NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 14
and)
) Award No. 14
UNION PACIFIC RAILROAD COMPANY)
)

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: November 12, 2008

STATEMENT OF CLAIM:

1. The five (5) day suspension imposed upon Steven W. Miller for violation of GCOR Rule 1.13 Rules 70.C and 70.1 of the Union Pacific Safety Rules and Rules 135.3.2 and 135.4 of the Union Pacific Chief Engineers Bulletins in connection with failing to comply with rules and instructions regarding Lock-out Tag-out procedures on August 23, 2007 is unjust, unwarranted, based on unproven charges and in violation of the Agreement (Carrier's File 1490579 UPS).

2. As a consequence of Part 1 above, we request that Mr. Miller's record be expunged of any and all reference to the Level 3 and that his personal record reflect that he has been exonerated of all charges. We further request that Mr. Miller be reimbursed for all loss of wages, straight time and overtime for the period of time that he has been instructed to observe five (5) days off.

FINDINGS:

Public Law Board No. 7258 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.

Claimant was notified by letter dated September 5, 2007 to report for an Investigation and Hearing on September 18, 2007. After a mutually agreed-to postponement the Investigation was conducted on September 25, 2007. Claimant was notified by letter dated October 11, 2007 that charges against him had been sustained and that he was being assessed a 5-day suspension. A

claim was filed November 1, 2007, denied December 26,2007, appealed February 6, 2008 and the appeal was denied March 10, 2008. The Claim was discussed in conference July 9, 2008 with no resolution.

Claimant was a machine operator originally assigned to operate a heater car. On August 23, 2007 Claimant was asked to operate an anchor applicator machine. Claimant testified that he had run the anchor applicator machine about 80% of the time since he had been assigned to the gang in June. Claimant testified that he had never received formal training on operation of the anchor applicator but had watched others run and adjust it and had 'picked up on how to adjust the machine.'

On the morning of August 23, Claimant attempted to make a running adjustment to the machine. Claimant testified that on that morning he pinned up or locked up all moving parts that could have been while making the running adjustment. He placed cones around his work area and began to make the adjustment as, he testified, he had been shown to do by mechanics and machine operators with knowledge of the machine. After adjusting the feeder, Claimant testified, he placed anchors in there and manually cycled just that part. Claimant recounted that at that point, one of the machine's parts caught his Kevlar glove, pulling his hand into the machine where his pinky finger on his left hand got smashed. Claimant further testified that he had been trained in the lock-out/tag-out procedures, that there was a sticker with the lock-out/tag-out procedures affixed to the machine and that the adjustment could have been made with the machine not running. Moreover, Claimant acknowledged knowing that the rules state that clothing, tools and other materials shouldn't get caught in the moving parts of a running repair and that another employee must be used as a guard for the machine's control panel.

The Organization argues that in this instance, the Carrier has failed to live up to its own rules by failing, the Organization contends, to invest the time, money and effort to ensure that each employee is trained for the particular job he/she is working. The Organization points to excerpts from the track supervisor's testimony to show Claimant was assigned to a heater car and not an anchor applicator; that the track supervisor did not check the Claimant's qualification to run the anchor applicator and that, thus, the track supervisor could only assume that the Claimant may have received some sort of training on that machine.

Moreover, the Organization contends, Carrier cited no direct evidence to prove that Claimant was in violation of any of the rules for which discipline was imposed and may not rely on mere speculation, assumption or conjecture as a basis on which to impose discipline. The Organization asserts that in this case, Carrier upheld the discipline solely because Claimant sustained an injury., but points out with authority that numerous Boards have rejected the notion that an injury is proof of a rule violation and that this Board should do the same.

The Carrier, however, avers that investigation of the machine in question and an interview of the Claimant established that lock-out/tag-out was not used when Claimant was making the adjustment and that the adjustment was made while the machine was running although it could have been made when it was shut off. Carrier contends that Claimant violated Rule 135.4 where it requires every employee to "take every precaution to ensure that all workers remain clear of the danger area around the active component" by making the adjustment while

the machine was running when that wasn't necessary. Moreover, the Carrier points out that it is apparent that Claimant failed to stay clear of the active component by virtue of Claimant's glove being pulled into the machine.

In answer to the Organization's assertion that Claimant was not properly trained on that machine, the Carrier points to Claimant's testimony that he had been trained on the machine by at least three different machine operators and mechanics and that he had been running the machine for 80% of the three months that he had been in that gang. The Carrier further argues that it is an employee's duty to notify their supervisor if they do not feel qualified to operate a machine and that if Claimant was not able to make the adjustment safely and in accordance with the rules, he could have called for a mechanic as he had previously done.

As an appellate body, we do not find facts de novo. Our review is limited to a determination of whether the factual findings made on the property are supported by substantial evidence, that is whether a reasonable person could have come to the same factual conclusions. Where, as here, there is an admission of guilt, substantial evidence has been established. Claimant admitted that the rules require another employee to be guarding the control panel of the machine and that in this case that was not done. Claimant admitted that the rules state that clothing, tools or other material shouldn't get caught in the moving parts of the running repair, but that here it did. Moreover, Claimant admitted that the adjustment could have been made with the machine safely shut off, but wasn't. The Carrier has carried its burden to provide substantial evidence to prove and demonstrate that Claimant's actions were in violation of the rules cited. Further, we cannot say that the penalty imposed was arbitrary, capricious or excessive but was instead consistent with Carrier's UPGRADE policy.

AWARD

Claim denied.

Richard K. Hanft, Chairman

D. A. Ring
Carrier Member
2/24/09

T. W. Kreke
Employee Member
2-24-09

Dated at Chicago, Illinois, January 29, 2009