

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
and) Case No. 160
UNION PACIFIC RAILROAD COMPANY) Award No. 155
_____)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: March 23, 2009

STATEMENT OF CLAIM:

1. The five (5) day suspension imposed upon Foreman Michael L. Smith for violation of General Code of Operating Rules 80.1 and 80.2 in connection with a personal injury sustained by him on October 14, 2007 is unjust, unwarranted and in violation of the Agreement (System File D-0748U-209/1493588).
2. As a consequence of Part 1 above, we request that all charges against Mr. Smith be dropped and that he not be made to serve a five (5) day suspension and his record expunged entirely of this discipline matter.

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 October 23, 2007, Carrier notified Claimant of charges that he failed to comply with Rules 80.1 and 80.2 on October 14, 2007, and offered him discipline at UPGRADE level 3. Claimant exercised his right to reject the offer and request a formal hearing. By letter dated November 6, 2007, Carrier directed Claimant to report for a formal investigation on November 8, 2007, concerning the charges. The hearing was held as scheduled. On November 28, 2007, Carrier notified Claimant that he had been found guilty of the charges and assessed discipline at UPGRADE Level 3, a five-day suspension without pay.

The record reflects that on October 13, 2007, Claimant and his crew were working at a road crossing where they removed 40 to 45 feet of track and installed a new track panel. A contractor was to pave the crossing the following day. In addition to setting up barricades, the crew parked a backhoe in the area they had excavated to remove the track and install the new rail panel. The following morning Claimant and the Welder were at the job site awaiting the arrival of the contractor. Claimant mounted the backhoe to check its fuel level and start it so that it would be warmed up when the contractor arrived. Claimant dismounted the backhoe. He then slipped and extended his arm to break his fall. He hit a tie with his wrist, breaking his wrist.

The mere fact that Claimant sustained an injury does not establish his culpability. Claimant testified that he was aware of the uneven terrain and was being cautious and taking small deliberate steps as he walked away from the backhoe when, without warning, the ground gave way under him due to a hidden void. The Welder testified that he did not notice any particular hazards, holes or voids and that there was enough room on either side of the backhoe for walking. The Welder further testified that after Claimant sought him out for assistance because of his fall and broken wrist, they walked over the same path and he judged the walkway adequate and saw no sign of any dangers.

The Manager Track Maintenance testified that "on the side where [Claimant] had mounted, there was definite objects and obstructions and holes in that area that he had to go through to mount the piece of equipment." But, the MTM conceded that he did not observe the accident scene in the condition in which Claimant was injured. When the MTM arrived on the accident scene, after meeting up with Claimant at the hospital, the contractor had already paved the crossing. Thus, the MTM's testimony can have no probative value as it was based entirely on speculation.

The MTM offered further speculation. He testified that in his opinion "there could have been a little extra time taken, some hand shovels and probably cleared a - a - cleared a smooth walking surface path to the right side of the piece of equipment . . ." But again, this opinion was not based on a personal inspection of the scene in its condition at the time of Claimant's injury. Similarly, the MTM testified that "many time you excavate, you cut asphalt and excavate and excavate next to asphalt, there's always the possibility for undermining the asphalt that's existing there. Sometimes you can see voids. Sometimes you can see indentations."

The MTM's speculation is no substitute for proof based on personal inspection and personal knowledge. Indeed, the MTM testified that in his view every slip, trip or fall is preventable. His view appeared to be, that because Claimant fell, he must have been culpable. The Senior Director of Terminal Operations testified to similar effect. But the testimony of the only witnesses other than Claimant who actually observed the conditions that led to Claimant's fall, i.e. the Welder, fully corroborated Claimant that the accident was not preventable.

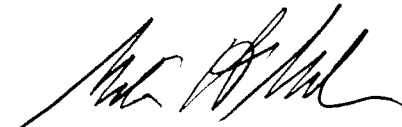
On this record, we must conclude that Carrier failed to prove the charges by substantial evidence. Accordingly, the claim must be sustained.

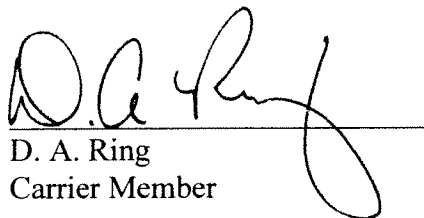
AWARD

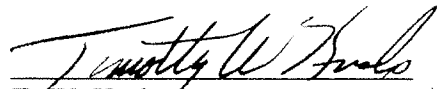
Claim sustained.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto


Martin H. Malin, Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member

June 23, 2009

Dated at Chicago, Illinois, June 23, 2009