

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 19
 and)
) Award No. 19
 UNION PACIFIC RAILROAD COMPANY)
)

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: May 1, 2009

STATEMENT OF CLAIM:

1. The Level 3 [five (5) day suspension] imposed upon Shelly J. Culloty for violation of General Code of Operating Rules 1.13 (Reporting and Complying with Instructions), 71.1 (General Guidelines), 71.4 (Hard Hats) and 71.5 (Eye Protection) in connection with failure to wear personal protective equipment on October 9, 2007 was based on unproven charges and is unjust, unwarranted and in violation of the Agreement (Carrier's File 1494178 SPW).
2. As a consequence of Part 1 above, we request that the Level 3 be expunged from Ms. Culloty's personal record and that she be compensated for all wages and benefits lost as a result of her five (5) day suspension.

FINDINGS:

Public Law Board No. 7258 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.

Claimant was notified by letter dated October 17, 2007 to report for investigation to develop facts and place responsibility, if any, concerning the Carrier's charge that Claimant failed to follow instructions and to wear personal protective equipment while on duty October 9, 2009. The parties mutually agreed to a postponement of the investigation until November 9, 2007, at which time the investigation was held. Decision was rendered by letter dated November 26, 2007 finding Claimant guilty of all charges and assessed a level 3, five (5) day suspension. The Organization filed claim refuting Carrier's decision on December 13, 2007 which was

denied on February 5, 2008. That denial was appealed on March 25, 2008 and the appeal was denied May 12, 2008. The matter was discussed in conference July 9, 2008 without resolution.

It is undisputed that Claimant was observed by the Manager of Bridge Maintenance at a work site on October 9, 2007 not wearing required personal protective equipment (PPE). The manager first testified that Claimant was in the back of a truck when he arrived at the job site and was not wearing a hard hat, safety glasses or a safety vest. The Manager subsequently testified that Claimant was initially observed behind the truck about 40 feet away. The manager stated that he did not have a clear explanation of why Claimant did not have the PPE on. The manager recalled that he was visiting the job site to have one-on-one meetings with three of the members of the crew that Claimant was in, and that upon arriving at the job site that the crew's leader walked from the work trucks where the crew was assembled and began giving the manager a job briefing. The manager did recount that the next time he saw Claimant, moments later, she was wearing all required PPE. Both the manager and Claimant agreed and testified that there was a one-on-one meeting between the manager and the Claimant later in his visit and that nothing was discussed in regard to Claimant's failure to wear PPE upon manager's initial observation.

Claimant, when questioned at the investigation, explained that the crew she was in had been cutting creosote-impregnated handrail from a bridge, collecting the pieces removed from under the bridge, loading it into the back of the boom truck and removing it to be unloaded into a track-side refuse container. Upon completion of those tasks, the crew members were at the trucks removing the contaminated wood chips and sawdust from their clothing and skin as is recommended in the Material Safety Data Sheet for creosote entered into the investigation record. Claimant testified she had debris and creosote and all the wood chips "all over me and inside my clothing." There was evidence presented that to get to the undergarments you had to take off the PPE. Claimant testified that she was taking care of the debris under her clothing when the manager drove up to the work site. Claimant testified that she then asked her supervisor if she could use his boom truck and go to the bathroom. Claimant stated that she then went to the bathroom and removed more of the wood chips from her clothing, returned and went back to work. Eight days later Claimant was charged with violation of Rules 1.13 (Reporting and Complying with Instructions), 71.1 (General Guidelines), 71.4 (Hard Hats) and 71.5 (Eye Protection).

Clearly, Claimant did not have her hard hat or safety glasses on when her manager drove up to the job site. While that would appear to be a bright line violation of Rules 71.1, 71.4 and 71.5, just as clearly, Claimant had her PPE removed for a plausible reason in full view of her immediate supervisor, to remove creosote tainted sawdust, wood chips and debris from her skin and clothing pursuant to Exhibit "J", General Considerations for Wood Treated with Creosote. It is apparent that the crew involved was faced with a Hobson's Choice: In order to comply with the General Consideration's recommendations, it was necessary to momentarily remove their PPE in violation of Rules 71.1, 71.4 and 71.5. There was no evidence presented that convinces us that Claimant was not in compliance with the instructions of her supervisor, who was standing in close proximity to the crew as they dusted themselves off.

We find that the imposition of a Level 3, five day suspension is excessive and an abuse of

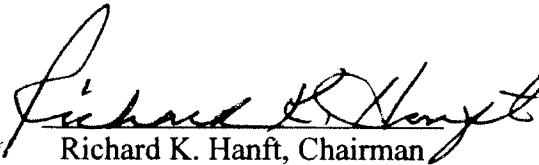
Carrier's discretion considering the facts of the case before us. (See Fourth Division Award 4665, [Zusman]). In regard to Rule 1.13, we find no record evidence to support the charge that Claimant was not in compliance with the instructions of her immediate supervisor. Accordingly, the discipline must be overturned.

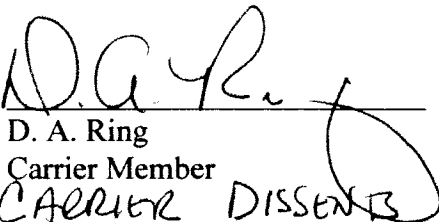
AWARD

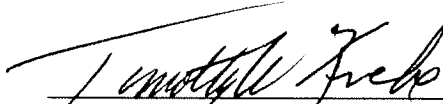
Claim sustained in accordance with the findings.

ORDER

The Board, having determined that an award favorable to the Claimant be made, hereby orders the Carrier to make the Award effective within thirty (30) days following the date two members of the Board affix their signatures hereto.


Richard K. Hanft, Chairman


D. A. Ring
Carrier Member
CARRIER DISSENTS
Dated at Chicago, Illinois, May 29, 2009
June 15, 2009


T. W. Kreke
Employee Member
June 15, 2009