Carrier's well-established UPGRADE program which, in this case, has not been shown to be unreasonable or excessive.

AWARD

Claim denied.


Richard K. Hanft, Chairman


D. A. Ring
Carrier Member
2/24/09


T. W. Kreke
Employee Member
2-24-09

Dated at Chicago, Illinois, January 17, 2009