

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 123
UNION PACIFIC RAILROAD COMPANY) Award No. 111
_____)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: June 4, 2007

STATEMENT OF CLAIM:

The Organization requested that discipline be stricken from Claimant Mark A. Roth's personal record and that he be returned to his prior status under Behavior Modification. Also, that he be made whole as if there had been no discipline issued and no suspension enforced. That Mr. Roth be paid for all hours that he would have worked absent the suspension, including overtime and be compensated for his time not paid on the day of the hearing on August 16, 2006

FINDINGS:

Public Law Board No. 6302 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.

By letter dated June 19, 2006, Carrier notified Claimant that he allegedly failed to have a proper job briefing, failed to ensure that work did not result in an unstable or unsafe track condition and failed to ensure that the track was safe for movement on June 12, 2006, in the vicinity of MP 666.25 on the Rawlins Subdivision. The letter proposed discipline at UPGRADE Level 3 and gave Claimant the option of exercising his right to a formal hearing or participating in the Behavior Modification Program. Claimant opted for a formal hearing.

By letter dated July 5, 2006, Claimant was notified to report for a formal investigation on July 13, 2006. The notice repeated the charges contained in the June 30, 2006, letter. The hearing was postponed to and held on August 16, 2006. On August 25, 2006, Claimant was advised that he had been found guilty of the charges and had been assessed discipline at Level 3, a five-day

suspension.

Carrier contends that the Board lacks jurisdiction over the claim because the claim failed to specify any Agreement rule claimed to have been violated. Carrier is correct that no Agreement rule was expressly cited in the claim or otherwise during handling on the property. The claim alleged that Claimant was denied a fair hearing, that Carrier failed to prove the charge and that the penalty imposed was excessive. That was the claim handled on the property. Both parties engaged on the claim as they would any other claim that discipline violated the Agreement's discipline rule, i.e. Rule 48. There is no question that although the claim did not expressly cite Rule 48, the parties understood that Rule 48 was at issue. Carrier's argument elevated form over substance to a level that we do not believe is contemplated within the Agreement.

Carrier has cited a number of awards in support of its position that the Board lacks jurisdiction. We see no need to discuss them in detail. It is sufficient to observe that none of the awards cited by Carrier approximates the situation before us, i.e., a claim appealing discipline that was processed on the property in the same manner as any other claim appealing discipline, analyzed in accordance with the Agreement's discipline rule and where to dismiss the claim for failure to expressly cite the Rule number would serve no purpose other than to elevate form over substance. Accordingly, we turn to the merits of the claim.

The critical issue is whether Carrier proved the charges by substantial evidence. The record reflects that on June 12, 2006, Claimant was working as Assistant Foreman on Gang 5497. Claimant's gang was working with the crew of Detector Car 30. The Detector Car gang was testing track and spotting defects and Claimant's gang was repairing the defects. Claimant was at the front of the gang changing defective rails while Welding Foreman A. G. Thornhill was trailing Claimant welding the replacement rails in place. The rail at MP 666.25 was left without being either angle barred or welded.

Foreman Thornhill testified that due to the number of defects DC-30 was finding and the unfavorable weather (temperatures exceeded 90 degrees), it became apparent that the crew would not be able to weld all replacement rails. Consequently, he instructed the gang to drill and bar all remaining defects. Claimant, however, did not angle bar the replacement rail at MP 666.25 but left it set up to be welded. Foreman Thornhill neglected to check the condition before releasing the track. Fortunately, a signal maintainer observed the defect and the defect was corrected before it resulted in damage to a train.

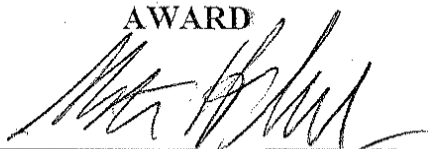
In his testimony, Claimant denied being advised by Foreman Thornhill to drill and bar all remaining defects. Claimant testified that he set up the replacement rail at MP 666.25 for welding and radioed Foreman Thornhill that the rail was ready to be welded.

Foreman Thornhill's testimony was corroborated by Welding Foreman M. D. Zumbrennen. Claimant's testimony was corroborated in part by two coworkers. Proof of the charges thus turned on the relative credibility of the witnesses.

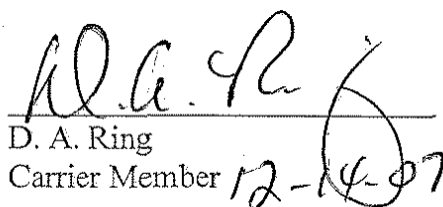
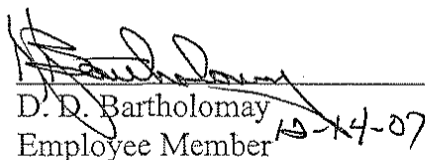
As an appellate body that does not observe the witnesses testify, we are in a comparatively poor position to evaluate witness credibility. Consequently, as a general rule, we defer to the credibility determinations made on the property. In the instant case, after a thorough review of the record, we see no reason to deny the decision to credit the testimony of Foremen Thornhill and Zumbrennen over that of Claimant and his two coworkers the deference generally afforded hearing officer credibility evaluations. Accordingly, we conclude that Carrier proved the charges by substantial evidence.

AWARD

Claim denied.



Martin H. Malin, Chairman


D. A. Ring
Carrier Member 12-14-07
D. D. Bartholomay
Employee Member 12-14-07

Dated at Chicago, Illinois, December 6, 2007