

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 47

)

) Award No. 41

)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: May 23, 2005

STATEMENT OF CLAIM:

1. The dismissal of Trackman/Bus Driver Kevin M. Folsom for his alleged violation of Rules 1.6(1) and (2) and 1.13 when, on February 7, 2004, he demonstrated a willful and reckless disregard for his safety when he injured his hand while replacing maul handles was without just and sufficient cause and based on an unproven charge (System File T04-13/1397758).
2. Trackman/Bus Driver Kevin M. Folsom shall now be reinstated to service with seniority and all other rights unimpaired and be compensated for all wage loss suffered.

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 February 12, 2004, Carrier notified Claimant to appear for an investigation on February 23, 2004. The notice alleged that Claimant demonstrated a willful and reckless disregard for his safety by failing to follow instructions in the proper replacement of maul handles. On March 5, 2004, Claimant was notified that he had been found guilty of the charge and dismissed from service.

The record reflects that on February 7, 2004, Claimant was replacing maul handles when

he hit the back of his hand with his hammer. The Supervisor transported Claimant to the hospital where Claimant was treated for a broken hand and released. Thereafter, Claimant reenacted the accident for the Supervisor.

The reenactment showed that Claimant was using a chisel and was holding it with his palm facing down. The Supervisor testified that the proper way to change out a maul head was to keep the palms facing up. According to the Supervisor, had Claimant properly positioned his hands, he would not have been injured. Furthermore, the Supervisor testified, Claimant should not have used a chisel but instead should have used a four-pound hammer, hacksaw and a track punch with a rubber guard on it.

The Organization contends that Claimant was not properly trained on changing out maul heads. The Supervisor testified that Claimant received the proper training, although the Supervisor did not personally provide the training. Claimant's testimony, on the other hand, was much more equivocal:

You know, we went through so much things on there, you know, it's hard to soak up everything. I don't - - I don't believe they had the - - say anything about there, the chip protector. But I might be wrong.

After a careful review of the record, we find that Carrier proved the charge by substantial evidence. However, considering all of the surrounding circumstances, we find that the penalty of dismissal is excessive. Claimant's actions were grossly negligent but we are unable to say that they were malevolently willful. Accordingly, we shall order that Claimant be reinstated to service with seniority unimpaired but without compensation for time held out of service.

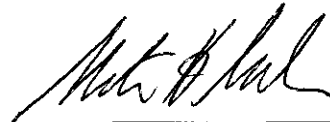
AWARD

Claim sustained in accordance with the Findings.

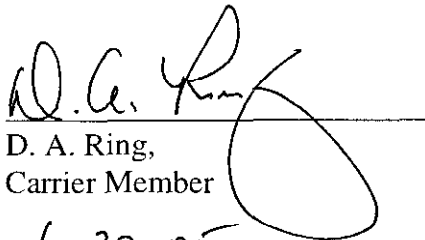
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ORDER

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

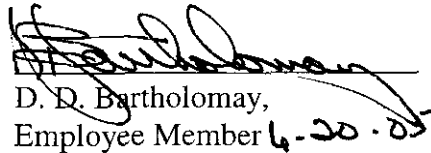


Martin H. Malin, Chairman



D. A. Ring,
Carrier Member

6-20-05



D. D. Bartholomay,
Employee Member

6-20-05

Dated at Chicago, Illinois, June 6, 2005