NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 122
and	)
	) Award No. 110
UNION PACIFIC RAILROAD COMPANY	)
	)

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

Hearing Date: June 4, 2007

STATEMENT OF CLAIM:

The Organization requested that discipline be stricken from Claimant Mark A. Roth's personal record and that he be returned to his prior status under Behavior Modification. Also, that he be made whole as if there had been no discipline issued and no suspension enforced. That Mr. Roth be paid for all hours that he would have worked absent the suspension, including overtime and be compensated for his time not paid on the day of the hearing on August 16, 2006

FINDINGS:

Public Law Board No. 6302 upon the whole record and all of 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.

By letter dated June 30, 2006, Carrier notified Claimant that he allegedly failed to have a proper job briefing on June 23, 2006, which resulted in the DC-30 rail test attempting to set on the main track in front of the UP 5469 in the vicinity of MP 746 on the Rawlins Subdivision. The letter proposed discipline at UPGRADE Level 3 and gave Claimant the option of exercising his right to a formal hearing or participating in the Behavior Modification Program. Claimant opted for a formal hearing.

By letter dated July 17, 2006, Claimant was notified to report for a formal investigation on July 26, 2006 The notice repeated the charge contained in the June 30, 2006, letter. The hearing was postponed to and held on August 16, 2006. On August 25, 2006, Claimant was advised that he had been found guilty of the charge and had been assessed discipline at Level 3, a

five-day suspension.

Carrier contends that the Board lacks jurisdiction over the claim because the claim failed to specify any Agreement rule claimed to have been violated. Carrier is correct that no Agreement rule was expressly cited in the claim or otherwise during handling on the property. The claim alleged that Claimant was denied a fair hearing, that Carrier failed to prove the charge and that the penalty imposed was excessive. That was the claim handled on the property. Both parties engaged on the claim as they would any other claim that discipline violated the Agreement's discipline rule, i.e. Rule 48. There is no question that although the claim did not expressly cite Rule 48, the parties understood that Rule 48 was at issue. Carrier's argument elevated form over substance to a level that we do not believe is contemplated within the Agreement.

Carrier has cited a number of awards in support of its position that the Board lacks jurisdiction. We see no need to discuss them in detail. It is sufficient to observe that none of the awards cited by Carrier approximates the situation before us, i.e., a claim appealing discipline that was processed on the property in the same manner as any other claim appealing discipline, analyzed in accordance with the Agreement's discipline rule and where to dismiss the claim for failure to expressly cite the Rule number would serve no purpose other than to elevate form over substance. Accordingly, we turn to the merits of the claim.

The critical issue is whether Carrier proved the charge by substantial evidence. The record reflects that on June 23, 2006, Claimant was working as Assistant Foreman on Gang 5497. Claimant's gang was working with the crew of Detector Car 30. They were to test track up to Bitter Creek. They were advised to wait for two freight trains to pass and to obtain track after train UP 5469 had passed. The Welding Foreman had driven to the location of the Detector Car for a job briefing because he could not understand a radio transmission. The ARASA Supervisor with the Detector Car advised the Welding Foreman that they were to wait until the trains passed and then to get a track permit to conduct their testing. They decided that the Welding Foreman would move his car closer to the Interstate while they were waiting and the Detector Car crew would follow and bring him back to the crossing. As they were returning to the crossing, they observed a train pass but could not see its number. The ARASA Supervisor radioed Claimant. The contents of their conversation are in dispute and the resolution of that dispute determines whether Carrier proved the charge by substantial evidence.

The ARASA Supervisor testified that he asked Claimant which train had passed and Claimant replied that it was the UP 5469 and the Supervisor reconfirmed this with Claimant. Claimant testified that the Supervisor asked him which train they were waiting on and Claimant told him UP 5469.

The ARASA Supervisor advised the Welding Foreman that the UP 5469 had passed and the Welding Foreman obtained a track permit. In fact, the train that had passed was not the UP 5469. As the Detector Car gang was setting the Detector Car on the main track, they noticed a headlight about two miles away. Fortunately, they were able to get clear of the track before the

UP 5469 passed by them.

The Organization's attack on the evidence against Claimant proceeds along two lines. First, it argues that Claimant's version of the conversation is the more credible one, i.e. that the ARASA Supervisor did not in fact ask Claimant which train had passed. Carrier, however, points out that the Welding Foreman corroborated the ARASA Supervisor's version as to what the Supervisor asked Claimant and the Supervisor's report of Claimant's response. Thus, substantial evidence supports the finding on the property that the Supervisor in fact asked Claimant what train had just passed. However, this does not necessarily mean that Carrier proved the charge by substantial evidence.

The Organization's stronger argument is that regardless of whether the ARASA Supervisor asked Claimant which train had passed, because of problems with radio transmission, Claimant understood the ARASA Supervisor to have asked which train they were waiting on and Claimant accurately replied UP 5469. In this regard, the Welding Supervisor's corroboration of the ARASA Supervisor's testimony cannot impeach Claimant's claim to have heard a different question from what the ARASA Supervisor actually asked.

There are two reasonable conclusions that could be drawn from the evidence. Either Claimant misheard the ARASA Supervisor's question because of static or other problems with the radio transmission, or Claimant's testimony that he heard the ARASA Supervisor ask which train they were waiting on was not credible. As an appellate body that did not observe the witnesses, particularly that did not observe Claimant's demeanor while testifying, we are in a much poorer position than the hearing officer to determine which of these two reasonable interpretations of the evidence is more likely to be accurate. Therefore, we defer to the determination made on the property. The determination on the property that Claimant's testimony was not sufficiently credible to warrant a finding that Claimant actually heard an inquiry as to which train they were waiting on, rather than an inquiry as to which train had just passed, was reasonable. Accordingly, we hold that Carrier proved the charge by substantial evidence.

AWARD

Claim denied.

Martin H. Malin, Chairman

D. A. Ring
Carrier Member 12-14-07

D. D. Bartholomay
Employee Member 12-14-07

Dated at Chicago, Illinois, December 6, 2007