

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
) Case No. 55
and)
) Award No. 35
UNION PACIFIC RAILROAD COMPANY)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: November 15, 2004

STATEMENT OF CLAIM:

1. The dismissal of Welder P. W. Seiber for his alleged insubordination and discourteous and quarrelsome behavior in a conversation with Track Inspector T. Finnigan on November 25, 2003 was without just and sufficient cause and excessive and undue punishment (System File MW-04-23/1385351D).
2. Welder P. W. Seiber shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

FINDINGS:

Public Law Board No. 6402, upon the whole record and all 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 November 25, 2003, Carrier notified Claimant to appear for an investigation on December 9, 2003. The notice alleged that Claimant was "quarrelsome and acted with insubordination, hostility, misconduct, and willful disregard and negligence" on November 25, 2003. The hearing was held as scheduled. On December 23, 2003, Claimant was notified that he had been found guilty of the charge and dismissed from service.

The Organization has advanced numerous procedural arguments. We have reviewed all of those arguments and the transcript and find that Claimant was afforded a fair and impartial hearing and that none of the procedural arguments provides a basis for setting aside the discipline.

The record reflects that on the date in question, the Track Inspector gave Claimant an

assignment and Claimant responded by cursing the assignment, cursing the Track Inspector and kicking a chair across the room. Claimant then went outside. Approximately, five minutes later, the Track Inspector went outside, saw Claimant and asked him if he was over being mad. Claimant responded by again cursing the Track Inspector.

Claimant admitted cursing the Track Inspector but denied kicking the chair. Claimant testified that he moved a chair but did not kick it or throw it. As an appellate body, we do not observe the witnesses testify and are in a relatively poor position to assess their credibility. Consequently, we generally defer to credibility determinations made on the property. In the instant case, The Track Foreman and a Welder corroborated the Track Inspector's testimony that Claimant cursed and kicked the chair. We see to reason to deny deference to the determination made on the property to credit the Track Inspector's testimony over that of the Claimant.

The Organization observes that Claimant was not insubordinate in that he did carry out the tasks assigned to him. Be that as it may, Carrier clearly proved that Claimant was quarrelsome and hostile. Moreover, Claimant's conduct was totally unprovoked. There simply was no explanation for it. It was further aggravated in that after Claimant went outside, he had five minutes to cool off before he next encountered the Track Inspector. Instead, when the Track Inspector asked Claimant if he had gotten over being mad, Claimant again was quarrelsome and hostile.

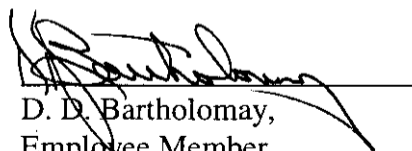
Claimant was a short term employee, with only a year and four months of service at the time of the incident. Given the seriousness of the offense, the absence of mitigating factors, the presence of aggravating factors and the consistency of the discipline imposed with Carrier's UPGRADE, we cannot say that dismissal was arbitrary, capricious or excessive.

AWARD

Claim denied.



Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, January 28, 2005