NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 32
and)
) Award No. 18
UNION PACIFIC RAILROAD COMPANY)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
C. M. Will, Carrier Member

Hearing Date: November 20, 2002

STATEMENT OF CLAIM:

1. The dismissal of Mr. D. W. Johnson for his alleged violation of Union Pacific Maintenance of Way Rule 42.2 and Rules 1.6(1) and 1.6(2) by allegedly operating the THCM 320S in an unsafe, careless and negligent manner on January 8, 2002, causing it to strike the BR0021 was without just and sufficient cause, based on an unproven charge and in violation of the Agreement.

2. Mr. D. W. Johnson shall now be reinstated to service with seniority unimpaired, and compensated for all straight time and overtime he was deprived of as well as any vacation and insurance benefits lost.

FINDINGS:

Public Law Board No. 6402, 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 January 23, 2002, Carrier notified Claimant to report for an investigation on January 31, 2002. The notice charged that Claimant allegedly violated Maintenance of Way Rule 42.2 and Rules 1.6(1) and 1.6(2) by allegedly operating the THCM 320S in an unsafe, careless and negligent manner on January 8, 2002, causing it to strike the BR0021, at MP 275.75 on the Reisor Subdivision. The hearing was postponed to and held on February 12, 2002. On March 18, 2002, Carrier informed Claimant that he had been found guilty of the charge and was dismissed from service.

There is no dispute that, on the date in question, Claimant was operating the THCM 320S, a mag crane, and that he struck the BR0021, a ballast regulator, that was stopped in front

of him. There was no direct evidence of Claimant's alleged negligence, in that no one actually observed his operation of the crane at the time of the incident. However, the record contained substantial circumstantial evidence of Claimant's negligence.

At the location of the incident, the track was straight, there were no obstructions to the operator's line of sight and the weather was clear. The operator of the ballast regulator testified that he received an instruction to travel from MP 254.75 to MP 257. He walked over to the other machines and verbally advised the operators, including Claimant, of the plan. He traveled to MP 257, stopped his machine and lowered his wing. He then heard Claimant's horn, looked back and saw Claimant waving indicating he was in trouble, tried to raise the wing and was struck. The impact caused the BR0021 to derail and caused considerable damage to the crane.

The Work Equipment Mechanic Foreman testified that to cause the extensive damage that the crane suffered, the impact would have to have occurred at a great speed. He further related that the crane weighed 16,700 pounds and the regulator weighed approximately 36,000 pounds. The impact moved the regulator 71 inches and derailed it. To accomplish this, there had to be a very severe impact.

The Equipment Supervisor testified that he performed a visual inspection of the crane's brakes and found that they were engaged at the time of impact. The brake shoes were tight. His inspection found nothing wrong with the equipment that would have prevented Claimant from stopping the crane safely. The evidence supports a reasonable inference that Claimant operated at an excessive speed, failed to pay sufficient attention to the regulator in front of him, and/or applied the brakes too late.

Claimant maintained that he applied the brakes but that the brakes did not operate properly. However, the inspection found no defects in the brakes.

Claimant also complained that the crane had only one chain, whereas it was supposed to have two chains. However, the evidence clearly established that the chains had nothing to do with the brakes.

Claimant complained about having to pull two push carts behind the crane. However, the evidence established that the carts were weighed and that their combined weight was well under the maximum load that the crane could pull safely. Furthermore, when pressed about the nature of his safety complaint, Claimant voiced concern over whether he would be able to see if the second push cart had cleared a crossing. That issue had nothing to do with stopping the crane short of colliding with the equipment in front of it.

Accordingly, we find that Carrier proved the charges by substantial evidence and we turn to the penalty imposed. Our role as an appellate body is not to decide whether we would have imposed the same penalty that Carrier imposed. Rather, we may only disturb the penalty if we find it to be arbitrary, capricious or excessive.

PLB 6402
Awd 18

The record reflects that Claimant had twelve years of service with Carrier and no prior discipline. Moreover, the Tie Gang Supervisor testified that Claimant "is a good employee. He's real safety minded."

Considering the peculiar facts and circumstances of the instant case, we find that the penalty of dismissal was excessive. Claimant's negligence was serious and justified a severe penalty but not termination. Accordingly, we shall order Carrier to reinstate Claimant with seniority unimpaired, but without compensation for time held out of service.

AWARD

Claim sustained in accordance with the Findings.

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

C. M. Will,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, December 18, 2002.