

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

**UNION PACIFIC RAILROAD COMPANY
(FORMER CHICAGO & NORTH WESTERN TRANSPORTATION
COMPANY)**

Case No. 265

Award No. 241

STATEMENT OF CLAIM: "Claim of the System Committee of the
Brotherhood that:

1. The dismissal of Assistant Foreman M.J. Justinak for his alleged involvement with an altercation with a fellow employee on November 1, 2003, was without just and sufficient cause, in violation of the Agreement and excessive and undue punishment (System File 7WJ-7338D/1393467).
2. Assistant Foreman M.J. Justinak shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered."

FINDINGS:

At the time of the events leading up to this claim, the Claimant was assigned to work for the Carrier as an Assistant Foreman, working with two separate gangs.

By letter dated November 5, 2003, the Claimant was notified to appear for a formal investigation and hearing to develop the facts and place responsibility, if any, in connection with the Claimant's alleged involvement in an altercation with a fellow employee. The hearing was conducted as scheduled on November 11, 2003. By letter dated November 18, 2003, the Claimant was notified that as a

result of the hearing, he had been found guilty as charged, and he was being assessed Level 5 discipline, dismissal from the Carrier's service. The Organization filed a claim challenging the Carrier's decision, and the Carrier denied the claim.

The Carrier initially contends that the record demonstrates that there were no procedural violations by the Carrier. The Carrier insists that the Claimant was afforded all elements of due process in accordance with the Agreement. The Claimant received adequate notice of his investigation, was allowed ample representation, and was able to present his own witnesses, as well as cross-examine all of the Carrier's witnesses who were present at the investigation. The Carrier points out that the Organization asserts that the discipline at issue should not stand simply because the General Chairman was not notified in writing about the pending charges against the Claimant before the investigation was held.

The Carrier maintains that Rule 19 is not violated if the Claimant and the Organization receive notice of the charges in enough time to prepare for the investigation and ensure that the Claimant is adequately represented. The Carrier asserts that a plain reading of this Rule shows that the General Chairman's notification is just a sidebar and is not intended to obscure the true intent of the Rule, which is to protect the Claimant's right to notice of charges. The Carrier asserts that although it erroneously notified the Organization's Vice President, rather than the General Chairman, the Organization nevertheless received more than enough notice in that the Vice Chairmen also received notice of the pending

charges. The lack of formal written notice to the General Chairman did not deprive the Claimant of a fair trial or prejudice the investigation in any way. The Carrier further points out that a number of Board Awards have held that minor procedural shortcomings do not provide enough grounds to overturn discipline assessments.

The Carrier goes on to contend that the transcript demonstrates that the evidence of the Claimant's guilt is overwhelming. All three impartial witnesses to the altercation agree that the Claimant struck his foreman multiple times without provocation. Moreover, the Claimant accepted his guilt, and he acknowledged that the foreman never fought back or instigated the violence in any way. The Carrier emphasizes that all the witnesses and the Claimant agree that the Claimant's violent acts were premeditated in that he disregarded prior warnings and advice from his colleagues about the possible consequences of striking the foreman. The Carrier insists that it is accepted on the property that an admission of guilt provides substantial evidence of a rule violation. The Carrier maintains that in the instant case, there is more than enough evidence of the Claimant's culpability to uphold the Carrier's decision.

The Carrier goes on to contend that once an arbitral panel verifies that substantial evidence supports a finding of guilty, the panel lacks authority to overturn the level of discipline assessed, even if the discipline may seem harsh, unless there is a sufficient demonstration that the discipline was arbitrary, capricious, or an abuse of Carrier discretion. The Carrier insists that the discipline

at issue was not arbitrary, capricious, or an abuse of Carrier discretion. The Carrier emphasizes that the Level 5 discipline assessed in the Grievant's case was correct and in accordance with the Carrier's UPGRADE Policy. The Carrier asserts that the Claimant's violence and threatening of Carrier employees was an act of hostility affecting the Carrier's interests and warranting dismissal. The Carrier further argues that the Level 5 discipline was the required discipline under the circumstances. There is no evidence of arbitrariness or capriciousness in connection with the assessment of discipline in the instant case, so there is no reason for this discipline to be overturned.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Board consistently has held that discipline is supposed to be corrective in nature, rather than retribution. The Organization asserts that the Claimant had a clear discipline record prior to the events at issue, and he admitted his wrongdoing. The Organization maintains that the time that the Claimant has been out of service constitutes more than sufficient punishment. The Organization also points out that a number of Board Awards provide ample precedent for reinstatement.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of violating Carrier rules when he became involved in an altercation with a fellow employee on November 1, 2003. The Claimant admitted that he struck his Foreman on several occasions without provocation on the date in question. The Claimant also acknowledged that the Foreman never fought back and did not instigate the violence.

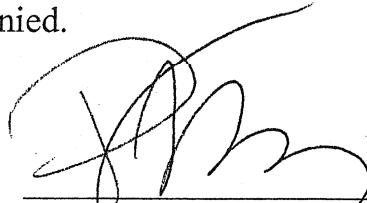
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

It is fundamental that engaging in violent acts toward one's Foreman is grounds for dismissal. The Claimant offered no evidence or basis to justify reinstating him to the Carrier's employment. There is nothing in the record that shows that the Carrier's action in terminating this Claimant for his violent actions was unreasonable, arbitrary, or capricious. Therefore, the claim must be denied.

SBA 924
Awd 241

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: 11-9-05



CARRIER MEMBER

DATED: November 9, 2005