

PUBLIC LAW BOARD NO. 6089

On October 29, 1996, Carrier notified Claimant to report for an investigation on November 12, 1996. The notice charged Claimant with not being alert and attentive while working as a Track Machine Operator on October 15, 1996, at 1:35 p.m., resulting in Claimant hitting a parked spike puller, in violation of Rules 1.1.2, 42.2.2, 42.8 and 43.2, and Contract Safety rules 136.7.2, and 136.7.4. Carrier also withheld Claimant from service, pending the outcome of the investigation.

The hearing was held as scheduled. On November 26, 1996, Carrier advised Claimant that he had been found guilty of the charge and had been dismissed from service.

The Organization contends that Carrier failed to provide claimant with a fair hearing. The Organization maintains that Carrier prejudged Claimant's guilt, as evidence by its withholding him from service. Furthermore, the Organization argues that Carrier asked the acting supervisor questions calling for speculation and denied Claimant his right to face his accuser by failing to call Claimant's supervisor who had signed the letter of charges. The Organization observes that Claimant did not act willfully, that Claimant was actually attempting to look out for Carrier's interests at the time of the accident, that the accident resulted in only minor damage. Under these circumstances, in the Organization's view, dismissal was excessive.

Carrier contends that it provided Claimant with a fair and impartial hearing and that it properly withheld Claimant from service. Carrier further observes that Claimant admitted his guilt. Carrier maintains that dismissal was imposed in accordance with Carrier's UPGRADE (Union Pacific General Rules for Administering Discipline Effectively) policy, which Carrier points out has been upheld in numerous awards.

We consider the Organization's procedural arguments first. We find no basis for overturning the discipline on procedural grounds. We find that Carrier properly withheld Claimant from service. Rule 48(o) authorizes Carrier to withhold an employee from service pending a hearing where the charges involve flagrant or serious violations. Inattention when operating a machine resulting in a collision with another machine certainly is a serious violation.

We have reviewed the transcript and concluded that Claimant was provided with a fair and impartial hearing. Claimant was not denied any due process right of confronting his accuser or cross-examining the witnesses against him. Although the supervisor signed the letter of charges, the supervisor was not involved in the incident. The acting supervisor was on duty at the time of the incident and investigated the cause of the accident. The acting supervisor was the key, indeed only, witness against Claimant and Claimant and the Organization had the opportunity to and did cross examine him.

Therefore, we turn to the merits of the claim. There is no question that Claimant was inattentive and violated the rules cited in the notice of charges. Claimant was operating a tie crane and struck a spike pulling machine that was stopped on the track ahead of him. Claimant testified that he was looking at the floor of the machine, contemplating an oil leak and how to

clean the machine to be able to locate the leak. He further testified that he knew the spike puller was in front of him and he knew he had to stop but he "just went blank for a split time."


Accordingly, we turn to the penalty imposed. It is not our role to substitute our judgment for Carrier's concerning the appropriate discipline to be imposed. Our review is limited to determining whether the discipline imposed was arbitrary, capricious or excessive.

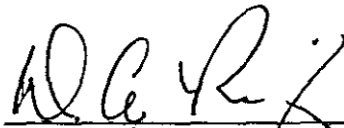
Furthermore, Carrier's UPGRADE Policy, as a general matter, provides for fair, consistent and progressive discipline and is entitled to considerable arbitral deference. However, as our decision in Case No. 9, Award No. 1 exemplifies, deference to Carrier's UPGRADE Policy is not the same as a rubber stamp. We cannot abdicate our responsibility to review the discipline imposed to ensure that it is not arbitrary, capricious or excessive. Of course, the UPGRADE Policy ensures that such cases will be rare.

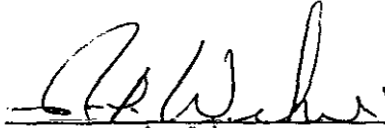
In the instant case, Claimant already was at discipline level 4 under the UPGRADE Policy. This resulted from three prior offenses: removing a blue flag set by another craft, failing to comply with proper tie installation procedures thereby causing the track to buckle, and failing to comply with a foreman's instructions. Claimant was given ample opportunity and incentive to correct his work habits and failed to do so. Dismissal in the instant case was in accordance with principles of progressive and corrective discipline as implemented in the UPGRADE Policy and was not arbitrary, capricious or excessive.

#### AWARD

Claim denied.

  
 Martin H. Malin, Chairman

  
 D.A. Ring,  
 Carrier Member

  
 R.B. Wehrli  
 Employee Member

Dated at Chicago, Illinois, August 17, 1998.