NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 2
and	)
	) Award No. 14
UNION PACIFIC RAILROAD COMPANY	)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
C. M. Will, Carrier Member

Hearing Date: June 25, 2002

STATEMENT OF CLAIM:

1. The dismissal Mr. M. A. Sotomayor for alleged failure to comply with On-Track Safety Rule 136.3.1 in the Chief Engineer Bulletin, while working as EIC on October 11, 2000, was without just and sufficient cause, based on unproven charge and in violation of the Agreement.

2. As a consequence of the violation referred to in Part (1) above, Mr. M. A. Sotomayor shall be reinstated to service with seniority and all other rights unimpaired, and shall be compensated for all wage loss suffered.

FINDINGS:

Public Law Board No. 6402, upon the whole record and all 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.

On November 16, 2000, Carrier notified Claimant to report for an investigation on December 13, 2000, in connection with his alleged violation of On-Track Safety Rule 136.3.1, by his allegedly failing to give a follow-up job briefing while working as Employee In Charge (EIC) on October 11,2000. The hearing was rescheduled for and held on December 7, 2000. On January 9, 2001, Carrier informed Claimant that he had been found guilty of the charge and dismissed from service.

The Organization has raised a number of procedural objections. None provide a basis for disturbing the discipline. Only one requires specific discussion.

On October 27, 2000, Carrier notified Claimant to report for an investigation on November 16, 2000, regarding his alleged failure to comply with On-Track Safety Rule 136.3.1 on September 11, 2000. The hearing was opened on November 16, 2000, and adjourned when it became apparent that no such incident occurred on September 11, 2000. Carrier then sent the notice of investigation at issue before this Board, alleging that the incident occurred on October 11, 2000. The Organization contends that Carrier subjected Claimant to double jeopardy. We do not agree. The November 16, 2000, investigation concerned activity on September 11, 2000. When it became apparent that no such activity occurred the investigation was adjourned. The instant investigation concerned activity on October 11, 2000. There is no double jeopardy here.

The crucial issue is whether Carrier proved the charge by substantial evidence. The record reflects that on October 11, 2000, Claimant was working as EIC. As EIC, he was responsible for clearing trains to operate within work limits and ensuring that they did so safely. Three employees testified that on the day in question, Claimant cleared a train while the employees were still fouling the track and that Claimant failed to hold a job briefing even though one was required whenever working conditions changed. Claimant testified that he did hold the required job briefing.

The record contains no evidence that any of the three employees who testified against Claimant harbored any animus toward him or had any other reason to fabricate their testimony. There is no reason in the record to believe that the employees were mistaken about such a basic fact as whether Claimant gave the follow-up job briefing. Although Claimant testified that he did give the job briefing, as an appellate body we generally defer to credibility determinations made on the property. We see no reason to depart from our general deference in this case. Accordingly, we conclude that Carrier proved the charge by substantial evidence.

We next consider the penalty that was imposed. We note that in Case No. 21, Award No. 11, we sustained the Organization's claim arising out of an UPGRADE Level 4.5, sixty day suspension imposed on Claimant on May 26, 2000. Disregarding that suspension, we note that, on October 4, 2000, Claimant signed a waiver and accepted a Level 4.5, sixty day suspension for violating Rule 1.03.01. Consequently, the validity of that suspension is not subject to collateral attack in this proceeding. Given Claimant's disciplinary record and the severity of the instant offense, we find that the penalty is not arbitrary, capricious nor excessive.

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AWARD

Claim denied.

Martin H. Malin, Chairman

C. M. Will,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, November 20, 2002.