

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 37
)
) Award No. 23
)

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 discipline (withheld from service on August 20, 2001 and subsequent dismissal on October 24, 2001) imposed upon Mr. D. M. Senegal for alleged violation of Union Pacific Rules 42.2 and Rules 1.6(1) and 1.6(2) in connection with charges that he allegedly "... failed to control the SAD9401 causing it to be operated in an unsafe, careless and negligent manner at MP 230.6, which caused it to strike the AASQ 9411 resulting in a personal injury to yourself and operator Singelton, along with major damage to the SDAG 9401, AASQ 9411, and ATS 9808. ***" was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MW-02-11/1293196-D MPR).
2. As a consequence of the violations referred to in Part (1) above, all reference related to these charges shall be removed from Mr. D. M. Senegal's personal record and he shall be reinstated to service with seniority and all other rights unimpaired and compensated for all loss of time and reimbursed for personal expenses incurred in attending the October 10, 2001 investigation.

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 August 20, 2001, Carrier notified Claimant to report for an investigation on August 30, 2001. The notice charged Claimant with alleged failure to help control the SDAG 9401 causing it to be operated in an unsafe, careless and negligent manner when it struck the AASQ 9411 on August 15, 2001. The hearing was postponed to and held on October 10, 2001. On October 24, 2001, Carrier informed Claimant that he had been found guilty of the charge and was dismissed from service.

We have reviewed the procedural objections raised by the Organization and find that they do not provide grounds for disturbing the discipline. The record reflects that notice was proper and Claimant was afforded a fair and impartial hearing.

We further find that Carrier proved the charges by substantial evidence. On August 15, 2001, Claimant was the Operator-helper on spiker SDAG 9401. Claimant and the Operator were moving the spiker to a siding where it would be parked. Tamper ATS 9808 and Squeezer AASQ 9411 preceded the spiker into the siding. There is no question that the spiker was operated at an excessive rate of speed as it entered the siding and was unable to stop before striking the squeezer, which in turn struck the tamper, causing damage to all three machines. Furthermore, as the operator-helper, Claimant had a set of controls on his side of the machine and had the ability to apply the brake and slow or stop the spiker. Claimant admitted that he realized too late that the machine was operating at an excessive rate of speed to stop it. Claimant yelled at the operator and attempted to stop the machine but his efforts were unsuccessful. Although Claimant was the helper, rather than the operator, he was responsible to take action where necessary to ensure the safe operation of the machine. He failed to do so.


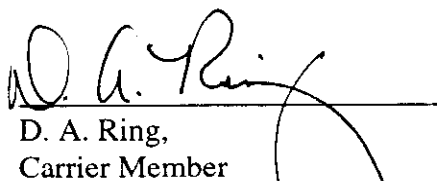
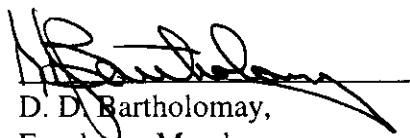
Having found that Carrier proved the charges by substantial evidence, we must consider the penalty imposed. Although Claimant was responsible for the safe operation of the spiker, primary culpability for operating at an excessive rate of speed rests with the operator. Most significantly, prior to the accident, Claimant had an excellent work record. Considering the peculiar facts presented, we find that the penalty of dismissal was excessive. Accordingly, we shall award that Claimant be reinstated to service, 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 issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto.


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

Dated at Chicago, Illinois, August 7, 2003.