NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 118
and	)
	) Award No. 97
UNION PACIFIC RAILROAD COMPANY	)
	)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: April 22, 2008

STATEMENT OF CLAIM:

1. The Level 2 UPGRADE discipline assessment (which cumulated to a Level 4 - 30 day suspension under Carrier's progressive discipline table) to Mr. W. P. Menard for an alleged violation of Union Pacific Rule 41.2 (Operators) and Rule 43.4 (Equipment Tie-Up) was not justified.

2. As a consequence of the violation referred to in Part (1) above, the Claimant shall have the removal of the charges and the assessment of discipline from his record, he shall be paid for all lost work opportunity and all expenses be paid to attend the hearing.

FINDINGS:

Public Law Board No. 6402 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.

On September 11, 2006, Claimant was notified to report for a formal investigation on September 14, 2006, concerning his alleged failure, on August 18, 2006, to secure the plow on regulator BR0301, causing it to bleed and drop on SPDD 0303. The hearing was postponed to and held on September 21, 2006. On October 11, 2006, Claimant was advised that he had been found guilty of the charges and had been assessed discipline at UPGRADE Level 2, but due to prior discipline at UPGRADE Level 1 and Level 2, Claimant's discipline cumulated to UPGRADE Level 4, a 30-day suspension.

The Organization has raised numerous procedural objections. None of them require substantial discussion. It is sufficient to say that we have considered all of the Organization's procedural objections in light of our careful review of the record and find that none of them, singularly or in combination, provide a basis for overturning the discipline. We find that Carrier afforded Claimant a fair and impartial hearing.

There is no dispute that when Claimant tied up his ballast regulator at the end of the day on August 18, 2006, he did not lower the plow to the ground. It is also apparent that, as a result of this, the plow bled down and contacted the tow bar hitch on the spike puller. Claimant's Supervisor at the time of the incident testified that the proper way to secure a ballast plow is to put the regulator in park, set the parking brake, lower the attachment to the ground and turn off the battery switch. Much of the investigation centered on two excuses offered by Claimant and the Organization.

First, there was no dispute that the lock on the ballast plow had been broken for quite some time. Conflicting evidence was offered as to why the lock had not been repaired, but we find that this was entirely besides the point. The evidence is clear that Claimant was aware that the lock was broken so he could not have relied on it to prevent the plow from bleeding down. Moreover, the inoperable lock did not prevent the lowering of the plow to the ground. We do not see the broken lock as excusing Claimant's failure to properly secure his equipment by lowering the plow to the ground.

Second, there was no dispute that Claimant's gang and a second gang tied up on the same portion of the siding, which made for a tight fit for all of the equipment. Claimant testified that the Foreman flagged him into the spot where he tied up. Claimant also testified that normally he would leave sufficient space between his machine and other equipment in case something might leak down. However, because of the tightness of the space that day, this was not possible. But, this does not establish an excuse for Claimant's failure to secure the regulator by lowering the plow to the ground. The Supervisor testified that there was enough room for Claimant to have lowered the plow to the ground to prevent it from bleeding down. When asked about this, Claimant's sole response was that he did not know. There is no evidence that Claimant even tried to secure the plow by lowering it to the ground. We find Claimant's offered excuses unpersuasive. We conclude that Carrier proved the charge by substantial evidence.

We turn to the penalty assessed. The failure to properly secure equipment warranted a Level 2 assessment under Carrier's UPGRADE policy. However, subsequent to the incident in question but before the assessment of discipline in this case, Claimant was notified of two other matters for which discipline was proposed: a Level 1 assessment for being absent without authorization on August 20, 2006, and a Level 2 assessment on August 21, 2006, for having unauthorized electronic equipment in his ballast regulator. Claimant did not request a hearing on either charge and the discipline assessments became final. When combined with these other two discipline assessments, the instant violation called for assessment at UPGRADE Level 4. We cannot say that this penalty was arbitrary, capricious or excessive.

AWARD

Claim denied.

Martin H. Malin, Chairman

B. W. Hanquist
Carrier Member

T. W. Kreke
Employee Member

Sept 17, 2008

Dated at Chicago, Illinois, August 31, 2008