

PUBLIC LAW BOARD NO. 4901

AWARD NO. 145
CASE NO. 145

PARTIES TO
THE DISPUTE:

United Transportation Union
vs.
Burlington Northern Santa Fe Railway Company
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISION: Claim denied.

DATE: April 11, 2001

STATEMENT OF CLAIM:

"Request in behalf of Valley Division Yard Foreman M. M. Kling for the removal of the alleged violations of Rules 1.4, 1.6 and 1.7 of the General Code of Operating Rules, effective April 10, 1994, and Rule 28.6 of the Safety Rules and General Responsibilities for all Employees, effective March 1, 1997, from the Claimant's personal record, and for his reinstatement to the service of the Burlington Northern Santa Fe Railway Company, Coast Lines, and with pay for all time including the payment of Health and Welfare Benefits on May 15, 1997, and continuing until returned to service, as a result of the Investigation held on May 8, 1997, concerning the Claimant's alleged physical altercation, quarrelsome conduct and profane language at approximately 1300 hours at Morman Yard in Stockton, California, continuing into the Southern Pacific Yard in Stockton, California while performing service as crew member on Switch Assignment &-ST101-20 on Sunday, April 20, 1997."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

The transcript of the investigation illustrates how an exchange that began with tossing an air test slip back and forth between Claimant and his helper escalated into a wrestling match in the cab of a locomotive with an abundance of harsh, profane and threatening language. Among other things, the evidence described the helper's upper body being pressed out of the locomotive window for a time.

Despite having some twenty-seven years of service at the time of the incident, Claimant was dismissed from all service. His helper, with relatively little service time, was disciplined with only a Level 1 deferred suspension of five days.

After careful review of the record, we find the procedural objections raised by the Organization lack merit. It has been common in the railroad industry for hearing officers to play multiple roles in the disciplinary process. This is the process that the industry parties developed for themselves years ago. It recognizes that management officials who participate in preliminary matters may also be called upon to conduct the formal investigation. If the parties find this arrangement to be unpalatable, they have been free, at virtually all times, to negotiate explicit restrictions that would limit the hearing officer to conducting the hearing only. The instant parties have apparently chosen

not to do so. No such explicit restrictions appear in their Agreement provisions. In the absence of any such limitations, we have no choice but to determine that the performance of multiple roles does not *per se* constitute a procedural defect. As long as the hearing officer's conduct is beyond reproach during the hearing as well as during any other involvement, it is permitted. According to the record, the hearing officer's prior actions appear to have been limited to superficial discussions over the phone to understand the nature of the incident reported by the helper and to advising the trainmaster how to preserve the recollections of the crew members still on the property at the time. There is no evidence that the actions of the hearing officer somehow "tainted" the evidentiary record or otherwise disadvantaged the Claimant.

Our review of the hearing officer's conduct during the hearing also fails to disclose any significant irregularities. It was proper for him to instruct witnesses to limit their testimony to factual matters and to refrain from indulging in opinion, supposition, speculation and conjecture.

The Organization also alleges that Claimant's discipline is disparate, harsh, arbitrary and excessive. The hearing transcript and exhibits, however, present substantial evidence in support of the Carrier's determination that Claimant's conduct was significantly more culpable than was that of the helper. The locomotive engineer provided corroboration for the helper's testimony and undermined the Claimant's account. Moreover, Claimant was in a position of authority as foreman. In addition, Claimant's testimony reveals that he knew "... that fighting was one thing that the company would not put up with, ..."

The corroborated testimony also shows that Claimant was the initiator of the physical altercation and that he persisted in the struggle while the actions of the helper are described more in the nature of attempts to free himself from Claimant's grasp. The record also shows that the helper reported the incident, as Rule 1.4 required, while Claimant left the property without doing so.

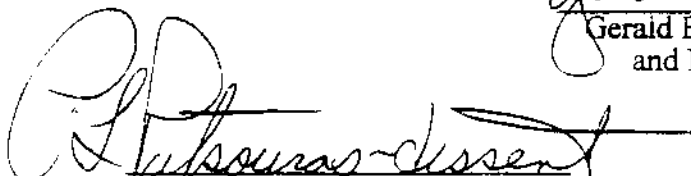
Claimant's prior record includes three prior disciplinary actions, including a 20-day suspension, within the three years prior to the incident in question. Per Carrier's Policy on Employee Performance Accountability (PEPA), the instant infraction would have placed Claimant at the step calling for the discharge penalty. Despite its dissimilarity with the previous misconduct for which he was disciplined, Claimant's instant misconduct is widely regarded, both in the railroad industry and elsewhere, as proper grounds for immediate discharge notwithstanding long years of service free of significant prior discipline. While reasonable minds may differ over the propriety of the discharge penalty in this case, in light of Claimant's lengthy service record, the evidentiary record leaves us with no proper basis for disturbing the Carrier's action. We are unable to conclude that Carrier abused its discretion.

AWARD:


The Claim is denied.



Gerald E. Wallin, Chairman
and Neutral Member



P. L. Patsouras,
Organization Member



Gene L. Shire,
Carrier Member