NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 54
and	)
	) Award No. 34
UNION PACIFIC RAILROAD COMPANY	)

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

Hearing Date: November 15, 2004

STATEMENT OF CLAIM:

1. The dismissal of Machine Operator D. L. Litzsey for his alleged carelessness and negligence of his safety when he failed to lockout/tagout the SDAG 9502 prior to making repairs which resulted in a personal injury to his hand was without just and sufficient cause and excessive and undue punishment (System File MW-04-15/1384763 D).

2. Machine Operator D. L. Litzsey shall now be reinstated to service with seniority and all other rights unimpaired and 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 September 23, 2003, Carrier notified Claimant to appear for an investigation on October 3, 2003, concerning his alleged failure to lockout/tagout the SDAG 9502 before making repairs on September 17, 2003. The hearing was postponed to and held on November 12, 2003. On October 31, 2003, Claimant was notified that he had been found guilty of the charge and dismissed from service.

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 one requires elaboration.

The Track Supervisor was the sole witness against Claimant. When the questioning of the Track Supervisor concluded and the questioning of Claimant began, the Organization protested the failure to sequester the Track Supervisor. The Hearing Officer overruled the Organization's objection because the Track Supervisor was the only witness against Claimant. The Hearing Officer indicated that sequestration would be in order only if there were multiple witnesses.

We disagree with the Hearing Officer's ruling. The purpose of sequestration is to protect against the testimony of one witness influencing, deliberately or subliminally, the testimony of another. Although questioning of the Track Supervisor had been completed, he remained subject to recall. Sequestration would protect against the Track Supervisor's testimony when recalled being affected by his having heard Claimant's testimony.

We note that in court and in de novo arbitration hearings, each party is entitled to the presence of one technical advisor throughout the hearing even though that person may testify after hearing the testimony of other witnesses. This approach represents a balance between the desire to protect witness testimony from being influenced by the testimony of other witnesses and the need of each party's advocate for technical advice during the proceeding. Railroad investigations, however, are very different. The Hearing Officer is not an advocate for any position but is charged with the responsibility of providing a fair and impartial hearing and determining the outcome based on the facts adduced at the hearing. The Hearing Officer has no need for a partisan technical advisor. There simply is no justification for a failure to sequester even one witness upon request.

In the instant case, however, the Track Supervisor was never recalled as a witness. Consequently, Claimant's testimony had no influence of the Track Supervisor's testimony because there was no testimony from the Track Supervisor after he observed Claimant's testimony. Therefore, the failure to sequester the Track Supervisor did not prejudice Claimant's case and does not provide a basis for setting aside the discipline.

The record does reflect that during Claimant's testimony, the Track Supervisor passed notes to the Hearing Officer. We agree with the Organization that such conduct was highly improper. However, the Hearing Officer made it clear that he did not read the notes, but merely pushed them back at the Track Supervisor. Although the General Chairman accused the Hearing Officer of reading the notes, we can find no basis in the record for disbelieving the Hearing Officer on this matter. Accordingly, we conclude that the Track Supervisor's improper conduct did not prejudice Claimant's right to a fair and impartial hearing.

Claimant admitted that he did not properly lockout/tagout the machine before placing his hand in the feeder mechanism of a spiker to release a jammed spike. Accordingly, Carrier proved the charge by substantial evidence.

Claimant maintained that Carrier had not issued him a hook or other tools for releasing jammed spikes. Assuming that Claimant had no such tools, that still would not justify his failure

to follow lockout/tagout procedures before placing his hand in harm's way. Claimant testified that no lockout/tagout equipment had been issued to him. However, the Track Supervisor testified that the equipment was located on the machine. As an appellate body, we do not observe the witnesses testify and are in a relatively poor position to assess their credibility. Consequently, we generally defer to credibility determinations made on the property. In the instant case, we see no reason to deny deference to the determination made on the property to credit the Track Supervisor's testimony over that of the Claimant.

Claimant committed a very serious safety violation. Given the absence of mitigating factors and the consistency of the penalty with Carrier's UPGRADE, we are unable to say that dismissal was 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, January 28, 2005