

ARBITRATION PROCEEDINGS BEFORE THE
MRL/BLE BOARD OF ARBITRATION

In the Matter of the Arbitration Between
MONTANA RAIL LINK, INC.

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

Award No. 9
Case No. 9
MRL File: 92-FF-004,
BLE File: D/262 PDA 92
Subject: Discipline of
P. D. Arnold

BOARD OF ARBITRATION

R. E. Dean, Union Board Member

J. L. Grewell, Company Board Member

Dana Edward Eischen, Chairman and Impartial Arbitrator

Appearances

For the Company: Thomas Lawrence, III, Esq.

For the Union: Dale L. McPherson, Vice General Chairman

PROCEEDINGS

The Parties selected Dana Edward Eischen to serve as Chairman and Impartial Arbitrator of the Board of Arbitration established to hear and decide grievances, including matters of discipline, under the terms of their Collective Bargaining Agreement, effective November 1, 1990 (Agreement). The Board convened in Cooke City, Montana on August 20, 1993 to hear docketed appeals of several cases, one of which involved Mr. P. D. Arnold (Claimant). Both Parties were represented and afforded full opportunity to present oral and documentary evidence in support of their positions. The representatives made closing statements at the hearing and waived posthearing briefs, whereupon the record was closed.

PERTINENT CONTRACT PROVISIONS

Article VII

Discipline

Section II, Article 10, Discipline, of the 1987 Agreement is hereby revised to read as follows:

A. Employees who have completed the probationary period shall not be dismissed without just cause and without a fair and impartial fact finding session. Subject to the provisions below, employees may be assessed discipline for rule infractions without a fact finding session. If, after review of the incident, the decision is made that discipline is appropriate, it must be assessed within ten (10) days of the incident or knowledge of the incident being known to the Company. The Company will notify the employee of its decision and at that time afford the employee the opportunity to meet with the designated company officer to discuss the matter. The discipline action will be removed from the employee's record under specific circumstances. In cases where discipline is assessed without a fact finding session the employee may decline the discipline by requesting a fact finding session. Failure of the employee to request a fact finding session within the ten (10) day time limit will be considered acceptance of the discipline assessed and waiver of right of appeal. The request for fact finding must be made in writing to the Superintendent and received within ten (10) days of discipline being assessed. If the request is sent via U.S. mail, it must be postmarked

within the ten (10) day period. Upon request for a fact finding session, the discipline previously assessed shall be void and shall not be considered in the fact finding session. Any discussion of discipline prior to a fact finding session will not be construed as an admission of guilt by the employee or prejudgment by the Company. The Superintendent shall schedule a fact finding to be held within the (10) days of the receipt of the request. The fact finding session will be conducted by a Company supervisor with the employee, and his duly accredited Union representative, if desired, in attendance. Each of the parties may have witnesses present at the fact finding session if desired. Employees required by the carrier to attend the fact finding session during regular assigned hours will be made whole for time lost. Fact finding sessions commencing outside assigned hours will be paid for on a minute basis at the straight time rate. If discipline is assigned as a result of the fact finding, the Company will provide a written, complete and accurate record (transcript) of the proceedings to the BLE Local Chairman by Certified Mail, return receipt requested, within thirty (3) days from the close of the fact finding. Copies of the transcript will also be provided upon request to principles and representatives within thirty (30) days.

B. Employees who have completed the probationary period shall not be dismissed without just cause and without a fair and impartial fact finding session. Employees may, however, in cases management determines to be serious (such as theft, altercation, Rule "G" violations, insubordination, major accidents, serious misconduct, etc.) be held out of service pending the fact finding. It is understood that any employee held out of service under this Article and, as a result of the fact finding proceeding is found to have not violated the rules will be reinstated immediately and paid for time lost.

C. If the General Chairman desires to appeal the discipline assessed, a written appeal will be processed to the highest designated Company officer within sixty (60) calendar days from the date the fact-finding session was held.

D. Decision of the highest designated Company officer shall be made within sixty (60) days from receipt of the General Chairman's appeal.

E. If the decision of the highest designated Company officer is not to reverse the discipline, the General Chairman may request a conference to discuss the case. Such conference request must be made in writing within sixty (60) calendar days of the highest designated Company officer's denial of the appeal. Conference between the General Chairman and the highest designated Company officer shall be held within sixty (60) calendar days of receipt of the General Chairman's request. If the issue is not resolved in conference, either party may within ninety (90) calendar days of the date conference was held, submit the case to arbitration. Listing of the issue to arbitration by either party within the aforementioned ninety (90) day period will serve to preserve all time limits thereafter.

F. If it is found as a result of a fact finding that an employee has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from the record. He shall be reinstated with his seniority rights unimpaired, and shall be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension.

G. In a joint effort by management and labor to promote safety and efficiency and to ensure that all employees are well schooled on matters pertaining to compliance with safety and operating rules, the Company has adopted a voluntary educational program which, when appropriate, will serve as an alternative to discipline.

The use of an educational program as an alternative to discipline (deferred days, suspension, dismissal, etc.) shall be at the discretion of the designated Company officer.

The offer of education will be made in those instances involving an operating rule(s) infraction and the incident indicates that the employees(s) will benefit from classroom instruction and/or on-the-job training.

ISSUE

- 1) Did the Carrier have just cause to suspend P. D. Arnold without pay for forty-five (45) days?
- 2) If not, what shall be the remedy?

BACKGROUND

After deadheading to Missoula, Montana from Spokane, Washington on May 5, 1992, Engineer P. D. Arnold (Grievant) proceeded to the Yard Office to tie-up. Mr. Arnold had worked with Assistant Engineer J. W. Krantz from 3:30 p.m. May 4, 1992 to 3:00 a.m. May 5, 1992 dog catching from Yardley to Sandpoint and Hauser. Apparently they did not sleep after tying up at Yardley, but waited for the 7:00 a.m. arrival of the Pixley, which deadheaded them back to Missoula.

Upon arriving at Missoula, Arnold and Krantz went to the Yard Office to tie up and check their intra-Company mailboxes. Mr. Krantz became very upset to learn that a time claim that he submitted had been "cut" by Trainmaster D. S. Swanson. According to his later testimony, Mr. Krantz became extremely angry. Mr. Arnold, who also serves as the elected Local Chairman for BLE Division 262, told Krantz in words or substance: "Calm down. I will handle this with Swanson."

After discussing the time claim with Swanson and apparently receiving no satisfaction, Mr. Arnold telephoned the home of MRL Manager of Train Movement, James M. Watkins at about 12:30 p.m. Mr. Watkins ordinarily works from 11:30 p.m. to 8:30 a.m. As Grievant Arnold knew, Watkins was asleep when he was telephoned. According to undisputed record testimony, Arnold replied affirmatively when Watkins' wife asked if the reason for the call was important enough to wake her husband up from sleep. When Watkins came to the phone, Arnold made the following statement and then hung up: "I just called to see how you liked having your rest disturbed."

A heated discussion then ensued between Swanson and Arnold concerning the latter's harassing telephone call to Watkins. Arnold and Swanson have differing recollections regarding the intensity and content of that confrontation. The testimony of these two principle witnesses at the fact finding investigation was supplemented by Carrier witness D. W. Cook, Supervisor of Buildings and Bridges and by Union witnesses J. W. Krantz, Engineer and V. J. McCabe, Engineer. (Several other witnesses called by the Union provided no material testimony regarding the incident of May 5, 1992). Rather than attempt to paraphrase the testimony of these witnesses, I quote verbatim from the transcript, as follows:

D. S. Swanson

I was present in the Missoula Yard Office doing some photocopying at the copy machine which is located in the area where the yard clerk normally sits. Ah, Mr. Arnold and Mr. Krantz, ah, had been in earlier to see me and questioned me about a, this same day, and had questioned me about a time claim that Mr. Krantz had problem with. And they had come in and tied up...had just dead headed back from Spokane, WA. I, ah, had talked to them and resolved the time claim issue so I was photocopying

in the clerks area. Mr. Arnold asked me what Jim's number was. And I thought he meant Jim Cearley. He said, "No, Jim Watkins." And I said will he's not working. He's gone home. And he said, well I know I want to call him up and see how he likes to have his rest disturbed. And I said, you're not going to do that are you? And he said, I feel like it. And, ah, I said, no, you're not going to do that.

So, I continued copying and, ah, I happened to turn and see Mr. Arnold was on the phone and he said, Jim, this is Dave Arnold. He said: "I just called to see how you liked having your rest disturbed." And then he hung up the phone. And I, ah, I said, ah, you didn't really call him did you. And he was walking back towards the register room. I said, you didn't really call him did you? And he said, ah, goddam right, I did. And I said, well what did you do that for? And, ah, he said, because it made me feel better. And I said, well, you don't look like you feel better.

At that point in time he came back from the register room into where I was standing next to the copy machine and got right in my face within just a couple of inches so that when he was talking he was... He wasn't really talking, he was shouting and shaking his finger in my face and at my chest. But he didn't really poke me. But he was jestering (sic) at my face and chest and yelling at the top of his voice. And some of which I don't even remember what he said because he was really angry and out of control.

Ah, I do remember him saying, ah, you guys are going to have to get your fuckin' heads out of your asses. And I said, well, calm down and we'll go into my office and we'll talk about this. And he said, no, I'm tired of talking. This shit's going to stop. And then he left and headed back towards the register room. And I followed him, ah, to where the... next to the door to the trainmaster's office. And he stopped there and we had some more discussion. A pretty heated discussion but at this point it was discussion. Ah, and at this point in time Val McCabe came and, and, ah, he was, ah, making his position pretty clear, too. He was agitated and angry, but we didn't really had a...what I would term as an altercation. He did never gesture or anything like that.

P. D. Arnold

Well, on May 5 the yard office, to the best of my recollection we arrived there at approximately 11:30, 11:35 at which time, ah, my assistant engineer, Mr. Jerry Krantz, had walked over to.....

At that time Mr. Krantz walked over to, ah, the area where we pick up our company, ah, affiliated mail and, ah, I noticed that he was a little upset about a time claim rejection that he had just received under the signature of Mr. Swanson. It was brought to my attention and I told him that we'd go in and talk to it...talk it over with Mr. Swanson. And, ah, we did such. And everything seemed to go fairly well and, ah, other than Mr. Krantz was a little upset with the situation here he had been taken from his family, dead headed to Plains, left there all night for basically meals which was twelve dollars a day for the 16 hour period. And I just advised him that he needed to handle this through the union and, and, ah, we'll take care of it, etc. etc.

From that point I went, ah, back to Mr. Swanson and kinda stuck my head in the door and asked if he had Jim Watkins phone number and he said no, he did not. And I said that's okay. I said I'll just get it from the telephone book. Which I did. Ah, from that point I went to the telephone, called Mr. Watkins. His wife answered the phone and

I asked Mrs. Watkins if Jim was there and she said, well, he was asleep and, ah, asked me if I would like to leave a message. And I said, ah, no, ma'am, I, I would not. And, and at that time she felt I, I don't know, apparently what brought her to that conclusion. But anyway she did laugh and said I'll go get him and woke him up. And I just asked Mr. Watkins how he felt about being woke up and disturbed during his rest. And, ah, he said that ah it didn't bother him at all and I said fine and hung up the phone.

At which time I turned after hanging up the phone and began to exit the yard office when Mr. Swanson was at the copy machine and made the statement, he said I can't believe you did that. And I said, I can understand that, Mr. Swanson, coming from you. I said, ah, we've had a rest rule issue here for the last four and a half to five years and, ah. - can I continue? And, ah, we've tried to bring it to your attention. Ah, it appears that we had better get our heads out of our asses, which is my exact statement, and realize that we have a rest rule issue out here and we'd better take care of it before we have a Bob Hawley, ah, Norm Browne incident like at Evaro again.

And at that time Mr. Swanson came out into the hallway and we continued our discussion because all I was....and I, and I, I. I made the statement to him. I said, what we have here is a retro issue and I am making an opinion, an opinion as the local representative on behalf of the members. And we continued our discussion. Mr. McCabe entered into the discussion and, ah, we talked about the rest issue again and, ah, notices that, ah. Or I told him what my prior trip was after being up for approximately 27, 28 hours. That I was definitely tired and I was using my position as a point....to let's do something to get this resolved and to understand that we're human beings out here. And we need to get some type of a rest rule in, etc..rather than just let it go the way it has.

At, ah, at that point I apologized to Mr. Swanson. I told him if I became loud, I'm very sorry, but you're dealing with basically a tired person that's been up quite a while and, ah, I think it's just best that we drop this issue and go home. That I go home right now and he basically agreed. He said don't worry about it. I understand perfectly that you're tired. There will not be anything or any recourse for this. It's just a matter you made an opinion and, ah, you did get a little loud. And, ah, you are tired. Just go home and get your rest. At that time which I turned around and left the premises.

That in a nut shell is basically what happened.

D. W. Cook

Well, as I recall I was in the, ah, at the...next to Val's desk which is the secretary, ah, in the next room. And I was looking in the file for something and I had heard some, Mr. Arnold, indicate... I can specifically quote that, ah, "When are you guys going to get your fuckin' head out of your asses." And, ah, I heard Dave say something. I couldn't quite distinguish it. Ah, something about, cool down and I, there was more words in the sentence than that. So I walked over and opened the door to, to see, ah, what was transpiring there because of the loudness and the sincerity in Dave's voice, I was concerned. And I opened the door and I saw, I heard his next statement, ah, this shit's going to stop and there was some words before that, but that's what I distinguished of the altercation at the time.

* * *

He said, when are you guys going to get your fucking heads out of your asses. And that's when I walked towards the door, opened the door. And concurrently or just before, whichever, at least the door was open enough that I could hear Mr. Swanson say, let's cool down; and some other few words with it. I cannot be specific, in a similar context. And then I heard Mr. Arnold say, this shits got to stop. And that's my recollection of the conversation.

J. W. Krantz

We arrived in Missoula from dead heading from Spokane after dog catching all night. And tied up. I walked over and checked in the mail box and I found a cut slip. I showed it to Dave. It was a cut slip for a dead head to Plains to cover a vacation of an engineer off a spray train. And he had cut it so basically I was, I went to Plains and spent 16 hours without pay.

We then went...Dave said, well, let's go in and talk to Mr. Swanson about it. So we went in and it was...he showed us where it was written that they didn't have to pay it. And I was very upset. Very upset. And I just wadded it up and walked out of the room. I'd finished my paper work. I heard Dave ask Dave Swanson for Mr. Watkins phone number and Mr. Swanson said he didn't have it.

And then I heard Dave slam the phone down and we walked out into the hall. And, we were mad about being dead headed on, with no rest, virtually no rest after being up for hours an hours. And it got loud. But I do not believe that it was an altercation. It was loud.

V. J. McCabe

What happened when, ah, when we, as in my crew as well as Dave Arnold's crew arrived to Missoula from Spokane after a dead head, was, ah, a lot of this that I've heard is vague to me. That that I do remember is, ah, one particular situation out in the hallway.

This hallway separates the trainmaster's officer, the, ah, yard clerks office where I spent most of the time either on the dispatchers phone or filling out a timeslip after we had arrived and went off duty at 11:35. And, ah, what I remember is, ah, Mr. Swanson and Mr. Arnold in that hallway. Mr. Arnold appeared. Before this situa...before this particular time, this narrow hallway, Mr. Arnold was talking to Mr. Swanson. He appeared to be disturbed, upset. And Mr. Swanson, I think, did his best to keep, ah, keep a low key. Keep the discussion low key. Tried to talk to Dave. Dave was obviously angry or upset.

* * *

Q Mr. McCabe, did you hear Mr. Swanson's testimony?

A Yes, I did, sir.

Q Do you feel Mr. Swanson's testimony is untrue?

A No. Not at all. Ah, there...I would say with one exception, Mr. Harper. And that would be the time that Mr. Arnold and his crew, myself and my crew arrived at Missoula and the time that this situation began and took place.

Q. But basically the rest of this testimony would be, ah, true?

A I would say from that part which I was familiar with, yes.

On the basis of the evidence developed at the fact finding investigation, Carrier served Grievant with a notice of discipline on June 4, 1992, reading as follows:

As a result of the fact finding accorded you on May 18, 1992, you are hereby notified you are being suspended from the service of Montana Rail Link for a period of forty-five (45) days for violation of Montana Rail Link General Safety Rules 518, 519, and 520 and General Code of Operating Rules 607 and 608 when you were communicating with Manager of Train Movements Watkins and Trainmaster Swanson on May 5, 1992.

Testimony develops you used profane, vulgar and boisterous language with Mr. Swanson; you entered into an altercation with Mr. Swanson without provocation; you were quarrelsome and vicious with Mr. Watkins and Mr. Swanson.

Your suspension is from 0001 hours June 8, 1992, until 2359 hours July 22, 1992, and the following entry is being made on your personal record:

"June 4, 1992. Suspended from the service of Montana Rail Link for forty-five (45) days commencing 0001 hours June 8, 1992, for violation of Montana Rail Link General Safety Rules 518, 519 and 520 and General Code of Operating Rules 607 and 608 by use of boisterous, vulgar, profane language; entering into an altercation; and quarrelsome, vicious behavior in conversation with Mr. Swanson and Mr. Watkins on May 5, 1992."

A timely appeal of the discipline remained unresolved throughout handling on the property and eventually was appealed to this Board for final and binding determination in arbitration.

POSITIONS OF THE PARTIES

The following positions of the Parties are edited and extrapolated from their respective prehearing briefs.

Carrier

The Carrier believes the evidence developed at the formal hearing held May 18, 1992, fully supports its finding that Mr. Arnold's conduct on May 5, 1992, was indeed reprehensible when he engaged in a public tirade, threatening Trainmaster Swanson and calling Mr. Watkins at his personal residence for the sole purpose of waking him up and harassing him. This conduct constitutes a flagrant violation of Safety rules 518-520 and Operating Rules 607-608. Further, the Carrier's assessment of a forty-five (45) day suspension is entirely justified and appropriate, and must remain undisturbed by the Board.

Safety Rule 518 provides:

Montana Rail Link service demands the faithful, intelligent, courteous and safe discharge of duty. Courteous, orderly conduct is required of all employees. Boisterous, profane, sexist or vulgar language is prohibited.

One of the fundamental tenets of any employer-employee relationship is that the employer must be permitted to exercise control and authority over its employees. Mr. Arnold's conduct on May 5, 1992, exhibits a complete lack of disregard for authority and instills upon other employees the concept that yelling and harassing your superiors is the only route through which progress in the workplace can be made. In truth, however, such conduct impedes the free flow of ideas and creates resentment and vindictiveness in the minds and hearts of all employees.

The Carrier submits that it has shown that Mr. Arnold's conduct on May 5, 1992, was in violation of MRL Safety Rules 518-520 and Operating Rules 607-608. The forty-five (45) day suspension Mr. Arnold received as a result of his conduct was an appropriate penalty.

Union

It is the Organization's position that Engineer Arnold did not violate Rules 607 and 608 of the MRL General Code of Operating Rules, MRL General Safety Rules 518, 519, 520, or any other MRL Operating Rule. Further, the Organization asserts that the Carrier has completely failed to carry the burden of proof necessary to uphold the discipline assessed Engineer Arnold.

The transcript presents compelling evidence that Mr. Arnold was not even operating in the service of MRL, but, instead, as representative of BLE Division 262, at the time of his conversation with Mr. Swanson.

Each of the witnesses through their testimony agree that a loud and heated discussion did occur. However, at no time does their testimony indicate that the "line" was crossed, whereby rule violations occurred. Further, it must be noted that Mr. Swanson, who was involved, was also talking loudly and in a "heated" fashion. Yet, only Mr. Arnold was disciplined.

The question properly before this Board is therefore three-fold: 1) was Mr. Arnold subject to MRL operating rules at this time or was he in fact an off duty employee working in another capacity, namely as the elected representative of Division 262; 2) if Mr. Arnold was subject to MRL operating rules, was he in violation of these rules; and 3) even if the answer to the first two questions is in the affirmative, and we do not believe it is, was the discipline assessed commensurate with the offense?

The forty-five (45) day suspension assessed Mr. Arnold is a harsh penalty and must therefore be supported by clear and convincing evidence. The Carrier has not met its burden of proof, and the facts as developed do not support the discipline assessed.

In the event the Board disagrees with our position that no violation occurred, it cannot ignore the fact that the discipline assessed was arbitrary, excessive, and unwarranted.

OPINION OF THE CHAIRMAN

Although the record is somewhat in conflict regarding the timing and level of intensity of Grievant's diatribe against Trainmaster Swanson, there is no conflict on this record concerning the fact that Mr. Arnold made a harassing telephone call to Mr. Watkins at his home. It is clear from the record that Carrier settled upon a forty-five (45) day suspension penalty because they concluded that Grievant had behaved improperly not only toward Mr. Watkins but also toward Mr. Swanson. Grievant's primary defense is that he was acting in the conditionally protected status of Union representative when he engaged in the conduct for which he was disciplined. Principles governing proper disposition of such cases are well established, as reported in a number of prominent arbitration decisions.

In Love Brothers, 45 LA 751, 756 (1965), Arbitrator Louis E. Solomon pointed out that a Union representative, in his official capacity interacting with his management counterpart during Grievance handling, has certain latitude to engage in conduct which might, in other circumstances, be arguably considered disrespectful or even insubordinate. While expressly declining to endorse profanity or contemptuous demeanor, Arbitrator Solomon pointed out that management may not justifiably discipline a Union representative simply because he "is not amenable, or 'stands up' for the rights of Union employees, unless his defiance results in willful disobedience or disregard for rules and regulations, or creates such a disruptive influence that the shop moral is

substantially adversely affected." See also Dallas Morning News, 45 LA 258 (James C. Giles, 1965). A more extended statement of the operative principles may be found in Air Canada, 77 LA 172, 180 (Howard D. Brown, 1981), citing Burns Meats Limited and Canadian Food and Allied Workers, Local P-139 (Arbitrator Michael Picher, June 1980):

While generally a company may be entitled to expect a degree of faithfulness and respect from employees in statements which they make after working hours it is clear that an employer cannot hold employees to a standard of unquestioning loyalty, especially where union business is concerned. It would be unrealistic not to expect that a union steward will, whether in a speech or a newsletter, occasionally express strong disagreement with the company and its officers and do so in vivid and unflattering terms. Being at the forward edge of encounters with management the shop steward becomes particularly vulnerable in the area of discipline...

If union stewards are to have the freedom to discharge their responsibilities in an adversarial collective bargaining system they must not be muzzled into quiet complacency by the threat of discipline at the hands of their employer. In our view the principles developed by the arbitral awards canvassed above ... disclose the standard to be applied. The statements of union stewards must be protected but that protection does not extend to statements that are malicious in that they are knowingly or recklessly false. The privilege that must be accorded to the statements of union stewards made in the course of their duties is not an absolute license or an immunity from discipline in all cases.

On the latter point, as veteran Arbitrator Fred Witney points out in Owens-Illinois, Inc, 73 LA 663, 668 (1979), the special immunity enjoyed by Union representatives acting within the scope of their legitimate role is not without limits:

As distasteful as the words he used may be, the fact remains that the Grievant was not in the status of an employee when he called the Division Manager a fool and a liar. At that time the employer and employee relationship did not exist. Rather the relationship was between a Company and Union representative, the matter under consideration being a grievance filed by employees whom the Grievant represented in his official capacity as a Union Steward. They stood as equals while negotiating the grievances.

* * *

It is recognized, of course, that union representatives as such are not free from discipline. Just being a union representative does not confer special immunity regardless of conduct. Like other arbitrators, the instant Arbitrator has sustained

discipline, including discharge, of union representatives even though the incidents leading to the discipline were directly or indirectly related to the persons' status as union representatives. Cases where special immunity does not apply involve conduct which interferes with the employers' right to operate their plants. Union officials are properly disciplined under circumstances such as when they participate and encourage wild-cat strikes, tell employees not to obey orders issued by supervisors, refuse themselves to obey management orders, harass management people, and strike or threaten supervisors with physical violence.

[For a number of additional cases establishing the outer limits of permissible conduct by Union representatives, see footnotes 2 and 3 in the Owens-Illinois, Inc. case.]

Application of these principles to the present case leads to the inescapable conclusion that Carrier had just cause to discipline P. D. Arnold for making a harassing telephone call to the home of Mr. Watkins. Up to that point, Grievant had not yet engaged in behavior which the Board would find just cause for disciplinary action. Profanity and "shop talk" are not uncommon in such settings and situations and Grievant was acting for the most part in his role as Union representative in handling Mr. Krantz's grievance. However, the stunt of waking Watkins up from his rest with a harassing telephone call was irresponsible, indefensible and outside the protected scope of Grievant's status as Union representative. In short, there is a line beyond which Union representative status is no excuse and in the present case Mr. Arnold crossed over that line.

We conclude that although Carrier had just cause to discipline Grievant for his behavior to Mr. Watkins, it lacked just cause to discipline him for aggressive presentation to Mr. Swanson of the position of the Union and the Employees regarding required rest. We find that at least in some part, the conduct for which Grievant

received a forty-five (45) day suspension was protected activity within the scope of his capacity as official Union Representative. We should not be heard to applaud Grievant's intemperate use of profanity or his escalation of the grievance discussion into a shouting match. Nor does the record show that Trainmaster Swanson provoked such an outburst or responded in kind. On the other hand, it cannot be overlooked that Grievant's behavior was perhaps out of character. While not justified, his outburst is at least explained by his extreme fatigue. In that connection, we find compelling the testimony of Engineer V. J. McCabe:

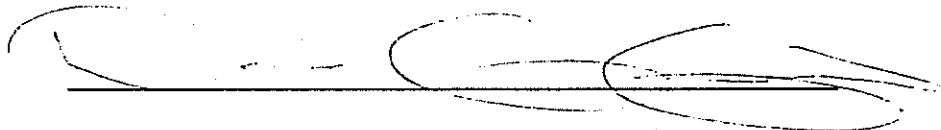
Yes, I can tell you this, Mr. Arnold was definitely, without a doubt...disturbed. He was very tired. When I saw the man at 5:30 in the morning in, in the Cavanaugh's Coffee Lounge, Rm 337, I saw him with two chairs pulled together, his shoes off, sleeping in his dirty clothes. And that was around five, a little after 5 AM, that would be Pacific time and, ah, he and, ah, Mr. Krantz were to dead head with my crew and myself to Missoula. And he, in turn, tired to sleep in the van on the way to Missoula and I understand that he put some thirteen plus hours in dog catching the day prior. So, yeah, he was irritable. And I think that was the whole jest...I'm sure that everybody involved that day did understand that the reason, that if there was some kind of a blow up or as, some kind of, ah, argument argumentive nature from Mr. Arnold, he was pretty tired.

Finally, we note that Grievant made what appears to be a sincere apology to Mr. Swanson for his outburst.

In all of the facts and circumstances, we conclude that the Company had just cause to discipline P. D. Arnold but the forty-five (45) day suspension without pay was unreasonably harsh. For all of the reasons set forth in the Opinion, we shall reduce that penalty by fifteen (15) days to a thirty (30) day suspension.

AWARD OF THE MRL/BLE BOARD OF ARBITRATION

- 1) MRL did have just cause to discipline P. D. Arnold for his conduct on May 5, 1992. However the penalty imposed by Carrier was unnecessarily harsh in all of the circumstances.
- 2) Accordingly, the disciplinary suspension without pay is reduced from forty-five (45) days to thirty (30) days.
- 3) MRL shall make Grievant whole for fifteen (15) days' suspension without pay.
- 4) MRL shall implement this award within thirty (30) days of its execution by a majority of the Board.



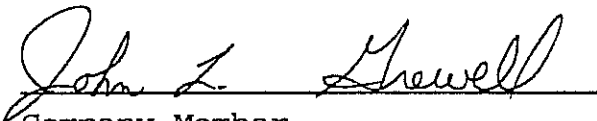
Dana Edward Eischen, Chairman

Signed at Ithaca, New York on February 11, 1994



Union Member

Signed at Springfield Mo.
on 3/11/94



Company Member

Signed at Laurel, Mt
on February 14, 1994