

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 136
UNION PACIFIC RAILROAD COMPANY) Award No. 122
_____)

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 Level 3 discipline [five (5) day suspension] imposed upon Machine Operator P. C. Roberts for violation of GCOR Rules 1.1, 1.12, 70.1 and 80.1 in connection with a personal injury sustained by him on July 17, 2007 is unjust, unwarranted, excessive, based on unproven charges and in violation of the Agreement (System File MW-07-138/1488437MPR).
2. As a consequence of the violation outlined in Part (1) above, Mr. Roberts' record shall be cleared immediately with all vacation rights, seniority rights, all pay for all lost time starting on August 23, 2007, on a continuing basis and days to be used as qualifying days for vacation purposes and all other rights due him under our collective bargaining agreement.

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 August 22, 2007, Claimant was notified to report for a formal investigation on August 27, 2007, concerning his alleged failure to watch his footing causing him to slip or trip and injure himself on July 17, 2007. Following two postponements, the hearing was held on October 8, 2007. On October 24, 2007, Claimant was advised that he had been found guilty of the charge and had been assessed discipline at UPGRADE Level 3, a five-day suspension.

The record reflects that on July 17, 2007, Claimant tripped over a cable, injuring himself. The record further reflects that the cable was hidden in high grass. Carrier contends that Claimant failed to be alert and attentive to tripping hazards and that Claimant and the other members of the gang had been alerted to the need to watch out for tripping hazards during safety briefings on the day of and the day prior to the incident.

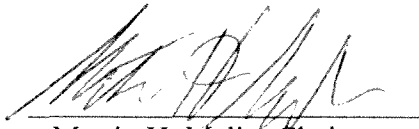
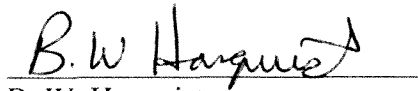
However, there is no specific evidence that Claimant was not alert and attentive to tripping hazards. There is no evidence of what Claimant could have done to have avoided tripping over the cable which was hidden in the grass. Carrier seeks to infer Claimant's inattentiveness from the fact that he did trip and did injure himself. However, the mere fact of an injury does not per se establish that the injured employee was culpable. Accidents do happen. We conclude that Carrier failed to prove the charge by substantial evidence.

AWARD

Claim sustained.

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 3-23-09
T. W. Kreke
Employee Member 3-23-09

Dated at Chicago, Illinois, February 26, 2009