

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION
IBT RAIL CONFERENCE**

and

**UNION PACIFIC RAILROAD COMPANY
(FORMER CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY)**

Case No. 285

Award No. 259

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

1. The discipline [personal record assessment with Level 4 which is thirty (30) days of work without pay (suspension effective December 11, 2006 through January 9, 2007) and a requirement to pass an annual operating rules examination prior to return to work] imposed upon Mr. S. Saunders for alleged violation of General Code of Operating Rules 1.13 in connection with charges of alleged failure to comply with Manger's instructions to have contractors wear safety gear at approximately Mile Post 150.4 on the Clinton Subdivision at approximately 1230 hours on November 14, 2007 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File 4RM-9773D/1467328 CNW).
2. As a consequence of the violation referred to in Part (1) above, the aforesaid discipline shall now be removed from Claimant S. Saunders' record and he shall be compensated for all time lost."

FINDINGS:

By notice dated November 16, 2006, the Claimant was directed to attend a formal hearing and investigation to develop the facts and place responsibility, if any, in connection with allegations that the Claimant allegedly had failed to comply with management's instructions to have contractors wear safety gear. The investigation was conducted, as scheduled, on November 22, 2006. By letter dated December 1, 2006, the

Claimant was notified that as a result of the hearing, he had been found guilty as charged, and that he was being assessed Level 4 discipline, which is thirty days' off work without pay, and that the Claimant would have to pass an operating rules examination in order to return to service. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to impose such discipline. The Carrier denied the claim.

The Carrier initially contends that it has met its burden of proving that the Claimant was in violation of General Code of Operating Rule 1.13. The Carrier asserts that the record contains substantial evidence that the Claimant failed to comply with instructions that employees are to wear personal protective equipment around the track. The Carrier argues that this evidence demonstrates that the Claimant did commit the rule violation with which he was charged. The Carrier emphasizes that there is no reason to overturn what is clearly appropriate discipline, considering the Claimant's actions.

The Carrier then addresses the Organization's assertion that the Carrier committed a procedural violation by failing to give the Claimant proper notice of the investigation. The Carrier maintains that this is nothing more than a red herring. The Carrier points to the Claimant's admission that he received adequate notice of the investigation, as well as the opportunity to prepare his defense. The Claimant was allowed a representative during the hearing, to cross-examine witnesses, view all evidence submitted, and present his own witnesses. The Carrier insists that the Claimant was afforded all of the requirements of due process, including a fair and impartial hearing, and nothing in the Carrier's handling of this claim was improper or in violation of the Agreement.

The Carrier argues that it is well established that the role of an arbitral panel is to verify whether substantial evidence supports a finding of guilt. Once the arbitral panel has determined that the Carrier has presented substantial evidence, the panel lacks authority to overturn the discipline assessed. The Carrier asserts that even if the discipline seems harsh, it cannot be overturned unless it is found to be arbitrary, capricious, or an abuse of Carrier discretion.

The Carrier asserts that the discipline in this case was not arbitrary or capricious. The Carrier points out that foremen and assistant foremen are responsible for ensuring the safety of the employees working under their supervision and others. The Carrier emphasizes that the Claimant served the thirty-day suspension because of the prior discipline on his record. The Carrier submits that if the Claimant did not want to take the responsibility for the safety of himself and the contractor employees, then he should not have bid the position. The Carrier maintains that the Claimant subjected himself to discipline.

The Carrier insists that safety is a no-nonsense issue with no room for compromise. The Carrier points out that the Organization has tried to shift the responsibility from the Claimant, but this is unacceptable. The Carrier contends that everyone must be responsible for ensuring that the safest possible work environment is being sustained. The Carrier argues that the Claimant's rule violation supported the assessment of discipline, and the discipline imposed was not arbitrary, capricious, or an abuse of Carrier discretion.

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

entirety.

The Organization initially contends that there is no evidence in the record that shows a violation of Rule 1.13. The Organization asserts that it had requested a postponement of the hearing in this matter because the Claimant was not provided with a copy of the Notice of Hearing in sufficient time to accept the proposed alternative discipline.

The Organization argues that the Carrier failed to prove that the Claimant did not comply with management's instructions about contractor employees wearing protective gear. Citing a number of prior Awards, the burden of proof in this matter rests with the Carrier, and an employee should not be disciplined unless probative evidence was presented during the investigation to support the charges specified against the employee. The Organization emphasizes that the Carrier may not rely upon mere speculation, assumption, or conjecture as a basis upon which to impose discipline.

The Organization maintains that in the instant case, the Carrier simply assumed that because the contractor's employees were observed without their protective gear that the Claimant was guilty of failing to comply with the manager's instructions regarding this gear. The Organization points out that assumption is not proof, and the discipline therefore cannot stand.

The Organization ultimately contends that the instant grievance 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. The record reveals that the Claimant was afforded all of his due process rights, including receiving proper notice of the investigation.

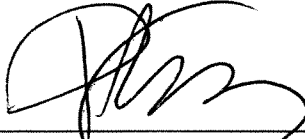
This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of not requiring the contractor employees to wear safety gear. The Claimant was the flagman who was in control of the protection of the contractors while they were working near the track. The Claimant was allowing those contractor employees to work without safety glasses and/or hard hats. The Claimant clearly did not fulfill his responsibilities in his position.

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.

The Claimant in this case received a thirty-day suspension. Given the Claimant's previous disciplinary background, as well as the seriousness of this offense, this Board cannot find that the action taken by the Carrier was unreasonable, arbitrary, or capricious. Therefore, the claim must be denied.

AWARD:

The claim is denied.

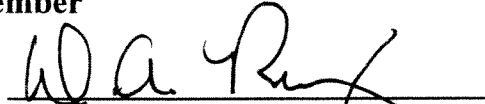


PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: Sept 9, 2009



CARRIER MEMBER

DATED: Sept 9 2009