

PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

UNION PACIFIC RAILROAD COMPANY

Case No. 7

Statement of Claim: Claim of the System Committee of the Brotherhood that:

- (1) The Level 1 Discipline (Letter of Reprimand) should be removed *from Claimant C. P. Farrell's record when he failed to follow instructions given by his immediate supervisor.*
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall have the Level 1 Discipline expunged from his record and he shall be reimbursed for any and all out-of-pocket expenses he may have incurred.

Background

On October 10, 2001, Claimant C. P. Farrell, while engaged as a Steelman in cutting anchor bolts near Patrick Nevada, was overcome by toxic fumes. He was taken to a hospital in Reno, treated with oxygen and released to return to work.

Upon investigation, it was learned that Claimant had failed to wear a respirator while working, and he was charged with violating Union Pacific Rule 70.1 (Safety Responsibilities) and 79.6 (Ventilation). Following a hearing, which was held by mutual agreement on January 9, 2002, the charges were sustained, and Claimant was assessed a Level 1 Discipline (reprimand) under the Carrier's UPGRADE policy.

At the hearing, Claimant admitted that he did not wear a respirator when torch cutting bolts on October 10, 2001. He also stated that he knew he was required to wear

a respirator under Union Pacific's safety rules. Claimant's defense was that he did not have a personal respirator even though he had requested to be fit-tested for one.

Claimant's foreman, A.B. Cundiff, did not directly order Claimant to use a respirator. It is undisputed, however, that he told Claimant there was a brand new respirator in the truck and that it was available for Claimant to use. In fact, at the job briefing that morning, Cundiff told his crew that "if anybody needed a respirator, there was one on hand to use." (Tr. 36).

Contentions of the Parties

The Carrier contends that Claimant fully understood that Company policy required him to wear a respirator. Moreover, the use of respirators was a result of the BMWF encouraging the railroads to better protect their employees. In the Carrier's view, it is unreasonable for the Organization to urge the Carrier to adopt safety rules for workers and then object when an employee is disciplined for failing to adhere to those rules.

The Organization contends that Claimant's supervisor did not require him to wear a respirator and that Claimant had never been fit tested and given a respirator. Claimant was guilty only of following his foreman's orders. In fact, the Organization emphasizes that Cundiff was disciplined for not requiring Claimant to wear a respirator along with himself. The Organization asks why Claimant should have been expected to wear a respirator when the foreman did not mandate it.

Additionally, the Organization submits that Claimant was afraid to challenge his foreman's direction. Had Claimant refused to perform his assignment because he lacked a respirator, he might well have subjected himself to a charge of insubordination.

Opinion

Undoubtedly, foreman Cundiff was lax in not making sure that Claimant wore a respirator when he was cutting anchor bolts. For his neglect of duty, Cundiff was charged with endangering his crew.

Cundiff's lapse in judgment did not excuse Claimant, however, from wearing the respirator when he knew that this equipment was absolutely required for the task he was performing. Cundiff told Claimant that a brand new respirator, still wrapped in plastic, was in his truck and available for use. While Claimant sought to justify his behavior by asserting that he had not been fit-tested for a personal respirator, the fact is that Claimant rejected the new one in Cundiff's truck without even attempting to try it on and use it.

As to the Organization's suggestion that Claimant would have suffered reprisals if he had challenged his foreman's orders, there is no proof in the Record that Claimant had any reason to be fearful about raising a safety issue. The Carrier acknowledges Claimant's obligation to challenge orders that are truly unsafe. Furthermore, there is no evidence that Claimant's foreman gave him a direct order to work without a respirator. To the contrary, Cundiff testified that if Claimant had tried on the available respirator and it did not fit, Claimant would not have had to do the job. (Tr. 49-50).

The credible evidence in the Record supports the conclusion that Claimant used the absence of his own personal respirator as an excuse to violate an important safety rule. As a result of not wearing necessary safety equipment, he was overcome by toxic fumes. Hence, his own experience underscores the validity of the Carrier's safety rule regarding respirators.

Moreover, the importance of wearing respirators was well understood on the property. This was recognized in *Public Law Board 270*, which emphasized that the BMWE had urged Union Pacific to establish a Respiratory Protection Program consistent with OSHA standards. Referee Arthur T. Van Wart stated:


....A study conducted on the Norfolk Southern by NIOSH determined that employees of the Maintenance of Way who were working around ballast dust were exposed to silica. Such report caused the BMWE President, Mac Fleming, to write to the Union Pacific Chief CEO, Dick Davidson, expressing his concern and urging the establishment of a Respiratory Protection Program on the UP in accordance with OSHA standards.



Subsequently, the Carrier on December 29, 1992 issued instructions for mandatory use of respirator protection....The policy was of a joint beneficial concern to the Carrier and to the Organization to insure that the employees wear the protection (safety equipment) where deemed necessary.

Given this history, and Claimant's admitted awareness of the requirement to wear a respirator for the task he performed on October 10, 2001, he acted irresponsibly by working without one. His failure to at least try on the respirator that was offered suggests that he did not make even a good faith effort to follow the rules. The Carrier's imposition of Level 1 discipline was not inappropriate; nor was it unduly harsh or arbitrary.

Award

The claim is denied.


CARRIER MEMBER
DATED 7-16-03


JOAN PARKER, Neutral Member

ORGANIZATION MEMBER
DATED 7-16-03