

PUBLIC LAW BOARD NO. 4338

PARTIES) UNION PACIFIC RAILROAD COMPANY
TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM:

1. The ordered suspension pending investigation effective November 13, 1987 and the eventual dismissal of System Gang 9062 Laborer Brad B. Brown for alleged violation of various Company Rules as indicated in Mr. R. D. Naro's letter of November 28, 1987 was arbitrary, capricious and unwarranted.

2. The claimant's record shall be cleared of the discipline referred to in Part (1) hereof and he shall be returned to service with all rights restored unimpaired and pay for all work time lost to date which is fifteen (15) days 11-13-87 through December 3, 1987 and pay for all future time lost which he would be allowed to work had his seniority and employment relationship not been inappropriately terminated.

FINDINGS: This Public Law Board No. 4338 finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction.

In this dispute the claimant was charged with being insubordinate and quarrelsome to Track Supervisor L. L. Paczosa indicating a possible violation of Rule 607, Paragraphs 3 and 6, Form 7908, revised 4-85, Form 7908.

The claimant was notified to attend an investigation in Topeka, Kansas on November 19, 1987. Pursuant to the investigation the Carrier found the claimant guilty of violating Rule 607 of Form 7908 and dismissed him from the service of the Carrier effective November 12, 1987.

The transcript of the investigation contains 60 pages of testimony and also included several exhibits. At the commencement of the investigation, the Union alleged that they had requested the Carrier to provide two witnesses, Mr. Manley and Mr. Coan, who had direct knowledge of the circumstances involved.

L. L. Paczosa, Track Supervisor of Tie Gang 9062, testified that on the date in question his gang was installing old cross ties with new ones on a system level at various locations. He stated that on November 12, 1987 at approximately 9:00 a.m. he was in conversation with Mike Coan about taking away three hours of time from his time roll.

Supervisor Paczosa then testified that after this conversation he went to the gang bus and talked to the claimant (Brad Brown). He stated that the claimant came out of the bus, which was about 100 yards away, and started walking toward his truck.

Mr. Paczosa testified that he was talking to Dale Peco and Bob Moser, Engineers of Track, when the claimant came up to him and demanded a ride to the telephone. He stated that he asked the claimant if it was an emergency, and the claimant replied that it was not, but he wanted to talk to the Union. He stated that he told the claimant if he wanted to talk to the Union, he would have to do it on his own time, either before or after work. He testified the claimant told him he had permission from the Union to make a call. He stated he again asked the claimant who he was going to call, and the claimant replied: "The Union." This witness then stated that he advised the claimant he could not let him leave railroad property while he was working, and the claimant replied: "I don't care" and started to walk away from the job site.

Supervisor Paczosa then testified that he walked after the claimant and advised him to get back to work and I would see what I could do for him. He stated that he started to walk back to the bus, and the claimant followed screaming in his face and saying that I had no right to do this, and further I was fucking with his time and fucking him all around.

This witness further testified that all the laborers were waiting for the machines to change track and witnessed the claimant screaming at him. He stated he told the claimant to quiet down, that he didn't need to make a scene. He stated the claimant replied: "You haven't seen me mad yet or really start to scream."

Supervisor Paczosa then stated that the claimant continued to scream at him for a total of about five minutes and kept throwing his arms up and saying: "Why are you fucking me?" He stated the claimant again demanded to be given a ride to a telephone.

This witness then testified that he went to the phone and called Labor Relations and advised them what had happened. He stated he saw his bus driver taking the claimant somewhere, and he stopped the pick up, and the claimant got out and started to walk off the Company property. He stated that he asked the claimant to remain on Company property.

Supervisor Paczosa also testified that he continued to fill out the papers to pull the claimant out of service. He then stated that Bob Moser and Dale Peco talked to the claimant, and Moser advised him that the claimant was in the bunk car. He testified that he went toward the bunk car, and Roadmaster Pensick drove up. He stated he explained to the Roadmaster what had occurred, and he and Joe Pensick went to the bunk car. He stated that he read the notice of charges to the claimant and advised him that he was pulling him from service. He stated he allowed Mike Coan to take the claimant somewhere.

Supervisor Paczosa also testified that the claimant was seen beating on the hood of a Company vehicle and put dents in the hood.

The testimony of all the other witnesses has been considered and studied. The claimant himself denied using vulgar and obscene language. However, the evidence is clear and convincing, and the Carrier was justified in reaching a decision that the claimant did use foul and vulgar language toward Supervisor Paczosa. Also the evidence is clear that the claimant delayed the work and created a disturbing situation at the work site on the day in question.

The witnesses requested by the Union were present and testified. Under ordinary circumstances the conduct of the claimant herein would justify discharge. However, there are some extenuating circumstances in this case which require that the discipline assessed be modified.

Supervisor Paczosa testified, and during his testimony he was asked if he cursed and used vulgar language about his immediate subordinate officer to an assistant foreman on the gang, and he replied that he did not understand how that pertained to the insubordination of the claimant. The hearing officer stated that the charges were not brought against Mr. Paczosa, and Mr. Paczosa did not respond to the question. This testimony is relevant and should have been admitted for the purpose of establishing that profane and vulgar language was commonly used on the tie gang.

Of greater import, Mr. Paczosa was again asked the question: "Is it true, Mr. Paczosa, that throughout the duration of your gang that you have singled Mr. Brown out in this method?" and the witness responded: "I feel that is not pertaining to the insubordination accused." The claimant's representative stated that if it didn't pertain to this question, the hearing officer would stop his question.

Mr. Paczosa requested that he be asked the question again, and the question was asked: "I asked you if it's not true that you have singled Mr. Brown out throughout his working for you on this gang?" Mr. Paczosa responded: "No, I believe that irrelevant." (Pages 21 and 21 of Transcript).

First, this question is most relevant. It is important for the Board to know whether or not there is a conflict of personality between the claimant herein and the supervisor involved. Secondly, the hearing officer is the one responsible for determining if a question is relevant or irrelevant. It is not for the witness to determine. In this instance the hearing officer should have directed the witness to answer the question.

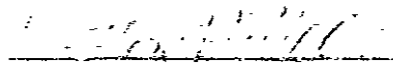
Substantial discipline is justified, but under the circumstances herein it is the opinion of the Board that permanent dismissal is

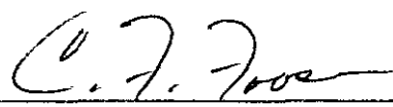
harsh, arbitrary and unjust. The Carrier is instructed to reinstate the claimant to work as of March 1, 1988 with seniority and all other rights unimpaired but without pay for time lost.

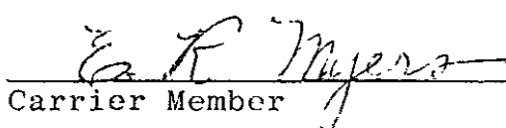
AWARD: Claim sustained as per above.

ORDER: The Carrier is directed to comply with this award within thirty days from the date of this award.

DATED: February 12, 1988


Preston J. Moore, Chairman


Union Member


Carrier Member