

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
and) Case No. 12
UNION PACIFIC RAILROAD COMPANY) Award No. 12

Hearing Date: November 12, 2008

1. The five (5) day suspension imposed upon Fredrick D. Jones for violation of GCOR Rules 70.1 (Safety Responsibilities) and 80.1 (Avoiding Slips, Trips and Falls) in connection with slipping on the ballast and cutting his wrist is unjust, unwarranted, based on unproven charges and in violation of the Agreement (Carrier's File 1488135 SPW).
2. As a consequence of Part 1 above, the Organization requests that Mr. Jones be compensated for all wage loss suffered by him, straight time and overtime and that the alleged charges be expunged from his record.

On July 20, 2007 Claimant was issued a Notice of Proposed Discipline/Waiver of Hearing by his Track Manager for alleged violation of Rules 70.1 and 80.1. Claimant elected to not accept the discipline and refused to waive his right to hearing. Claimant was notified to report August 2, 2007 for an Investigation and Hearing concerning an allegation that he violated Rules 70.1 and 80.1. The Investigation and Hearing was held on August 16, 2007.. The Carrier notified Claimant on September 11, 2007 that all charges against him had been sustained. On October 12, 2007 the Organization filed a claim on Claimant's behalf. That claim was denied on

December 4, 2007 and the denial was appealed on January 11, 2008. The appeal was denied on March 10, 2008 and the claim was further discussed in conference on May 2, 2008 without resolution.

The facts in this case are relatively straightforward. The record reveals that Claimant and a fellow employee were installing rail clips as part of a gang of six to seven employees. The gang had set up an assembly line type system to do their work with some of the gang working ahead removing clips, another group in the middle setting the rail and Claimant and his buddy coming up the rear replacing the clips. This was routine work and the pair had been performing it in the same fashion for a number of weeks together.

Claimant, he testified, was leaning over in a three-point football- style stance performing his duties when his foot slipped on loose ballast and he lunged forward. Claimant testified that he tried to use his right arm to break his fall, and in the process of doing so, fractured his wrist. As he pulled his arm away, it brushed against the far side of the rail, cutting Claimants wrist.

Some four hours later, the Manager of Track Services joined Claimant at the accident site where Claimant re-enacted what he was doing when the accident occurred and how the accident occurred. The following day, the Manager of Track Services, with others, determined a proper way to install clips in the future. Both Organization witnesses testified that they had received no previous training concerning the proper way to install clips.

The Organization contends that the record fails to prove a violation of the rules for which discipline was imposed. Moreover, the Organization points out, the Manager of Track Services testified that there was never a proper procedure established prior to Claimant's injury. Thus, the Organization argues, Carrier's case is based on nothing more than speculation, assumption and supposition and that discipline must be based on substantially more than speculation and conjecture.

Moreover, the Organization avers that Carrier assumes that because Claimant incurred an injury that he must have violated a rule. The Organization cites numerous Awards standing for the proposition that an injury, in and of itself, is not necessarily proof that a rule was violated. Hence, the Organization submits that the discipline cannot stand and that the claim should be sustained.

The Carrier feels that it presented more than a substantial amount of evidence at the Investigation to warrant the assessed discipline. Carrier points out that the Manager of Track Services testified, with photographic evidence to bolster his opinion, that Claimant's poor use of body mechanics led to his injury. Moreover, the Carrier asserts that the discipline imposed was neither arbitrary, capricious nor unreasonable and was in line with Carrier's UPGRADE Policy, which has been upheld as reasonable on numerous occasions.

Normally, because this Board, as an appellate body, is unable to see and hear the testimony of the witnesses, we would defer to the credibility determinations of the fact finder on the property. In this case, however, after reviewing the record, we are unable to do so. It is clear that the fact finder completely ignored the testimony of the only two eye-witnesses who were

present when the accident occurred and credited the opinion and speculation of a manager who was three hours away when the accident occurred and only after the fact devised a more appropriate method of performing the work.

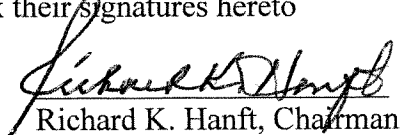
There is not a scintilla of evidence in the record to prove that Claimant was in violation of either of the rules for which he was disciplined. To the contrary, the testimony of both employees that were involved shows just the opposite. The Carrier provided no witnesses with the ability to rebut the testimony of the eye-witnesses. The fact that Claimant was injured does not necessarily equate to the fact that he was violating any of the Carrier's rules. Hence, we find that the Carrier failed to prove with substantial evidence that the Claimant violated either of the rules for which he was disciplined.

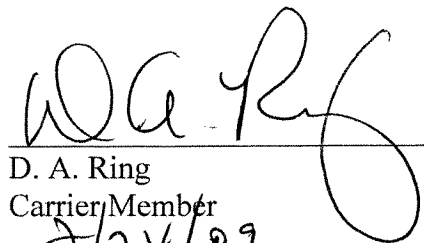
AWARD

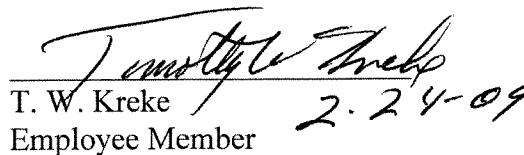
Claim sustained according to the findings.

ORDER

The Board, having determined that an award favorable to the Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto


Richard K. Hanft, Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member

2/24/09
Dated at Chicago, Illinois, January 25, 2009