

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 40

)

) Award No. 27

)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: March 22, 2004

STATEMENT OF CLAIM:

1. The discipline [Level 2 requiring one (1) day of alternate assignment with pay to develop a corrective action plan] imposed upon Mr. J. T. Bergeron for his alleged violation of Union Pacific Rule 41.2 was without just and sufficient cause, in violation of the Agreement, excessive and undue punishment (System File MW-03-145/1358762).
2. As a consequence of the violation referred to in Part (1) above, the Carrier shall remove all references to Mr. J. T. Bergeron's personal record and he shall be compensated for eight (8) hours' pay at his respective straight time rate of pay for attending the investigation held on January 8, 2003.

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 November 22, 2002, Carrier issued Claimant a Notice of Proposed Discipline of UPGRADE level 2 for violating Rule 41.2 by failing to operate his TKO safely, causing the rail clamps to strike a crossing damaging the rail follower. Claimant signed the Notice on November 23, 2002, requesting an investigation. On December 12, 2002, Carrier notified Claimant to appear for an investigation on January 8, 2003, concerning the charge that, on November 16, 2002, he failed to operate the TKO properly, causing the rail clamps to strike the crossing. The hearing was held as scheduled. On January 22, 2003, Claimant was notified that he had been found guilty of the charge and assessed discipline of UPGRADE Level 2, one day of an alternative assignment with pay to develop a corrective action plan.

The Organization has advanced numerous procedural arguments. We have reviewed all of those arguments and the transcript and find that Claimant was afforded a fair and impartial hearing and that none of the procedural arguments provides a basis for setting aside the discipline. Only one of the arguments merits further discussion.

The Track Supervisor was the sole witness against Claimant. When the Track Supervisor completed his testimony, the hearing officer began to question Claimant. The Organization objected that the Track Supervisor had not been sequestered. The hearing officer refused to sequester the Track Supervisor. Frankly, we do not understand why the hearing officer refused to sequester the Track Supervisor. The fact that the Track Supervisor was the only witness against Claimant does not diminish the importance of sequestration as a safeguard against one witness's testimony influencing another's. However, as developed below, there was no dispute in the key facts and Claimant admitted that he operated the TKO with the rail clamps down. Consequently, Claimant was not prejudiced by the hearing officer's failure to sequester the Track Supervisor. Nevertheless, we admonish Carrier that its hearing officers should sequester witnesses when requested to do so and when there is no substantial reason to deny the request.

Turning to the merits of the case, we note that Claimant testified that he knew he had to raise the rail clamps when proceeding across a road crossing. He explained his failure to do so as follows:

I pushed the button to hold my clamps. I had released it to sound the horn, and with the other things going on, I was distracted and apparently, I left my clamps down and drug the crossing.

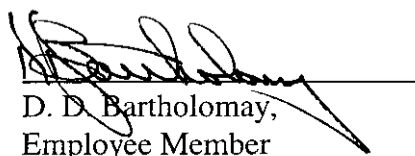
Thus, Claimant admitted that he failed to operate the TKO correctly. Carrier proved the charge by substantial evidence. The penalty imposed was in keeping with Carrier's UPGRADE policy and was not arbitrary, capricious or excessive.

AWARD

Claim denied.


Martin H. Malin, Chairman


D. A. Ring,
Carrier Member


D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, July 23, 2004