

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 43

)

) Award No. 29

)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: March 22, 2004

STATEMENT OF CLAIM:

1. The discipline [UPGRADE Level 3, five (5) days suspension] imposed on Mr. E. L. Simon for his alleged violation of Union Pacific Rule 136.0, On-Track Safety for his allegedly parking a vehicle fouling live track causing the vehicle to be struck by a tank car on May 5, 2003, was without just and sufficient cause, in violation of the Agreement, excessive and undue punishment (System File MW-295/1374270 D).
2. As a consequence of the violation referred to in Part (1) above, on Mr. E. L. Simon shall now be compensated for all wage loss suffered and his record shall be cleared of the charges leveled against him.

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 May 16, 2003, Carrier offered discipline to Claimant of UPGRADE Level 3, five days suspension, in connection with a charge that he allegedly violated Rule 136.0 on May 5, 2003, by parking a company truck fouling live track, resulting in its being struck by a tank car. Claimant rejected the offer and requested an investigation. On June 10, 2003, Carrier notified Claimant to appear for an investigation on June 20, 2003, concerning the charge. The hearing was postponed to and held on July 10, 2003. On July 30, 2003, Claimant was notified that he had been found guilty of the charge and assessed discipline at Level 3.

The Organization has advanced numerous procedural arguments. We have reviewed all

of those arguments and the transcript and find that Claimant was afforded a fair and impartial hearing and that none of the procedural arguments provides a basis for setting aside the discipline.

On the date in question, Claimant was operating a fuel truck. The Foreman was the Employee In Charge of the job. He testified that he held a job briefing that morning at which he advised the employees that Tracks 1, 2 and 3 were out of service and that North Dock track had an engine that would not move until the crew contacted the EIC, but when the engine left, the track would be back in service. Later in the day, the engine crew contacted the gang and advised that it was ready to move the train. The EIC advised the gang but Claimant was running assigned errands and therefore did not receive that information. Around 5:50 p.m., Claimant was directed to fuel a cribber that was on the track adjacent to North Dock track. Claimant parked the fuel truck within four feet of the North Dock track, thereby fouling the track, and the fuel truck was struck by a tank car.

Carrier contends that in fouling the track, which was live, Claimant violated Rule 136. The Organization argues, however, that Carrier was responsible for the accident because it did not hold a job briefing to advise Claimant of changed conditions, i.e., that the engine crew had contacted the gang and advised that it would be moving the train. We are not persuaded by the Organization's argument.

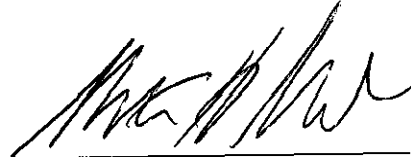
Although Claimant apparently was not present when the gang was informed that the North Dock track was back in service, Claimant clearly was aware that the North Dock track's status was ambiguous – it was out of service until the engine crew moved the train, at which point it would be back in service. Claimant did not contact the EIC to check on the status of the track before he fouled it. Rather, Claimant relied on his own visual inspection, which observed no trains on the track, and on his belief that he was not fouling the track because when he exited the truck, he extended his arms and was able to touch the rail. Both of Claimant's assumptions (i.e. that the track was still out of service because he could see no activity on it and that he was not fouling the track) were faulty. Claimant should have checked with the EIC before fouling the track, whose status he knew or should have known from the morning job briefing was ambiguous.

The Organization argued that the instant case is analogous to NRAB Second Division Award No. 10260. We do not agree. In Award No. 10260, the Board sustained the claim of an employee who operated a motor car that struck another employee. The Board observed that the struck employee did not hear the motor car because of a noisy compressor motor and stepped into the path of the car leaving the claimant with no time to stop. The Board held that Claimant was not negligent or responsible for the accident. In the instant case, as detailed above, Carrier proved Claimant's responsibility for the accident. We conclude that Carrier proved the charge by substantial evidence.

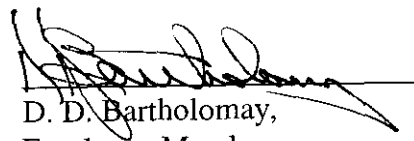
The penalty of a five day suspension was in keeping with Carrier's UPGRADE policy. We cannot say that the penalty imposed was arbitrary, capricious or excessive.

AWARD

Claim denied.



Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, July 23, 2004