NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 43
and)
) Award No.41
UNION PACIFIC RAILROAD COMPANY)

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

Hearing Date: April 1, 2003

STATEMENT OF CLAIM:

1. The discipline (Level 5-dismissal) assessed Assistant Foreman J. W. Clark for his alleged failure to follow instructions by not reporting an accident which occurred at approximately 2:30 P.M. on October 15, 2001 in Colton, Utah was without just and sufficient cause, arbitrary, capricious and excessive punnishment (System File D-02-01D/1310869-D).

2. Assistant Foreman J. W. Clark shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

FINDINGS:

Public Law Board No. 6302, 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 October 17, 2001, Carrier notified Claimant to attend an investigation on November 7, 2001, concerning his alleged failure to follow instructions by not reporting an accident that occurred on October 15, 2001. The notice charged alleged violations of Rules 1.1.1, 1.1.3, 1.2.5, 1.6(3), and 1.13 and Safety Rules 71.5.2, 71.6, and 71.8. The hearing was postponed to and held on November 8, 2001. On November 23, 2001, Carrier notified Claimant that he had been found guilty of the charge and dismissed from service.

The record reflects that on October 15, 2001, Claimant was cutting fibreglass panels. Initially, he was not wearing a face shield. The truck driver observed this and advised Claimant to wear a face shield. Claimant put on a face shield but did not pull it down completely over his

face. Claimant completed his shift, went home, showered, and, around 8 p.m. found that his eyes were irritated and his vision impaired. Claimant telephoned a friend but did not contact any Carrier officer. He went to the hospital where he was treated for having fibreglass particles in his eyes. Claimant notified his supervisor of the injury the following morning. The Manager Track Maintenance testified that he had previously instructed Claimant to report an injury immediately, and to call him regardless of the time of day or night.

Carrier thus proved by substantial evidence that Claimant failed to properly wear his face shield while cutting the fibreglass. This was a very serious violation of an important safety rule and the violation resulted in the injury to Claimant's eyes. Furthermore, the violation was aggravated by Claimant's failure to report his injury immediately after he discovered it. The Organization argues that Claimant should not have to delay getting medical attention to call the MTM. We agree. However, the record reflects that Claimant was able to telephone a friend before proceeding to the hospital and there is absolutely no evidence that Claimant could not telephone the MTM before going to the hospital.

The Organization contends, however, that Claimant was only charged with failing to report the injury in a timely manner; that he was not charged with safety violations. The notice did state that the purpose of the investigation was "to develop the facts and place responsibility, if any, that while working as Assistant Foreman, you allegedly failed to follow instructions by not reporting an accident . . ." Certainly, the notice would have been drafted more artfully if it also had specifically mentioned Claimant's alleged failure to properly use the face shield. However, the notice also cited, among the alleged rule violations, Safety Rule 71.5.2 concerning eye protection.

At the hearing, Claimant's representative made no objection to the reference to Safety Rule 71.5.2. Much of the evidence at the hearing concerned Claimant's failure to use the face shield properly and no objection to any of that evidence was made by Claimant or his representative. Indeed, Claimant's representative specifically addressed Rule 71.5.2 in his examination of Claimant, and specifically with respect to the face shield. Thus, it is apparent from the record that Claimant and the Organization understood that the reference to Rule 71.5.2 in the notice concerned his use, or failure to properly use, the face shield.

As indicated above, Claimant's failure to properly use the face shield was a very serious safety violation. Claimant's failure to promptly report his injury the night of October 15 was also a very serious rule violation. It is essential that Carrier be made aware of on-duty injuries as quickly as possible so that Carrier can take corrective measures to protect the health and safety of the injured employee and to protect against repetition of the incident in the future. Given the seriousness of Claimant's transgressions, his relatively short length of service and the absence of any mitigating factors in the record, we cannot say that the penalty of dismissal was arbitrary, capricious or excessive.

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AWARD

Claim denied.

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, September 26, 2003.