

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 6302**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

and

**UNION PACIFIC RAILROAD COMPANY**

)

) Case No. 48

)

) Award No. 51

)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: March 22, 2004

**STATEMENT OF CLAIM:**

1. The discipline of UPGRADE Level 3 [five (5) days suspension] imposed upon Track Machine Operator Gabino Chavez for his alleged violation of Union Pacific Maintenance of Way Rule 42.11.1 in that while working as Machine Operator on April 9, 2003 at CP VP 320 at the south end of Dunsmuir Yard, while operating the ATS 9909 he allegedly ran through a facing point derail, derailing said machine, was without just and sufficient cause, in violation of the Agreement, excessive and undue punishment.
2. As a consequence of the violation referred to in Part (1) above, Track Machine Operator Gabino Chavez's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

**FINDINGS:**

Public Law Board No. 6302, 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.

On April 10, 2003, Carrier issued Claimant a Notice of Proposed Discipline alleging that he violated Rule 42.11.1 on April 9, 2003, at CP VP 320 on the south end of Dunsmuir Yard while operating Tamper ATS 9909 in that he allegedly ran through a facing point derail, derailing the tamper. On the same date, Claimant rejected the proposed discipline. On April 14, 2003, Carrier notified Claimant to appear for an investigation on April 22, 2003, concerning the alleged charge. The hearing was held as scheduled. On May 12, 2003, Claimant was notified that he had been found guilty of the charge and assessed discipline at UPGRADE Level 3, a five day suspension.

The record reflects that on April 9, 2003, Claimant was operating Tamper ATS 9909 when it ran through a derail switch and derailed. However, every witness who was present at the incident testified that at the job briefing Claimant and the other members of the gang were instructed that the Foreman was in charge of lining the switches and that the equipment was to move on the Foreman's instruction only. Furthermore, every witness testified that the Foreman instructed Claimant that he had lined the switch and that Claimant was to move his machine out toward the work location. Indeed, the record reflects undisputed testimony that the operators asked the Foreman to confirm that he had lined the switches and the Foreman replied that the switches were lined for movement of the equipment and that the operators were to "hurry and get to work." On this record, Carrier simply failed to prove Claimant's culpability in the derauling of the tamper.

### AWARD

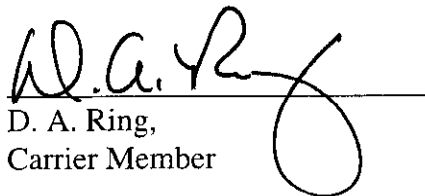
Claim sustained.

### ORDER

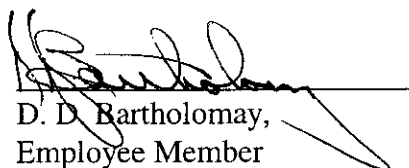
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto



Martin H. Malin, Chairman



D. A. Ring,  
Carrier Member



D. D. Bartholomay,  
Employee Member

Dated at Chicago, Illinois, July 23, 2004