

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 5905**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES** )  
 ) Case No. 33  
and )  
 ) Award No. 29  
**ELGIN, JOLIET AND EASTERN RAILWAY COMPANY** )

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

Hearing Date: December 11, 2003

**STATEMENT OF CLAIM:**

1. The discipline (five day suspension and sixty demerits) assessed L. J. Aguilar for allegedly violating Rule 1.15 by failing to follow a directive to work overtime on July 25, 2002 was without just and sufficient cause and based on an unproven charge (System File UM-13-02/GC-11-02).
2. As a consequence of the violation referred to in Part (1) above, L. J. Aguilar shall now be compensated for all wage loss suffered and this matter shall be removed from his personal 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.

On August 1, 2002, Carrier directed Claimant to report for an investigation on August 7, 2002, concerning his alleged violation of Rule 1.15 by failing to comply with an order to work overtime on July 25, 2002. The hearing was held as scheduled. On August 9, 2002, Carrier notified Claimant that he had been found guilty of the charge and assessed sixty demerits and suspended for five days.

The record reveals that on July 25, 2002, the Track Supervisor received a call reporting a broken rail at the U.S. Steel Coke Plant. The Track Supervisor required four laborers to work overtime to replace the rail. He obtained one volunteer and determined to force the three least senior laborers, which included Claimant. He directed the Foreman to tell Claimant that he would have to stay late.

The Foreman testified that when he directed Claimant to work overtime, Claimant replied that he would not do so and did not care if he was given demerits. Claimant denied making such a statement. Claimant maintained that he told the Foreman that his hands hurt. As an appellate body, we are in a poor position to judge the relative credibility of the witnesses. Consequently, we defer to the credibility determinations of the hearing officer who observed the witnesses' testimony. In the instant case, we see no reason to deny the credibility determinations made on the property the deference to which they are usually entitled. Furthermore, we note that it was not disputed that Claimant failed to work the overtime on July 25, 2002. Accordingly, we find that Carrier proved the charge by substantial evidence.

We turn to the penalty imposed. Insubordination is a very serious offense. Under the circumstance presented, we cannot say that the penalty of a five day suspension was arbitrary, capricious or excessive. However, we note that Claimant was a long term employee with seniority dating to 1978 and at the time of the incident he had no demerits on his record. Under these circumstances, and without setting a precedent for future cases, we find that sixty demerits is excessive and will order Carrier to reduce the demerits assessed for this offense to thrity. The suspension shall not be disturbed.

#### AWARD

Claim sustained in accordance with the Findings.

#### ORDER

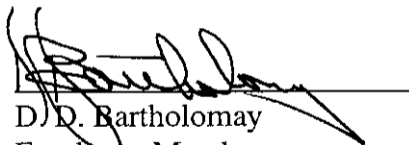
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto



Martin H. Malin, Chairman



J.F. Ingham  
Carrier Member



D.D. Bartholomay  
Employee Member

Dated at Chicago, Illinois, March 15, 2004.