

PUBLIC LAW BOARD NO. 7194

AWARD NO. 11

CASE NO. 11

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees Division – IBT Rail Conference

vs.

Union Pacific Railroad Company

ARBITRATOR: Janice K. Frankman

DECISION: Claim denied

STATEMENT OF CLAIM:

1. The five day suspension imposed upon R. S. Langston for violation of General Code of Operating Rules 71.1 (General Guidelines) in connection with failure to use the proper personal protective equipment (PPE) is based on unproven charges, unjust and unwarranted (Carrier's File 1476249 SPW).
2. As a consequence of Part 1 above, we request that the Level 3 discipline be expunged from Claimant's personal record and that he be compensated for all wages lost for attendance at formal investigation and for five days pay for time lost.

FINDINGS:

The Board, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute herein; and that the parties were given due notice of the hearing.

Claimant commenced service with Carrier on January 16, 1978, and holds seniority rights in several classes of the Track Sub-Department. He was assessed a five day suspension on March 5, 2007, for failure to wear required PPE in violation of GCOR Rule 71.1. Organization filed this Claim on May 2, 2007.

Under Rule 71.1, employees are required to use PPE where conditions of the job require it and in accord with directions from their supervisor. Violation of the Rule is a Level 3 offense under UPGRADE.

Claimant was assigned as Assistant Foreman on System Curve Gang 8555, headquartered at Industry, CA on December 14, 2006. In a job briefing before starting work that day, he was told that everyone at the site needed to wear a respirator and face shield. The work was blowing rock on the tracks which required a face shield to protect against the rocks and a respirator for

the dust. There was only one face shield and respirator at the site which was on the truck pulling the compressor and was being used by laborer Carabajal. Claimant's Supervisor Castro agreed to bring an additional face shield and respirator to the job site. Carabajal was doing the work alone, and when he became fatigued, Claimant offered to relieve him for a short period.¹

Manager of Construction Projects J.P. Adams and Manager Special Projects R. Boeckner were inspecting projects in the LA Basin when they observed Claimant using the air compressor with a wand, clearing gravel without a face shield and respirator. Claimant was wearing all other required PPE including a hardhat, ear plugs and safety glasses. Adams and Boeckner did not speak with Claimant. They called Supervisor Castro to find out what was going on. He told them that he was on the way with a face shield and respirator and that he had told Claimant not to work without the equipment.

Claimant had decided it was safe to relieve Carabajal without the equipment because there was an east wind and gravel was being blown with it. He was concerned for Carabajal's welfare and did not believe it was unsafe for him to do the work. He and Carabajal had been trained and fitted for a face shield and respirator in March, 2006, and again shortly before the investigation hearing but had not been issued the equipment. The face shield and respirator that Carabajal was wearing was used and in poor condition. At the time of the investigation, 12 of the 54 men supervised by Mr. Castro, who had been trained and fitted for respirators, had been issued the equipment.

Organization argues Claimant was not provided with a full and fair hearing and was disciplined improperly. It questions the process observing that Carrier named another employee in its responses to this Claim. It seeks leniency under the circumstances, pointing to Carrier's failure to provide required equipment and the conditions under which Claimant provided a brief break for crew for whom he was concerned. It argues Claimant's tenure and work record should be considered in removing the discipline and making him whole.

Carrier argues Claimant was properly disciplined and was provided a full and fair hearing. It asserts Rule 71.1 is clear, and violation of its provisions is a Level 3 UPGRADE offense. It argues Claimant was trained and understood the Rule, was in clear violation of it and was disciplined consistent with its policy. It argues this Board has no jurisdiction to consider leniency as a basis for reversing Carrier's decision following the investigation.

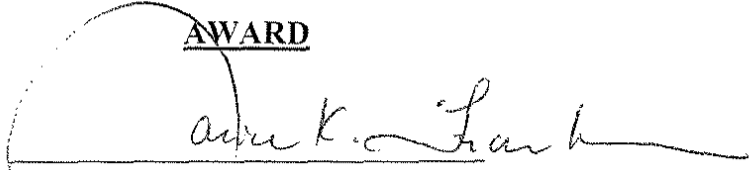
There is no evidence of due process violation or that Claimant was denied a full and fair hearing. This Award is based upon close and careful review of the transcript of the investigation hearing and arguments made on the property. Organization's concern that the transcript of Claimant's hearing had not been reviewed following the filing of this Claim is understandable given consistent reference to another employee and not Claimant in Carrier's responses. However, there is no evidence that the transcript produced for review by this Board is improper or that David Heineman, the Manager who issued the discipline, reviewed a different transcript.

¹ At the investigation, Organization and Carrier did not agree as to how many crew were working that day. Claimant and Carabajal testified that Carabajal was the only crew while Supervisor and Managers testified that there were two crew.

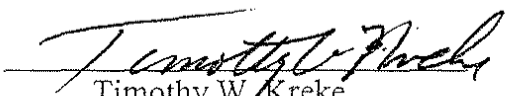
By his own admission, Claimant was in strict violation of Rule 71.1. There has been no argument that violation of the Rule is an UPGRADE Level 3 offense or that UPGRADE was improperly applied. Organization argued for leniency in its closing statement at the investigation hearing which was implicitly denied by assessment of the discipline. There is no proper basis for replacing Carrier's discretion and reversing its decision in this case.

Claim denied.

AWARD


Janice K. Frankman, Chairperson
Neutral Member


Dominic A. Ring
Carrier Member


Timothy W. Kreke
Organization Member

Oct. 9, 2008

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