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DEC - 6 1996

BMWE

BEFORE PUBLIC LAW BOARD 5546

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

Case No.20

STATEMENT OF CLAIM: Claim of the Brotherhood that:

(1) The dismissal of Track Laborer B. L. Fajardo for allegedly violating General Rules A, B, E and I of Maintenance of Way Rule Book and the General Notice, Rules 600, 4004, and 4007 of Form 7908, Safety, Radio and General Rules for all Employees, in connection with the alleged incident which occurred on June 30, 1993 resulting in a personal injury to himself (System File D-201930732) NRAB 94-3-554.

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with all rights unimpaired and he shall be compensated for all wage loss suffered beginning August 27, 1993 and continuing until he is reinstated to service.

FINDINGS:

Claimant Fajardo began his employment with the Carrier on September 2, 1977 and worked as a track laborer.

On June 30, 1993, the Claimant was removing rubberized crossing panels from between rails at the road crossing on Elk Street in Rock Springs, Wyoming when he slipped and fell resulting in a personal injury. Subsequently, the Claimant was notified to appear for a formal investigation to determine his responsibility for the personal injury he sustained on June 30, 1993. After a postponement, the hearing was held on August 13, 1993, at which the Claimant did not appear. The Claimant was found guilty of violating

General Rules A, B, E, and I of the Maintenance of Way Book for Examined Employees and General Notice Rules 600, 4004, and 4007 of Form 7908. As a result, he was dismissed from service.

The discipline was appealed and the Claimant was reinstated without backpay based upon his length of service for the Carrier. The time off was considered as a lengthy suspension.

The Organization filed a claim on behalf of the Claimant contending that he "failed to receive his contractual right to due process". Furthermore, the Organization contends that there was conflicting testimony at the hearing and that the Hearing Officer at the hearing was not the one to render the final decision. The Organization complained that the Superintendent of Transportation Services, who was not present at the hearing, was the one to render the final decision. Therefore, the Organization argues that "this case denied the Claimant an opportunity of his contractual right to an unbiased first step of the parties' two step appellate process."

The parties being unable to resolve the issues, this matter now comes before this Board.

This Board has reviewed the procedural arguments raised by the Organization and we find them all to be without merit. This Board finds that the Claimant was well aware of the investigation and the Carrier had every right to go forward without the Claimant being present. The hearing had already been postponed and the Claimant was represented

at the hearing. This Board also finds that the Carrier did not violate the due process rights of the Claimant by the hearing officer being different from the person who rendered the final decision.

With respect to the merits, this Board has reviewed the evidence and testimony in this case and we find that although the Claimant was involved in an incident on June 30, 1993, which resulted in an injury to himself, the Carrier has not proven with sufficient evidence that the Claimant was in violation of any Rules which resulted in that incident. There was no sufficient testimony to show that the Claimant did not exercise care to prevent injury to himself, did not comply with instructions, did not report the incident promptly, or did not maneuver himself properly when performing his work. Numerous Boards have held that just because an incident occurs which results in injury to an employee does not mean that the Carrier can impose discipline on that employee for a violation of the rules. The Carrier must come forward with sufficient evidence that shows that the Claimant acted improperly and in violation of the Rules before the Carrier can impose any discipline on that employee. There is no question that an incident occurred resulting in an injury to the Claimant. However, this Board finds that the Carrier has not proven that the Claimant acted unsafely and in violation of the Rules.

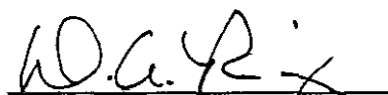
Since this Board has found that the Carrier has not met its burden of proof, we must also find that the discipline that was issued to the Claimant must be removed from his must be record and he be made whole for any lost pay. This Board agrees that any

backpay to the Claimant shall begin only on such date that he was actually released by his medical practitioner to return to work with the Carrier. Also, we agree with the Carrier that any backpay should be reduced by any outside earnings of the Claimant during the period of time that he was off work.

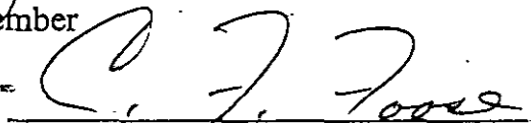
AWARD

Claim sustained. The suspension shall be removed from the Claimant's disciplinary record and he shall be made whole for the period of time beginning when he was released by his doctor to come back to work and the date that he was actually reinstated by the Carrier. The Carrier may reduce the backpay Award by any outside earnings by the Claimant during the period that he was off work.


PETER R. MEYERS
Neutral Member


Carrier Member

DATED: 5-18-95


Organization Member

DATED: _____