

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case Nos. 33 & 36
)
) Award No. 20
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: April 1, 2003

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier disqualified Ballast Regulator Operator H. Demouchette from his assigned position on Southern District Tie Gang 9817 on January 23, 2002 (System File MW-02-50/1309851-D).
2. The Level 2 discipline assessed Ballast Regulator Operator H. Demouchette for his alleged violation of Rule 41.1.2 when his ballast regulator struck a signal box on January 8, 2002, was without just and sufficient cause and in violation of the Agreement.
3. The Level 3 discipline [five (5) day suspension] assessed Ballast Regulator Operator H. Demouchette for his alleged violation of Rule 41.1.2 when his ballast regulator striking and damaging a switch machine on January 22, 2002, was without just and sufficient cause and in violation of the Agreement (System File MW-02-63/1313679)
4. As a consequence of the violations referred to in Parts (1) and (2) above, Ballast Regulator Operator H. Demouchette shall now have "... the opportunity for a **'Fair and Impartial Investigation'**, eight (8) hours each day of his respective straight time rate of pay as a Ballast Regulator Operator, and any and all overtime to be paid at the Claimant's respective overtime rate of pay as a Ballast Regulator Operator and the removal of the unjust disqualification as a Ballast Regulator Operator and the removal of Discipline Status of a Level 2, with regard to the Union Pacific Upgrade Policy and the removal of the level two (2) from the Claimant's personnel record, to begin on January 25, 2002, through and including

on a continuous basis until this matter is settled * * * (Emphasis in original)
(Employees' Exhibit A-3).

5. As a consequence of the violation referred to in Part (3) above, Ballast Regulator Operator H. Demouchette shall now be compensated "for ten (10) hours each day at the Claimant's respective straight time rate of pay, working schedule of Compressed Halves, for a total of forty (40) hours and any and all overtime to be paid at the Claimant's respective overtime rate of (sic) as a Ballast Regulator Operator, and the removal of the of the (sic) Discipline Status of a Level Three (3) from the Claimant's personnel record * * * (Underscoring in original)
(Employees' Exhibit B-1).

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 8, 2002, Claimant struck a signal box while operating a ballast regulator. On January 22, 2002, Claimant struck a switch machine while operating a ballast regulator. On January 23, 2002, Carrier notified Claimant that he was disqualified as ballast regulator operator. On January 28, 2002, Carrier gave Claimant two Notice of Proposed Discipline forms, one proposing an UPGRADE Level 2 for the January 8 incident and one proposing an UPGRADE Level 3 for the January 22 incident. The forms advised Claimant that, pursuant to the Agreement, he had fifteen days to waive hearing or request a hearing and that if he did not respond within fifteen days, he would be deemed to have waived hearing.

The record contains the following additional documents:

1. A handwritten letter signed by Claimant, dated 1-25-02 and addressed, "To Whom It May Concern," setting forth Claimant's version of the facts concerning the January 22 incident and stating, "So, therefore I am requesting a hearing."
2. A copy of the Notice of Proposed Discipline for the January 22 incident. Neither the option requesting an investigation nor the option waiving a hearing is checked. The Manager's Signature appears on the appropriate line and is dated 2/3/02. The Claimant's signature appears on the appropriate line at the bottom but is not dated. Handwritten at the bottom are the words, "under protest Rule 21."
3. A copy of the Notice of Proposed Discipline for the January 8 incident. Neither the option requesting an investigation nor the option waiving a hearing is checked. No Manager's Signature appears on the appropriate. The Claimant's signature appears on the

appropriate line at the bottom but is not dated. Handwritten at the bottom are the words, "under protest Rule 21."

4. A letter dated January 28, 2002, from the Organization's First Vice Chairman to Carrier's Director of Tie Gangs contending that the disqualification was disciplinary and requesting a hearing.

Consistent with prior authority, we hold that Claimant's disqualification as a ballast regulator operator was not discipline and, therefore, Claimant was not entitled to a hearing under Rule 21. *See, e.g.,* NRAB, Third Division Awards Nos. 35713 & 29307. Accordingly, we turn to the Level 2 discipline imposed for the January 8 incident and the Level 3 imposed for the January 22 incident.

Rule 21(a)(2) provides, in pertinent part:

When employees are offered discipline pursuant to paragraph (g) of this rule, such employees will either accept or reject the offer within fifteen (15) calendar days from the date of receipt of the letter of charges. Discipline will be considered accepted if formal rejection is not received within fifteen (15) calendar days from the date of receipt of Carrier's letter. . . .

The critical question is whether Claimant complied with Rule 21(a)(2) by providing Carrier with formal rejection of the discipline within fifteen calendar days of his receipt of notice of proposed discipline. We find that he did not.

The January 28, 2002, letter from the First Vice Chairman did not request a hearing on the discipline. It expressly requested a hearing on the disqualification. We note that the notices of proposed discipline were also dated January 28, 2002, making it likely that the First Vice Chairman was not aware of them when he wrote the hearing request.

Claimant's handwritten letter of January 25, 2002, requested a hearing after relating his version of the January 22 incident. However, the letter did not specify for what purpose he was requesting a hearing. The letter did not mention the January 8 incident and cannot in any way be considered a request for hearing in connection with that incident. Furthermore, the letter was written three days before any notice of proposed discipline was issued, but two days after Claimant was disqualified as a ballast regulator operator. Thus, the reasonable inference is that the letter requested a hearing on the disqualification. In any event, the letter does not unambiguously reject proposed discipline or request a hearing on proposed discipline.

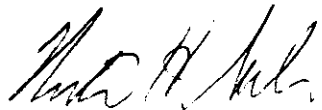
Finally, there are the two notices of proposed discipline that Claimant signed. It would have been very easy for Claimant to check the line to reject discipline and request an investigation, but on neither did he do so. Claimant's handwritten words, "under protest Rule 21," are at best ambiguous. In light of Claimant's failure to check the line or otherwise affirmatively indicate that he was rejecting discipline and requesting an investigation, Claimant's

handwritten addition to the form could reasonably be read as accepting the proposed discipline under protest.

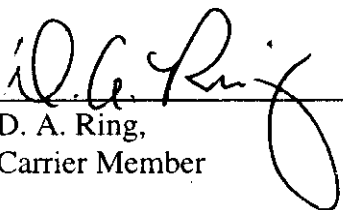
Rule 21(a)(2) plainly places the burden on the charged employee to clearly reject proposed discipline and request a hearing. Ambiguous words and conduct such as exhibited by the Claimant do not meet that burden. Accordingly, the claims must be denied.

AWARD

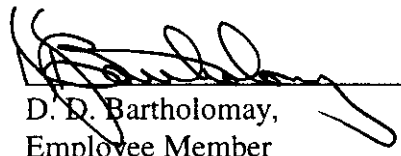
Claims denied.



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, July 29, 2003.