

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 5905**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES** )  
 ) Case Nos. 28 & 29  
and )  
 ) Award No. 26  
**ELGIN, JOLIET AND EASTERN RAILWAY COMPANY** )

Martin H. Malin, Chairman & Neutral Member  
D. D. Bartholomay, Employee Member  
J. F. Ingham, Carrier Member

Hearing Date: June 25, 2002

**STATEMENT OF CLAIM:**

Case No. 28:

1. The discipline [thirty (30) demerits] assessed Welder E. C. Feagan for allegedly assuming the attitude of sleep at Van Look Diamonds at approximately 12:15 P.M. on September 5, 2001 was without just and sufficient cause and based on an unproven charge (System File GC-25-01/UM-33-01).
2. As a consequence of the violation referred to in Part (1) above, Welder E. C. Feagin shall now have the demerits removed from his record.

Case No 29:

1. The discipline [sixty (60) demerits] assessed Welder E. C. Feagan for his alleged failure to provide protection for Welder Foreman D.C. Shapely while he was welding at Van Loon Diamonds at approximately 12:15 P.M. on September 5, 2001 was without just and sufficient cause and based on an unproven charge (System File GC-26-01/UM-34-01).
2. As a consequence of the violation referred to in Part (1) above, Welder E. C. Feagin shall now have the discipline assessed rescinded and any mention of this discipline removed from his record.

**FINDINGS:**

Public Law Board No. 5905, 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.

These two cases arose out of the same incident. On September 5, 2001, Claimant was assigned to provide protection for the Welder Foreman, who was performing rail welding. The Welder Foreman alleged that Claimant assumed the attitude of sleep around 12:15 p.m. The allegation led to two separate investigations: one in which Claimant was charged with assuming the attitude of sleep and one in which Claimant was charged with failure to provide roadway protection. Following the hearings, Claimant was found guilty of both charges and assessed thirty demerits for the sleeping charge and sixty demerits for the failure to provide protection charge, for a total of ninety demerits for the same incident.

The records of the two investigations are substantially the same. The Welder Foreman testified that Claimant began to doze off and appeared to be falling asleep. The Welder Foreman further testified that he had Claimant get up and walk around to wake up. Claimant testified and denied that such incident took place. Thus, Claimant and the Welder Foreman told conflicting stories. Proof of the charges turned on the relative credibility of Claimant and the Welder Foreman.

As an appellate body, we are not in a position to judge the credibility of the witnesses. Rather, we generally defer to credibility determinations made on the property because the hearing officer, having heard the testimony and observed the demeanor of the witnesses, is in the best position to assess credibility. We see no reason to overturn the decision made on the property to credit the Welder Foreman's testimony over Claimants. Therefore, we find that Carrier proved the charges by substantial evidence.

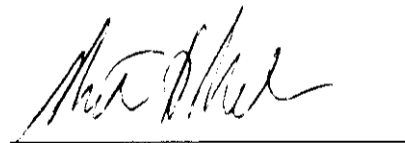

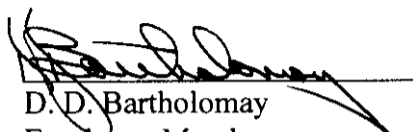
For this one incident, Carrier assessed a total of ninety demerits. Based on the peculiar facts presented and without setting a precedent for future cases, we find that the penalty assessed was excessive. We shall order Carrier to reduce the ninety demerit assessment to thirty demerits.

**AWARD**

Claim sustained in accordance with the Findings.

**ORDER**

The Board, having determined that an award favorable to 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

  
Martin H. Malin, Chairman  
J. F. Ingham  
Carrier Member  
D. D. Bartholomay  
Employee Member

Dated at Chicago, Illinois, December 11, 2002.