NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 21
and)
) Award No. 11
UNION PACIFIC RAILROAD COMPANY)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
C. M. Will, Carrier Member

Hearing Date: January 21, 2002

STATEMENT OF CLAIM:

1. The discipline [Level 4.5 requiring sixty (60) days off work without pay and passing necessary annual rules in order to return to work and developing a Corrective Action Plan upon return to work] imposed under date of May 26, 2000 upon Mr. M. A. Sotomayor allegedly violating Union Pacific's Equal Opportunity/Affirmative Action and related policy directives while working as a welder on March 24, 2000 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MW-00-123/1234332 MPR).

2. As a consequence of the violation referred to in Part (1) above, all references of this discipline shall be removed from Mr. M. A. Sotomayor's personal record and he shall now be compensated for all lost time and reimbursed for all expenses incurred in connection with attending the investigation held on April 18 and 19, 2000.

FINDINGS:

Public Law Board No. 6402, 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 April 3, 2000, Carrier notified Claimant to report for an investigation on April 18, 2000. The notice charged that Claimant "while working as Welder, March 24, 2000, you allegedly violates Lucy Velazquez's fundamental rights and Union Pacific's commitment to equal opportunity in all matters relating to employment and its continuing pledge to a sex discrimination free workplace." The hearing began as scheduled and concluded the following

day. On May 26, 2000, Carrier informed Claimant that he had been found guilty of the charge and was assessed a sixty day suspension.

The Organization has raised a number of issues. We need only address one because it is dispositive of the claim.

The Organization contends that the discipline was fatally flawed because a Carrier official other than the hearing officer assessed the discipline. Carrier responds that the Agreement does not require that the hearing officer assess the discipline. The Third Division of the NRAB, with the chair of this Board sitting as referee, addressed the identical issue in Award No. 31774. The Board observed that, although the agreement did not expressly require that the hearing officer issue the discipline, it did guarantee employees a right to due process. The Board held that having someone other than the hearing officer assess the discipline was not a per se due process violation. The Board then analyzed the facts of the case before it and concluded:

> As an appellate body, we generally defer to credibility determinations made on the property. This is because the hearing officer, having observed all of the witnesses, is in the best position to make such determinations. However, in the instant case, there is nothing to indicate that the hearing officer made any credibility determinations. Thus, faced only with a discipline notice issued by someone other than the hearing officer, we have nothing to which we can defer. Under these circumstances, we find that the failure of the hearing officer to find the facts and evaluate the relative credibility of the witnesses deprived Claimant Pool of a fair investigation. Our finding is consistent with prior decisions of this Board under similar circumstances. See Third Division Awards 30015, 13180.

Our review of the record developed on the property leads us to conclude that the circumstances of the instant case are comparable to those present in Third Division Award No. 31774. The charge against Claimant was centered on the events of March 24, 2000. Ms. Velazquez testified that on March 24, 2000, Claimant told her that the only reason she was hired was because she was a woman, that other men looked much stronger than her and did not get hired, that she was not fit for the job because she was a woman, and that she was not worth her pay and that there were men who were better fit for the job and who did not have jobs because of her. She further testified that she was certain that the other employees at the job site heard these remarks. She identified Trackman A. A. Acosta, Trackman/Driver J. G. Maesse and Welder Helper C. Hernandez as witnesses.

Claimant denied making any of the alleged discriminatory remarks on March 24, 2000. Mr. Hernandez testified that Claimant did not make the comments that Ms. Velazquez attributed to him on March 24, 2000. Mr. Hernandez testified that he did hear Claimant say, "[G]oddam, shit, woman, can't you see that I'm trying to make our welds." Claimant testified that he may have made such a statement but that he did not direct it at anyone in particular.

Mr. Masse testified that he did not hear Claimant make any comments about Ms.

Velazquez's gender. He testified that he heard Claimant tell Ms. Velazquez that she was not worth what she was getting paid, but he interpreted the comment as a joke. He also heard Claimant use profanity but indicated that the profanity was not directed at any individual.

Mr. Acosta testified that he heard Claimant make all of the sex-based derogatory comments as alleged by Ms. Velazquez. Initially, however, Mr. Acosta was unable to state whether the comments were made on March 24, 2000, the date alleged in the notice of investigation. After subsequent questioning, he changed his testimony and maintained that he was sure that the comments were made on March 24.

The record thus presented five different witnesses with five different accounts of what, if anything, was said and when, if ever, it was said. Mr. Acosta provided the greatest corroboration for Ms. Velazquez of any of the witnesses, but his testimony was inconsistent. Initially, he testified that he could not say if the alleged derogatory comments were made on March 24 or on some other day. Only in the later part of his testimony did he maintain that he realized that the comments were made on March 24. Mr. Acosta's inconsistency may be a reason to discount his credibility. It may also reflect a sincere effort by Mr. Acosta to recall when the comments were made and a sincere improvement in his memory as the questioning progressed. We find it impossible to determine which explanation is more likely by examining the sterile black and white transcript. Clearly, observation of Mr. Acosta's demeanor and consideration of such other factors as the tones and inflections in his voice as he testified is crucial to assessing his credibility.

The need to observe the witnesses in person went beyond assessment of Mr. Acosta's credibility. As discussed above, each of the witnesses gave conflicting accounts of the events of March 24. Yet, we fail to see how the Carrier officer who assessed discipline could evaluate the relative credibility of the witnesses based on the transcript alone. Yet those credibility determinations were crucial to the decision whether to convict or exonerate Claimant of the charge against him.

We conclude that the circumstances of the instant case are indistinguishable from those presented in Third Division Award No. 31774. Accordingly, we find that Carrier deprived Claimant of a fair investigation and the discipline resulting from that flawed investigation may not stand.

The claim seeks, among other relief, that Claimant be compensated for expenses incurred in attending the investigation. As we stated in Case No. 19, Award No. 10, there is no support for such relief in the Agreement. It has long been established on this property that, absent an express Agreement provision for payment of expenses incurred in attending an investigation, such payment is not required even where the claim is sustained. See NRAB, Third Division Award No. 4834. Accordingly, we shall sustain the claim except for the request that Claimant be reimbursed for expenses incurred in attending the investigation.

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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

C. M. Will,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, June 11, 2002.

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INTERPRETATION ON REMAND FROM UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

This matter is before the Board for interpretation of Award No. 11, on remand from the United States District Court for the Northern District of Texas. On May 26, 2000, Carrier assessed Claimant a sixty-day suspension pursuant to its UPGRADE policy, Level 4.5, following a formal investigation held on April 18 and 19, 2000. Carrier assessed the discipline for Claimant's alleged violation of a coworker's right to equal employment opportunity and Carrier's commitment to equal opportunity and pledge to a sex harassment free workplace (EEO Violation).

On October 4, 2000, Carrier charged Claimant with violating Rule 1.3.1 for not having his rule book while working at MP 771.0 and 770.0 and proposed discipline at UPGRADE Level 4.5, another sixty-day suspension (Rule Book Violation). The Waiver/Hearing Offer Form 2, provided in Section 2, "Under the UPGRADE discipline assessment table, the violation listed in section one requires a minium discipline of Level 2. Section 3 of the form referred to the Level 4.5 discipline assessed on May 26, 2000 as discipline assessed within the prior thirty-six months. Section 4 stated, "Using the UPGRADE progressive discipline table, the current violation plus the current discipline status require the assessment of Level 4.5. The violation did not have results requiring assessment of the next higher level of discipline. Therefore, the required discipline level is 4.5.

Section 5 of Form 2, gave Claimant two options. Option A provided:

I, the undersigned employee, have discussed the alleged violation(s) with the responsible manager and have been afforded a right to union representation in making my decision to accept the discipline listed above and to waive any rights to a formal investigation.

Option B provided:

> I, the undersigned employee, have discussed the alleged violation(s) with the responsible manager and do not agree with the facts or the recommended discipline. I understand that a formal investigation will be held to review all the facts of these allegations.

On October 4, 2000, Claimant signed Option A and added "(under protest)" to his signature. As of that date, a claim had already been filed contesting the discipline imposed for the EEO Violation.

On January 9, 2001, Carrier dismissed Claimant following a formal investigation held December 7, 2000. The dismissal was based on a finding that Claimant violated On-Track Safety Rule 136.3.1 by failing to give a follow-up job briefing while working as Employee In Charge on October 11, 2000.

On June 11, 2002, this Board issued Award No. 11. We sustained the claim contesting the discipline for the EEO Violation that "all references of this discipline shall be removed from Mr. M. A. Sotomayor's personal record and he shall now be compensated for all time lost." We denied the claim that Claimant be "reimbursed for all expenses incurred in connection with attending the investigation held on April 18 and 19, 2000."

On November 20, 2002, this Board issued Award No. 14. We denied the claim attacking Claimant's January 7, 2001, dismissal. We rejected an Organization procedural argument and found that Carrier proved the charge by substantial evidence. We then considered the penalty imposed:

> We note that in Case No. 21, Award No. 11, we sustained the Organization's claim arising out of an UPGRADE Level 4.5, sixty day suspension imposed on Claimant on May 26, 2000. Disregarding that suspension, we note that, on October 4, 2000, Claimant signed a waiver and accepted a Level 4.5, sixty day suspension for violating Rule 1.03.01. Consequently, the validity of that suspension is not subject to collateral attack in this proceeding. Given Claimant's disciplinary record and the severity of the instant offense, we find that the penalty is not arbitrary, capricious nor excessive.

The Organization filed suit in the United States District Court for the Northern District of Texas to enforce Award No. 11 and vacate Award No. 14. The Organization contended that Carrier failed to comply with Award No. 11 by failing to remove all references to the EEO Violation from its paper and computer records and by failing to abrogate the effects of the Level 4.5 discipline imposed for the EEO Violation on subsequent discipline. The court granted the Organization's motion for summary judgment "to the extent that there are still references in Sotomayor's personnel record to the discipline for the EEO Infraction. The court rejects UP's interpretation of Award No. 11 that allows it to retain references to the EEO violation in files pertaining to subsequent disciplines." *Brotherhood of Maintenance of Way Employees v. Union Pacific RR*, No. 3:03-CV-0417-D (N. Dist. Tex. Oct. 6, 2004), slip. op. at 9. The court also

dismissed the Organization's petition for review of Award No. 14. The court remanded Award No. 11 to this Board to consider whether Award No. 11's requirement that Carrier remove all references of the discipline from Claimant's personal record requires that Carrier abrogate the effects of the vacated discipline on subsequent disciplines.

Agreement Rule 21(f) provides, "If the charges against the employee is (sic) not sustained, the record of the employee will be cleared . . ." The Organization contends that Award No. 11 and Rule 21(f) require that, as part of the process of clearing Claimant's record of the EEO Violation, Carrier adjust subsequent disciplines that relied on it. Thus, in the Organization's view, Award No. 11 required Carrier to remove the reference to the EEO Violation from the Form 2 waiver signed by Claimant for the Rule Book Violation. In the Organization's view, under Carrier's UPGRADE, the Level 4.5 discipline imposed on Claimant for the Rule Book Violation may no longer stand once the EEO Violation is removed from Claimant's record. Rather, without the EEO Violation, the Organization contends, the UPGRADE mandates a discipline at Level 2, not Level 4.5. Moreover, with only a Level 2 discipline on his record when he committed the violation of Rule 136.3.1, the UPGRADE Level 5 dismissal also cannot stand but must be adjusted to UPGRADE Level 3. Thus, the Organization urges, Award No. 11 requires Claimant's reinstatement and the reduction of his Level 5 discipline to Level 3. Any other result, the Organization maintains, continues to punish Claimant for the EEO Violation and, in effect, keeps it on his record.

Carrier contends that each incident of discipline is a distinct event that stands on its own merit. Award No. 11 did not require reassessment of other discipline and, in Carrier's view, Claimant's signature on the waiver accepted the Level 4.5 discipline that was offered. According to Carrier, the waiver was a special agreement that stands on its own.

Furthermore, Carrier argues, Rule 21(f) does not require adjustment of other discipline and the Organization's argument to the contrary stretches Rule 12(f) beyond the breaking point. In Carrier's view, the Organization is really seeking an interpretation of Carrier's unilateral UPGRADE policy and the Board lacks authority to interpret Carrier policy.

UPGRADE is a unilateral Carrier policy. It is not part of the controlling Agreement between the parties and this Board does not interpret it or apply it. This Board's authority is confined to determining whether Carrier violated the controlling Agreement. In a discipline case, the Board may find that Carrier violated the Agreement where, as in Case No. 11, it failed to provide the Claimant with a fair and impartial investigation; where it failed to take action within required timelines set forth in the Agreement; where it failed to prove the charge by substantial evidence; and where it assessed discipline that was arbitrary, capricious or excessive.

The unanimous decision of PLB 6089[1] in Case No. 7, Award No. 5, relied on by the Organization, illustrates the difference between interpretation and application of the Agreement

[1]The Neutral and Carrier members of this Board also sat on PLB 6089.

and interpretation and application of the UPGRADE. Claimant in that case had been absent without authority on August 8, 1994, and was assessed discipline at UPGRADE Level 1. Presented to the Board were claims attacking a Level 2 discipline imposed for an absence on August 11, 1994, a Level 2 imposed for an absence on August 25, 1994, and a Level 5 dismissal for an absence on September 12, 1994. The Board denied the claims with respect to the August 11 and August 25 absences, but sustained the claim with respect to the September 12 absence. Carrier argued for the Board to uphold the claimant's dismissal despite sustaining the claim with respect to the September 12 absence because the August 11 and 24 absences, when combined with the August 8 absence amounted to three violations of the same rule within thirty-six months and under Carrier's UPGRADE constituted grounds for dismissal. The Board rejected Carrier's argument, reasoning:

> Carrier's argument misconceives our role. As an appellate body, we do not assess discipline de novo. Our role is limited to reviewing the discipline Carrier assessed to determine whether it is arbitrary, capricious or excessive. Carrier assessed a level 2 discipline for the August 11 violation and a level 2 discipline for the August 25 violation. We already have found that those penalties were not arbitrary, capricious or excessive. In essence, Carrier has asked us to increase the penalty that it imposed for the August 24 violation from level 2 to dismissal. We have no authority to do so.

In other words, the Board held that whether Carrier's UPGRADE would have supported a Level 5 dismissal for the August 25 violation was irrelevant to the Board's consideration. The only issue the Board had authority to consider with respect to the punishment imposed for the August 25 violation was whether the penalty that Carrier imposed was arbitrary, capricious or excessive.

Carrier has unilaterally instituted its UPGRADE policy to ensure uniformity in discipline and to insure adherence to principles of progressive discipline. In so doing, it has greatly reduced the likelihood that its disciplinary decisions will be found by a board to be arbitrary, capricious or excessive. However, the UPGRADE is not binding on this or any other Board, and when discipline imposed is arbitrary, capricious or excessive a Board will overturn it even though it may comply with the UPGRADE. *See, e.g.*, PLB 6089, Case No. 9, Award No. 1.

When Carrier relies on a claimant's prior disciplinary record to augment discipline imposed in a case before the Board and that prior discipline is overturned by a board, Carrier may not rely on the overturned prior discipline when arguing to the Board that the augmented discipline was justified. The removal of the prior discipline from the claimant's record may result in the Board finding that the augmented discipline in the case before it was excessive.[2] Any relief awarded to the claimant is awarded under the case resolving the claim attacking the augmented discipline; it is not awarded under the case attacking the prior discipline.

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[2]Of course, where there is additional prior discipline, the Board may conclude that even when not considering the overturned discipline, the augmented discipline was not excessive. Such was the case in Award No. 14.

NRAB First Division Award No 24893, relied on by the Organization, clearly illustrates the above point. In Award 24893, the Board upheld the dismissal of an engineer for exceeding the maximum authorized speed. In reviewing the penalty imposed, the Board noted that Claimant already had been assessed a Level 4 discipline for failure to stop and poor handling of his train. The Board further noted that the combination of the prior Level 4 discipline and the Level 4 the UPGRADE specified for his speeding violation resulted in a Level 5, dismissal. The Board continued, "This Claimant was aware that he was facing the possibility of discharge when he received his first Level 4. This Board cannot say that the Carrier acted unreasonably, arbitrarily or capriciously when it terminated the Claimant's employment after this second Level 4 violation."

Unbeknownst to the Board that issued Award No. 24893, in Award No. 24874, the First Division, with a different referee sitting as the neutral, sustained a claim and overturned the prior discipline. That award was issued approximately three months prior to Award 24893. Carrier reinstated the claimant but refused to pay him any backpay. The Organization filed suit and the parties submitted a joint motion to remand "limited to the NRAB determining whether and to what extent NRAB Award No. 24874 may have a bearing on the appropriate level of discipline for the safety rule violation that was upheld in Award No. 24893." On remand, the Board which decided Award No. 24893 held that the claimant was entitled to backpay except for the period covered by a thirty-day suspension (UPGRADE Level 4) and for the one-year maximum period that his license had been revoked. Notably, the relief was provided by the Board that decided the claim attacking the dismissal. There was no suggestion that such relief should have been considered by the Board that issued Award No. 24874, even though that Award sustained a claim for, among other things, "clearing of [claimant's] employment record of notation of a Level 4 under the Carrier's unilaterally imposed 'Upgrade' Discipline Policy . . ."

Rule 21(f) requires that when charges are not sustained, "the record of the employee will be cleared and if suspended or dismissed, the employee will be returned to his former position and reimbursed for any net loss of compensation incurred in connection therewith." It does not require that when charges are not sustained, subsequent discipline will be reevaluated. Similarly, Award No. 11, required that the discipline for the EEO Violation be removed from Claimant's personal record. It did not require that Carrier reevaluate subsequently imposed discipline.

Of course, with such discipline removed from Claimant's record, Carrier could not rely on the EEO Violation to defend subsequent discipline in claims challenging such subsequent discipline before this or any other Board. Thus, in Award No. 14, we completely disregarded the EEO Violation in determining whether the penalty of dismissal was arbitrary, capricious or excessive. Claimant, however, did not challenge the Level 4.5 discipline imposed for the Rule Book Violation. On the contrary, Claimant accepted the Level 4.5 discipline that was offered to him and waived his right to a formal investigation. At the time he did so, a claim had already been filed challenging the discipline imposed for the EEO Violation. Thus, Claimant accepted the Level 4.5 discipline for the Rule Book Violation even though proceedings were underway that could, and did, result in the removal of the EEO Violation from his record. Claimant could have preserved an attack on the Level 4.5 discipline for the Rule Book Violation premised on

the invalidity of the discipline imposed for the EEO Violation by checking Option B on Form 2 indicating that he did not agree "with the facts or the recommended discipline." He chose not to do so but to accept the Level 4.5 discipline offered. As we held in Award No.14, that decision is not subject to collateral attack in a proceeding challenging other discipline.[3]

Accordingly, we hold that Award No. 11 does not require Carrier to abrogate the effect of the EEO Violation on subsequent discipline. We further hold that by accepting the proffered Level 4.5 discipline for the Rule Book Violation, Claimant waived his right to challenge that discipline on the ground of the invalidity of the discipline imposed on him for the EEO Violation.

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, May 14, 2005

[3]Claimant's addition of the words "under protest" after his signature does not change the result. Rule 21(a)(2) provides, "When employees are offered discipline pursuant to paragraph (g) of this rule, such employees will either accept or reject the offer within fifteen (15) calendar days of receipt of the letter of charges. Discipline will be considered accepted if formal rejection is not received within fifteen (15) calendar days from the date of receipt of Carrier's letter. . . ." Thus, under Rule 21(a)(2), Claimant was required to check Option B or otherwise communicate his formal rejection of the discipline offered to preserve his right to contest the discipline. The addition of the words "under protest" to Claimant's acceptance of the discipline offered carries no meaning under the Agreement.