

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5905

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
and) Case No. 16
ELGIN, JOLIET **AND** EASTERN RAILWAY COMPANY) Award No. 16
)

Martin H. Malin. Chairman & Neutral Member
D. D. Bartholomay. Employee Member
D. M. Gevaudan. Carrier Member

Hearing Date: March 23, 2001

STATEMENT OF CLAIM:

1. The dismissal of **Trackman** R. R. Rash for his alleged violation of Maintenance of **Way** Safety Rules 1.2, 1.54, 9.5, 10.2, 10.3 and 10.4 when Mr. S. C. Anaya was injured on November 6, 2000 was without just and sufficient cause and based on an unproven charge (System File **GC-1-01/UM-1-01**).
2. The dismissal of **Trackman** R. R. Rash for his alleged violation of Maintenance of **Way** Safety Rules 1.54, 14.09 and Roadway Worker Rules 17, 17.6 and 17.17.6.2 when Mr. K. M. Ward was injured on November 22, 2000 was without just and **sufficient** cause and based on an unproven charge (System File **GC-1-01/UM-1-01**).
3. The dismissal of **Trackman** R. R. Rash for his alleged violation of Maintenance of **Way** Safety Rules 1.54, **1.59, 4.3, 4.13** and 4.14 when he was injured on November 13, 2000 was without just and sufficient cause and based on an unproven charge (System File **GC-1-01/UM-1-01**).
4. Based on the unproven charges in Parts (1), (2), and (3) above, R. R. Rash shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

INDINGS:

Public Law Board No. 5905, 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.

This case arises out of three investigations. each held on December 4.2000. The **first** investigation concerned a charge that Claimant violated Maintenance of Way Safety Rules 1.2, 1.54, 9.5. 10.2. 10.3 and 10.4 when Mr. S. C. Anaya was injured on November 6.2000. The second investigation concerned a charge that Claimant violated Maintenance of Way Safety Rules 1.54, 14.09 and Roadway Worker Rules 17. 17.6 and 17.17.6.2 when Mr. K. M. Ward was injured on November 22.2000. The third investigation concerned a charge that Claimant violated Maintenance of Way Safety Rules 1.54. 1.59. 4.3, 4. I3 and 4. 14 when he was injured on November 13, 2000. On December 12.2000. by three separate letters. Carrier advised Claimant that he had been found guilty of the charges and had been dismissed from service.

The critical issue in this case is whether Carrier proved the charges by substantial evidence. With respect to the **first** charge, the record reveals that on the date in question, Claimant and a coworker were removing bolts from an insulated joint. The coworker was holding a punch and Claimant w-as striking the punch. A piece of the punch flew off and struck the coworker in the chin.

It is undisputed that Carrier's rules require the use of a sledge hammer when striking a punch. Carrier maintains that it proved that Claimant used a spike maul instead. in violation of the rules. Claimant and the coworker testified that Claimant was using a sledge hammer at the time of the incident. However. Claimant also testified that initially he used a spike maul and then switched to a sledge hammer. On his accident report, Claimant stated that he was using a "mall." The supervisor who investigated the incident testified that he was able to find the punch, the piece that had sheared off of it, and a spike maul. However, he found no sledge hammer at the accident scene.

The circumstantial evidence supports a strong inference that Claimant was using a spike maul instead of the required sledge hammer. Carrier acted appropriately in discrediting the testimony of Claimant and his coworker. Accordingly, we find that Carrier proved the charge by substantial evidence.

The evidence in the second investigation revealed that on the date in question, Claimant was operating a tie crane. A coworker injured his back. The coworker testified that Claimant struck him with the crane boom. Claimant denied doing so. No other persons witnessed the incident.

We note that both Claimant and the coworker were noticed for investigation in connection with the incident. Thus, each had a motive to provide self-serving testimony as each

had reason to fear discipline resulting from the investigation. In the absence of additional evidence, we find no basis for crediting the coworker's testimony over Claimant's. Accordingly, we find that Carrier failed to prove the second charge by substantial evidence.

With respect to the third charge, the evidence revealed that Claimant was working with three other employees. using a tie tong to insert a cross tie when he strained his left knee. The record contains no additional evidence whatsoever that might establish any culpable conduct on Claimant's part. The record merely establishes that Claimant was injured on the date in question, but evidence of an injury alone cannot establish Claimant's culpability. Accordingly, we find that Carrier failed to prove the third charge by substantial evidence.

We therefore must decide whether, in light of our findings that Carrier proved only one of the three charges, the discipline of dismissal was arbitrary, capricious or excessive. Under most circumstances we would be very concerned with a level of discipline imposed for three incidents. where culpability was established for only one of the incidents.

However, in the instant case, we note that we reinstated Claimant on a conditional basis in Award No. 10. In that case, we found that Carrier proved the charge that Claimant had been asleep while on duty. However, we overturned Claimant's dismissal based on the peculiar circumstances presented. We wrote:

However, in the instant case, based on the peculiar facts and circumstance presented, including the fact that Claimant had served the Carrier since 1974, we find that Claimant should be given one last chance to demonstrate that he is and can be a productive employee who complies with all of Carrier's rules. Accordingly, we shall sustain the claim but only to the following extent. We shall order Carrier to reinstate Claimant with seniority unimpaired but without compensation for time held out of service.

Reinstatement shall be on a last chance basis. Any subsequent rule violation or other act of misfeasance or malfeasance, no matter how minor, shall be cause for Claimant's permanent dismissal. Claimant is admonished that this award does not diminish the seriousness of his violation and is further admonished of the need to correct his conduct immediately. Claimant shall have this one last chance but if he squanders it, Carrier will have the right to terminate his employment permanently.

Claimant clearly squandered the chance that our Award No. 10 gave him when he used a spike maul instead of a sledge hammer to drive a punch. In Accordance with Award No. 10, we find that Carrier acted within its rights in dismissing Claimant permanently.

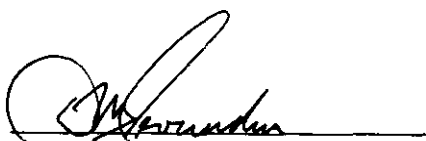
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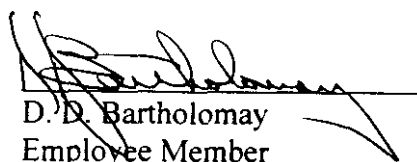
Claim denied.



Martin H. Malin, Chairman



D. M. Gevaudan
Carrier Member



D. D. Bartholomay
Employee Member

Dated at Chicago, Illinois. May 12. 2001