NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 46
and)
) Award No. 49
UNION PACIFIC RAILROAD COMPANY)

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

Hearing Date: May 23, 2005

STATEMENT OF CLAIM:

1. The Level 3 UPGRADE discipline assessment (five day suspension from service) issued to Mr. R. Lavin for allegedly not providing adequate on-track safety while assigned as a Lookout and for not conducting a proper job briefing in violation of Union Pacific Chief Engineer bulletins 136.4.47 and 136.3.1 was unwarranted and unjustified.

2. As a consequence of the violation referred to in Part (1) above, the Claimant should be exonerated in accordance with Rule 21(f).

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 December 30, 2003, Carrier notified Claimant to appear for an investigation on January 7, 2004. The notice alleged that Claimant did not provide adequate on track safety while being a lookout for a fellow worker at CPI 016 on the Villa Grove Subdivision on November 25, 2003, and did not have a proper job briefing. The hearing was postponed to and held on January 30, 2004. On February 20, 2004, Claimant was notified that he had been found guilty of the charges and assessed discipline at UPGRADE Level 3, a five day suspension.

On the date in question, Claimant was working as a lookout, providing Train Approach Warning On Track Safety for a fellow Welder who was repairing a frog. Rule 136.4.4 requires, among other things, that a lookout not be assigned other duties while functioning as such, that the

lookout remain in the position until relieved or until it is determined that protection is no longer needed, that the lookout devote his entire attention to detecting approaching trains and warning roadway workers, and that the lookout be positioned to give a train approach warning in sufficient time to enable the roadway worker to occupy a previously arranged place of safety at least fifteen seconds before a train arrives.

The evidence against Claimant consisted of the testimony of the Director Track Maintenance and the Manager Track Maintenance. Neither testified from personal knowledge. Both related a report provided by an FRA inspector. The report maintained that Claimant was observed failing to provide adequate roadway safety protection from 9:49 a.m. to 10:01 a.m. The report was accompanied by nine photographs. The witnesses testified that the FRA inspector advised that he observed Claimant talking to another worker for approximately twelve minutes. Carrier requested the FRA inspector's presence at the hearing but he refused to attend.

The Organization contends that Carrier denied Claimant a fair hearing because Claimant was not afforded an opportunity to confront and cross examine the FRA inspector. We do not agree. It is well-established that admission of hearsay testimony is acceptable in railroad investigations. Carrier does not have subpoena power and therefore had no means of compelling the FRA inspector to appear at the hearing. All that can be expected of Carrier is to make a good faith effort to obtain the witness and in this case Carrier did so. Reliance on hearsay testimony of the Manager Track Maintenance and the Director Track Maintenance concerning the FRA inspector's written report and oral statements did not deny Claimant due process.

However, as the Board observed in PLB 6089, Case No. 21, Award No. 20:[1]

> Recognizing that Carrier could validly introduce [hearsay evidence] is not equivalent to finding that the [hearsay evidence] proved the charge. The question remains whether Carrier proved the charge by substantial evidence.

The primary factual issue in the instant case was whether Claimant engaged in a 12-minute conversation with the other employee. If he did, then he clearly was not devoting his full attention to detecting approaching trains. The proper procedure would have been for Claimant to have advised the Welder to step off the track while Claimant conducted the conversation. Claimant clearly was aware of this procedure as he followed it when the FRA inspector came over to talk with him. On the other hand, both Carrier officers testified that a very brief conversation with the other employee, i.e. one of thirty to sixty seconds in duration, would not violate the rule.

Carrier urges that it properly relied on the hearsay evidence of the FRA inspector's observations because the FRA inspector was a neutral party who had no motive to fabricate. We

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[1]The Carrier member and the neutral chair of this Board also served on PLB 6089. The Carrier member dissented from the Award No:.21 of PLB 6089.

agree with Carrier that the FRA inspector had no apparent motive to fabricate. Nevertheless, his failure to appear and testify left some open questions. Nowhere in his written report or in the Carrier officers' testimony is an indication of the basis for the inspector's conclusion that Claimant was engaged in a twelve minute conversation with the other employee. For example, we do not know from the hearsay evidence whether the inspector actually heard a conversation (unlikely given the inspector's physical distance from the two employees), observed Claimant's and the other employee's mouths moving, observed other movement such as animated hand motions that would indicate conversation, or just inferred from the amount of time that the two employees were near each other that they were engaged in a continuous conversation. Therefore, the FRA inspector's report alone cannot constitute substantial evidence.

Accordingly, we turn to the other evidence in the record. The Welder testified that he heard a conversation going on between Claimant and the other employee but he was unable to say how long the conversation persisted. Claimant testified that he did speak with the other employee. As to the duration of the conversation, Claimant testified as follows:

> Q: And it appears that you were having a conversation with another employee. Is that a fact?
>
> A. No. That is not a fact. I don't recollect holding a conversation for 12 minutes. I was asked a few questions. But it did not take away from my duties at hand at the time of providing lookout protection.
>
> I see a lot of these pictures are pretty unclear. But what I can gather from these pictures is looking left to right. But to my recollection, I don't remember a 12-minute conversation.

Claimant testified that he and the other employee were in the same vicinity during the twelve minute period depicted in the photographs. When asked if he had a conversation with the other employee, Claimant responded, "I might've answered a few questions while I was looking out and had a briefing."

Claimant's testimony is difficult to interpret from the black and white of the transcript. However, it appears that Claimant admitted having a conversation with the other employee and did not flat out deny that the conversation lasted twelve minutes. Rather, he stated that he did not remember the conversation as lasting twelve minutes. The thrust of his testimony seems to be that despite having the conversation he was still being attentive to his lookout duties.

The most significant piece of evidence in the record is the photographs taken by the FRA inspector. We have examined these photographs very carefully. In a picture taken at 9:49 a.m., Claimant is standing parallel to the track with the other employee facing him. Claimant's head appears to be turned so that the back of his head is to the Welder. In a second picture taken at 9:49 a.m. Claimant's position has shifted slightly so that his back is toward the Welder. The other employee's position is the same as the first picture. Claimant's position and the other

employee's position are similar in three pictures taken at 9:50 a.m. and in a picture taken at 9:53 a.m. A picture taken at 9:55 a.m. depicts Claimant and the other employee bending over at the waist.[2] A picture taken at 9:59 a.m. shows Claimant in the same position as in the earlier pictures, other than the 9:55 picture. A picture taken at 10:01 a.m. shows Claimant standing a bit further away from the Welder but facing the Welder with the other employee standing next to Claimant and between Claimant and the Welder.

The pictures thus depict that throughout this twelve minute period, Claimant and the other employee were physically very close to each other, that over the course of this period their positions relative to each other changed and that midway through this period they were both bending over apparently engaged in a common enterprise. A reasonable inference may be drawn from the pictures that Claimant was engaged in conversation with the other employee during the twelve minute period depicted. The inference is strengthened by the Welder's testimony that he heard a conversation and by Claimant's failure to testify that his conversation was limited to the thirty to sixty second period that would be acceptable as not detracting from the lookout's duties. Furthermore, if they had not been engaged in conversation, one would expect an alternate explanation for the other employee's continuous presence at Claimant's lookout location. Claimant provided so such explanation.

On the record presented, a reasonable trier of fact could conclude that Claimant was not paying full attention to his lookout duties during the twelve minutes depicted in the pictures. Accordingly, we hold that Carrier proved the charge by substantial evidence.

The penalty imposed was in keeping with Carrier's UPGRADE. We cannot say that the penalty was arbitrary, capricious or excessive.

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[2] Claimant testified that he bent down to retrieve his keys, but the picture suggests that Claimant and the other employee were engaged in a common enterprise, rather than Claimant simply retrieving keys which he had dropped.

AWARD

Claim denied.

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

D. D. Bartholomay,
Employee Member 9-15-05

9.15.05 Dated at Chicago, Illinois, August 16, 2005