

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
and) Case No. 137
UNION PACIFIC RAILROAD COMPANY) Award No. 113
_____)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

STATEMENT OF CLAIM:

- ## 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 November 13, 2007, Carrier notified Claimant to appear for a formal investigation on November 29, 2007, concerning charges that he was "allegedly careless of the safety of themselves and others and allegedly negligent when you allegedly failed to observe the sight distance and speed of the CATS 0203 to enable it to stop within half the distance the track is seen to be clear," resulting in a collision with the rear of Train UP 2434 on November 7, 2007. The hearing was held as scheduled. On December 18, 2007, Carrier notified Claimant that he had been found guilty of the charges and dismissed from service.

The record reflects that on November 7, 2007, Claimant was working as Track Foreman and was riding inside the CATS 0203 Tamper when it collided with the rear of Train UP 2434. Claimant testified that he and the Machine Operator were in the Tamper in an uncontrolled siding when the UP 2434 passed them. Approximately 42 minutes later, Claimant received track and time behind the UP 2434. They proceeded to the switch, Claimant got out and lined the switch and after the Machine Operator moved the Tamper onto the main line, Claimant lined the switch back and reentered the Tamper. Approximately three miles later, they collided with the UP 2434 which was stopped in a curved portion of the track. Property damage exceeded \$1 million. Claimant suffered relatively minor injuries and the Machine Operator suffered a broken nose.

Claimant testified that at no time did he believe that the Tamper was traveling at an excessive rate of speed. He related that at no time was the Tamper proceeding in excess of 30 m.p.h. Consequently he never told the Machine Operator to slow down.

Measurements taken after the accident showed that there was a line of sight distance of 765 feet. It is clear that the Tamper was going too fast to be able to stop within one-half the distance of the line of sight. Although the Machine Operator was primarily responsible for the accident, as Foreman, Claimant also had a responsibility for the safety of their travel and should have cautioned the Machine Operator to slow down. Claimant failed to do so. We conclude that Carrier proved the charges by substantial evidence.

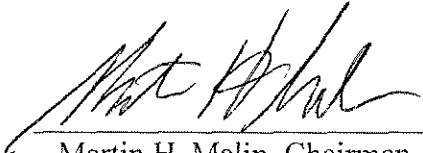
We note, however, that Claimant was not primarily responsible for the accident. Furthermore, Claimant was not qualified to operate the Tamper. Considering the circumstances and Claimant's level of culpability, we conclude that the penalty of dismissal was excessive. Carrier shall reinstate Claimant to service, with seniority unimpaired, but without compensation for time out of service.

AWARD

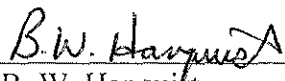
Claim sustained in accordance with the Findings.

ORDER

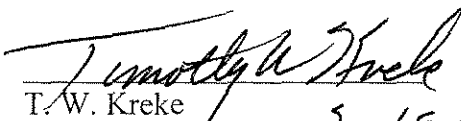
The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto



Martin H. Malin, Chairman



B. W. Hanquist
Carrier Member 2-18-09



T. W. Kreke
Employee Member 2-18-09

Dated at Chicago, Illinois, January 31, 2009