NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 44
and)
) Award No. 30
UNION PACIFIC RAILROAD COMPANY)

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

Hearing Date: March 22, 2004

STATEMENT OF CLAIM:

1. The discipline [Level 2 requiring one (1) day of alternate assignment with pay to develop a corrective action plan] imposed upon Mr. E. L. Simon for his alleged violation of Union Pacific Rule 1.13, in conjunction with alleged failure to comply with instructions to wear proper personal protective equipment while fueling equipment on September 5, 2002 was arbitrary, capricious, on the basis of unproven charges, and in violation of the Agreement (System File MW-03-24/1344336 MPR).

2. As a consequence of the violation referred to in Part (1) above, the Carrier shall remove all references to Mr. E. L. Simon's personal record and he shall be compensated for eight (8) hours' pay at his respective straight time rate of pay for attending the investigation held on October 16, 2002 and for any and all expenses incurred in connection therewith.

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 September 11, 2002, Carrier notified Claimant to appear for an investigation on October 16, 2002, concerning the charge that, on September 5, 2002, he failed to comply with instructions to wear personal protective equipment while fueling equipment. The hearing was held as scheduled. On November 8, 2002, Claimant was notified that he had been found guilty of the charge and assessed discipline of UPGRADE Level 2, one day of an alternative assignment with pay to develop a corrective action plan.

The Organization has advanced numerous procedural arguments. We have reviewed all of those arguments and the transcript and find that Claimant was afforded a fair and impartial hearing and that none of the procedural arguments provides a basis for setting aside the discipline. Only two of the arguments merit further discussion.

The Safety Coordinator was the sole witness against Claimant. When the Safety Coordinator completed his testimony, the hearing officer began to question Claimant. The Organization objected that the Safety Coordinator had not been sequestered. The hearing officer refused to sequester the Safety Coordinator. Frankly, we do not understand why the hearing officer refused to sequester the Safety Coordinator. The fact that the Safety Coordinator was the only witness against Claimant does not diminish the importance of sequestration as a safeguard against one witness's testimony influencing another's.

However, as developed below, the crucial issue concerning the charge involved Claimant's failure to wear a safety shield while dispensing fuel into two cans. Although the Safety Coordinator was recalled as a witness after Claimant had testified in his presence, the questions posed to the Safety Coordinator concerned the actions of a Machine Operator in dispensing hydraulic fluid from the fuel truck into his machine, i.e. the testimony did not concern Claimant's failure to wear the safety shield while dispensing fuel into the cans. Accordingly, we do not find that the failure to sequester the Safety Coordinator prejudiced Claimant's case or otherwise provides a basis for overturning the discipline. Nevertheless, we admonish Carrier that its hearing officers should sequester witnesses when requested to do so and when there is no substantial reason to deny the request.

The second procedural objection that merits discussion occurred when Claimant was cross-examining the Safety Coordinator. Claimant asked a question which the Safety Coordinator answered. Claimant then made a statement that he disagreed with the Safety Coordinator's answer. The hearing officer properly cut Claimant off, advising him that he was to confine himself to asking questions and that he should save his statements for later in the proceeding. He then asked his co-hearing officer whether he had any questions of the Safety Coordinator. The Organization contends that the hearing officer cut short Claimant's cross-examination, violating his right to a fair investigation.

It certainly would have been more polite if the hearing officer after admonishing Claimant to confine himself to asking questions had asked him if he had any further questions to ask. However, when the hearing officer turned the questioning over to the co-hearing officer, neither Claimant nor his representative objected or otherwise indicated that Claimant had any further questions to ask. Neither Claimant nor his representatives were bashful about asserting Claimant's rights during the hearing. With no indication that Claimant was precluded from asking any questions that he wanted to ask, we cannot say that the hearing officer's failure to inquire whether he had further questions of the Safety Coordinator denied Claimant a fair hearing.

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Turning to the merits of the case, we note that Claimant testified that the policy required employees to wear a safety shield while dispensing fuel and he began dispensing the fuel wearing the safety shield. He explained that the shield fell off. He further explained that the shields do not fit securely into the slots in the helmets. Consequently, they stay on while the wearer is standing upright but fall off when the wearer bends over. Claimant testified that it was necessary to secure the shield with small pieces of wire but that he had obtained a new shield because his old one was scratched and dirty and he had not had the opportunity to secure it. But it was Claimant's responsibility to work safely and, when the face shield fell off, it was his responsibility to secure it so that he could wear it while fueling the one-gallon cans. We conclude that Carrier proved the charge by substantial evidence.

The penalty imposed was in keeping with Carrier's UPGRADE policy. The penalty was not arbitrary, capricious or excessive.

AWARD

Claim denied.

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, July 23, 2004