NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 59
and)
) Award No. 43
UNION PACIFIC RAILROAD COMPANY)

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 Track Laborer R. C. Green for his allegedly causing injury to himself on December 20, 2003, and for his alleged past injury record was without just and sufficient cause, based on unproven charges and in violation of the Agreement (System File MW-04-72/1393183).

2. As a consequence of the violations referred to above, Track Laborer R. C. Green shall now be reinstated to service with seniority and all other rights unimpaired and 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 December 30, 2003, Carrier notified Claimant to appear for an investigation on January 8, 2004. The notice alleged that Claimant caused injury to himself on December 20, 2003, at MP 213.50 in Grandview, Texas, and, coupled with Claimant's safety/injury history, charged Claimant with possible violations of Rules 1.6 and 1.1. On January 27, 2004, Claimant was notified that he had been found guilty of the charges and dismissed from service.

There is no question that Claimant sustained an injury on December 20, 2003. The record reflects that on the date in question, Claimant was working as a Track Laborer on Gang 9169. The gang was loading machines on a train. The gang needed additional chains and turnbuckles to tie down the machines. The chains and turnbuckles were away from the track, down a steep

incline. Claimant was walking down the incline to get some chains and turnbuckles when he fell and injured his ankle.

The critical question before this Board is whether Carrier proved Claimant's culpability with respect to the injury by substantial evidence. As the board stated in NRAB Third Division Award No. 30747:

> This Board does not review factual findings de novo and generally defers to findings made on the property. Those findings, however, must be based on the evidence in the record and cannot be based on speculation or conjecture. The fact of an employee injury alone does not establish that the employee operated without proper caution or in an unsafe manner.

Claimant's accident report named four individuals who witnessed the incident. Only two of those individuals were called to testify at the investigation. Significantly, Claimant's foreman, was one of the two named witnesses who was not called to testify.

Testimony of the two employees who witnessed the incident was consistent with testimony by Claimant. Together, their testimony establish the following. Chains and turnbuckles were delivered to an area at the bottom of the incline. This was not the usual procedure. Typically, the chains and turnbuckles would be brought with a backhoe as close to the track as possible. However, on the day in question, the foreman instructed employees to descend the embankment to retrieve chains and turnbuckles as needed. The weather was good. The embankment's terrain was tall dry grass and the remnants of cleared brush.

Thus, in descending the embankment, Claimant was performing his duties as assigned by his foreman. The foreman was present and observed employees going down and up the embankment. Claimant testified that in descending the embankment, he slipped and fell and his left leg fell behind him, resulting in the ankle injury.

Carrier presented no evidence or analysis of anything Claimant did that he should not have done or of anything Claimant failed to do that he should have done. The mere fact that Claimant slipped in the terrain does not establish his culpability for his injury. The uncontradicted testimony established that other employees were also having difficulty traversing the embankment's terrain. However, they were carrying out the instructions of their foreman and there is no evidence of any available alternative route to retrieve the chains and turnbuckles. Carrier has established an unfortunate accident resulting in a personal injury but has failed to prove by substantial evidence that Claimant was working unsafely, was negligent or was otherwise culpable.

Claimant was also charged with violating Rules 1.6 and 1.1 as evidenced by his safety/injury history. We note that unlike the typical case of alleged accident proneness, in the instant case no comparative evidence was presented. Carrier simply presented Claimant's injury history but did not compare it to similarly situated employees. We need not decide whether the

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absence of comparative evidence would be fatal to the charge. The injury which triggered the review of Claimant's injury record was the ankle injury sustained on December 20, 2003. Claimant's dismissal was based on a determination on the property that the December 20 injury was the culmination of a pattern of unsafe conduct which rendered Claimant no longer employable. However, we have found that Carrier failed to prove by substantial evidence that Claimant was in any way culpable on December 20, 2003. Thus, the very premise on which Claimant's dismissal was based cannot stand and the claim must be sustained.

AWARD

Claim sustained.

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

D. D. Bartholomay,
Employee Member 8-8-05

8-8-05

Dated at Chicago, Illinois, July 29, 2005