

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
and) Case No. 142
UNION PACIFIC RAILROAD COMPANY) Award No. 138
_____)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: June 18, 2008

STATEMENT OF CLAIM:

- (1) The dismissal of Shawn F. Pollock for violation of Union Pacific Rule 1.6 Conduct and the Union Pacific Railroad HR Policy on Violence & Abusive Behavior in the Work Place in connection with allegedly making harmful and threatening remarks toward his supervisor on September 29, 2006 while working as assistant foreman on System Gang 8568 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File D-07-01D/1473567 UPS).
- (2) As a consequence of the violation outlined in Part (1) above, the Organization requests that Claimant Pollack now be restored to service at the Carrier's first available opportunity to do so, with all seniorities held restored intact; that his record of dismissal be completely expunged and eradicated from the Claimant's personnel record; and that he be made whole compensated for all straight time and overtime wage loss suffered on account of this improper dismissal of Claimant, continuing to such time as Claimant is properly restored to active duty service with the Carrier.

FINDINGS:

Public Law Board No. 6302 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 October 10, 2006, Carrier notified Claimant to report for an investigation on October 27, 2006. The notice charged that Claimant made harmful and threatening remarks directed toward the Supervisor of System Undercutting Gang 8568, while working as Assistant Foreman on Gang 8568 on September 29, 2006. The hearing was held as scheduled. On November 16, 2006, Carrier notified Claimant that he had been found guilty of the charge and dismissed from service.

The critical issue in dispute is whether Carrier proved the charge by substantial evidence. The alleged incident under investigation occurred on September 29, 2006, at approximately 9:35 a.m. Claimant, the bus driver and four other employees were on the bus awaiting instructions. The bus driver testified that Claimant accused the bus driver and another assistant foreman of being "ass kissers," and leaving early. According to the bus driver, Claimant complained that other employees who left early faced discipline but the bus driver and other assistant foreman did not and that Claimant threatened to have one of the other employees charge the ARASA Supervisor with discrimination. The bus driver testified that Claimant then said he would speak to the ARASA Supervisor and continued,

Maybe after I talk to that SOB I may get Level 5 but before I get fired I give Largent [the ARASA Supervisor] a drink with something in it that make him a vegetable or cripple him for the rest of his life.

Claimant testified and denied making such remarks or any threatening remarks. Although there were four other employees on the bus, none were called to testify. The Special Agent who investigated the incident took statements from each of them. None of the statements corroborated the bus driver. Claimant's Representative also introduced written statements from three of the other employees. The employee who gave a statement to the Special Agent but for whom the Organization did not introduce a statement wrote, "I only here for five days now. I got bump from 8500 New Construction out of Tucson that was 9-27-06. I don't know Shawn Pollack. I got no idea."

A second employee gave the Special Agent a statement that he had known Claimant "for only 3 days prior to today. Within the three days I've known him, I heard him say that Greg [the ARASA Supervisor] didn't like him and he was out to get him. Also he warn me how Greg was. Saying he's the kind of person that will nail you for anything if he doesn't like you. That's the only thing I heard him say about Greg." Claimant's representative introduced a statement from the same employee which attested that he did not hear Claimant say "anything dangerous about anyone on 9-29-06."

A third employee gave a statement to the Special Agent stating that he did not hear anything because he was thinking about going home. That employee also gave a statement to the Organization stating that he heard nothing and did not know what they talked about.

A fourth employee gave the Special Agent a statement attesting that he did not hear Claimant "say anything directed at anyone in general . . . he did blow off steme (sic)." The same

employee gave the Organization a statement that he did not hear Claimant “say anything against anyone on the bus or off the bus.”

As an appellate body, we do not find the facts de novo and generally defer to credibility determinations made on the property. However, in situations where discipline has been imposed in reliance on the uncorroborated testimony of a single witness denied by the disciplined employee, Boards have found that the findings of guilt were not supported by substantial evidence. *See, e.g.*, NRAB Third Division Award Nos. 32890 & 18551.

In the instant case, the sole evidence against Claimant was the uncorroborated testimony of the bus driver. Claimant vigorously denied making the alleged threatening remarks. The Special Agent testified that he found the bus driver credible when interviewing him and opined that he could think of no reason why the bus driver would have fabricated the story. On the other hand, Claimant testified that, among other things, as assistant foreman he had to constantly tell the bus driver to clear off the track when a train was coming through and caught the bus driver sleeping when others were working and the gang was shorthanded. The bus driver did not report the allegedly threatening remarks immediately, but waited until after the shift ended and then wrote out a statement upon the advice of the safety captain who was also the other assistant foreman who Claimant allegedly maligned as an “ass kisser.” The bus driver also testified that the remark was not made in face-to-face conversation as, according to the bus driver, he was in the driver’s seat facing forward while Claimant was standing on the steps facing the rear of the bus.

The Special Agent opined that his impression was that a majority of the other employees knew something was going on but were guarded in their answers because they did not want to be involved. Such speculation, however, cannot provide competent corroboration of the bus driver’s testimony. Although the Organization did not request the other employees as witnesses, if Carrier was to rely on their apparent knowledge or apparent avoidance of corroborating the bus driver, then it was incumbent on Carrier to call them as witnesses, ask them pointed questions and observe their demeanor.

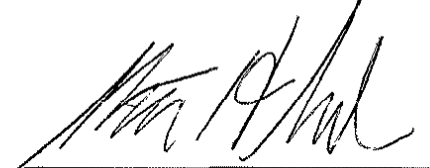
On the record as developed on the property, we cannot say that Carrier proved the charge by substantial evidence. Accordingly, the claim must be sustained.

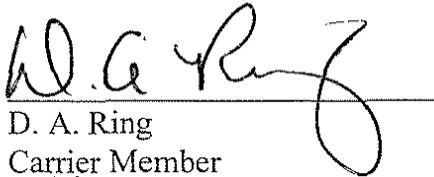
AWARD

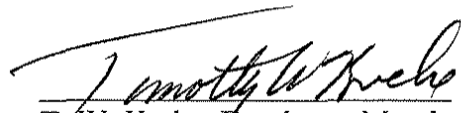
Claim sustained.

ORDER

The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto



Martin H. Malin, Chairman

D. A. Ring
Carrier Member
11-12-08

T. W. Kreke, Employee Member
Employee Member Nov 12, 2008

Dated at Chicago, Illinois, October 30, 2008