

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
and) Case No. 138
UNION PACIFIC RAILROAD COMPANY) Award No. 114
_____)

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

Hearing Date: December 17, 2008

STATEMENT OF CLAIM:

1. The dismissal of Machine Operator Albert A. Riojas for violation of GCOR Rules 1.6(1), 1.6(2), 1.1, 1.1.1, 1.1.2, 42.1.7, 42.2.2 and 42.8 in connection with his failure to observe the sight distance and the speed of the CATS 0203 to enable it to stop in half the distance the track is seen to be clear is unjust, unwarranted, based on unproven charges and in violation of the Agreement (System File MW-07-173/1493528 MPR).
2. As a consequence of the violation outlined in Part (1) above, we are now requesting that the charges be dropped and that Mr. Riojas have his personal record cleared of all charges as addressed in the first paragraph of this letter. Also that he be reinstated with all back pay, seniority unimpaired and all other rights due to him by the collective bargaining agreement. This is in addition to any and all compensation that the Claimant may have already received.

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 in controlling the 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 operating the CATS 0203 Tamper when it collided with the rear of Train UP 2434. Property damage exceeded \$1 million. Claimant suffered a broken nose and the Foreman who was riding in the machine suffered relatively minor injuries.

This is the same accident that was before this Board in Case No. 137, Award No. 113. In his investigation, which was separate from the investigation of the Foreman who was claimant in Award No. 113, Claimant testified that he was proceeding at a speed of 30 m.p.h. The record reflects that Claimant’s line of sight was 765 feet. Claimant clearly was going too fast to be able to stop within one-half the distance of his line of sight. Carrier proved the charges by substantial evidence.

As we observed in Award No. 113, Claimant was primarily responsible for the accident. There was a dispute on the property over whether the Dispatcher was responsible for advising Claimant that the UP2434 had stopped. Regardless of whether the Dispatcher should have so advised Claimant, Claimant remained responsible to operate at a speed that allowed stopping within one half the distance seen to be clear. Claimant clearly operated at an excessive rate of speed.

Recognizing that Claimant was primarily responsible for the accident and that his rule violations and their consequences were very serious, we are nonetheless compelled to observe that Claimant had more than 30 years of service and there is no evidence of any prior discipline on his record. Considering the peculiar facts and circumstances of the instant case, 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

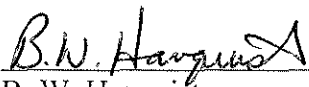
Claim sustained in accordance with the Findings.

ORDER

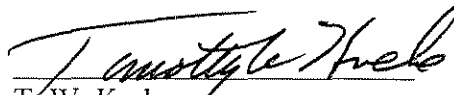
The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto



Martin H. Malin, Chairman



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



T. W. Kreke
Employee Member

Dated at Chicago, Illinois, January 31, 2009