

PUBLIC LAW BOARD NO. 4338

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

STATEMENT OF CLAIM:

1. The dismissal of Curve Gang 9010 Tongman Daniel Crespín for alleged violation of various company rules as indicated in Hearing Officer D. C. Jones' letter of May 26, 1989 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 compensated for all time lost.

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 committing a sexual violation to another employee while on Company property in Company Outfit Car U.P. 906350 indicating a possible violation of Rules A, 607 and 608 of Form 7908 effective April 1985.

The claimant was notified to attend an investigation on May 17, 1989 in Las Vegas, Nevada. Pursuant to the investigation claimant was dismissed from the service of the Carrier. The Union filed an appeal, and the matter is now before this Board for a decision.

Phil C. Egan, Track Supervisor, testified that Wendell Stangroom reported to him that he was violated over the weekend on May 6. He stated Mr. Stangroom advised him Danny Crespín had oral sex with him.

Supervisor Egan also testified that he had Special Agent Dave Warner with him when he confronted the claimant about 3:30 in the afternoon of May 9. He then corrected the time and said it was probably 2:45 p.m. when he talked to the claimant.

Mr. Egan then testified the claimant denied the offense and stated he and Manuel Pino had gone to Vegas for the day and cashed their paychecks. He further testified the claimant told him he returned to the bunks and watched movies; but about 10:30 p.m. he went down to Wendell's bunk car and talked to him for approximately 15 to 30 minutes.

Supervisor Egan further testified the claimant told him he said to Wendell that he had heard he was gay but that didn't bother him, and that Wendell Stangroom admitted he was a confirmed gay.

Special Agent Dave Warner testified that he investigated the matter and talked to the claimant and to Mr. Pilo. He stated there were many discrepancies in the claimant's and Mr. Pino's stories as to where they ate and drank beer in Las Vegas.

Wendell Stangroom testified he was in his bunk car asleep at 2:20 a.m. on May 6 when the claimant came into his bunk car, looked at a porno magazine, came upon a picture and told him: "You are gay and well, I'm gonna try you out."

Mr. Stangroom stated the claimant then turned out the lights, undressed and put his penis in my mouth. He testified the claimant did that for a while and then asked him to get out of bed, and the claimant then laid down flat on the bed and had him (Stangroom) come down and give him some more head.

Mr. Stangroom testified that the claimant then wanted to do it to him in the butt, and he (Stangroom) got some rubbers, and the first one broke so he got a second one, and the claimant started to do it in the butt, and he did penetrate for a very short time, and then he lost his erection. He further testified the claimant went back to screwing him in the mouth, and then after that he left.

Mr. Stangroom testified the claimant got dressed and before leaving said he would kill him if he told anybody. He testified claimant did not threaten him until he was ready to leave. He testified he felt there was a threat to his well being if he did not cooperate with the claimant. He stated that it frightened him when claimant locked the bunk car door.

The Union made several contentions in behalf of the claimant; One, the major objection was that the charges were not precise; another objection was that the claimant's personnel record should not be introduced in the hearing.

The Board has carefully examined all of the testimony and transcript of record which contains 106 pages of testimony. Also the exhibits have been considered.

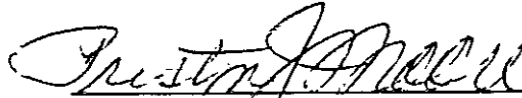
Perhaps it should be mentioned that there is absolutely nothing wrong with attaching an employee's service and discipline record as an exhibit. It should not be a part of the transcript of record.

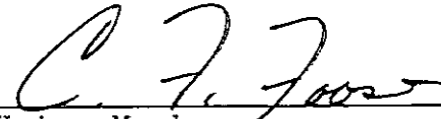
After much deliberation the Board finds the evidence is sufficient for the Carrier to find that the claimant was guilty, but in view of all the circumstances herein, permanent discharge is too severe. The Board finds that the claimant should be reinstated effective September 6, 1989. There will be no 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: August 28, 1989.


Preston J. Moore, Chairman


Union Member


Carrier Member