

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 6402**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

and

**UNION PACIFIC RAILROAD COMPANY**

)  
) Case No. 68  
)  
) Award No. 53  
)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: January 25, 2006

**STATEMENT OF CLAIM:**

1. The dismissal of Track Foreman Lee Eaton for his alleged responsibility in connection with a collision between a test truck and hi-rail truck at approximately 9:00 A. M. on June 24, 2004, was without just and sufficient cause, based on unproven charges and in violation of the Agreement (System File T04-26/1410908).
2. As a consequence of the violation referred to in Part (1) above, Track Foreman Lee Eaton shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered. His record shall also be cleared of this incident.

**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 June 28, 2004, Carrier notified Claimant to appear for an investigation on July 8, 2004. The notice alleged that Claimant violated Rules 1.6(1), (4) and (5), 42.8, 42.2.2, 42.9, 42.1.7, 136.7.5, 1.13, 74.3, 1.1.2, and 70.3, in connection with an incident in which he ran into the rear of a test truck on June 25, 2004, near MP 381.7 on the Inid Subdivision. Following several postponements, the hearing was held on August 24, 2004. On September 10, 2004, Claimant was notified that he had been found guilty of the charges and dismissed from service.

The Organization has raised a number of alleged procedural deficiencies in the

investigation. We have reviewed the record thoroughly. We find that none of the Organization's procedural objections individually or taken together provide a basis for setting aside the discipline. Accordingly, we turn to the merits of the charges.

The record reflects that on June 25, 2004, Claimant was operating a hi-rail truck and was following a test car. A Trackman was riding in the hi-rail truck. Claimant and the Trackman were to repair rail defects uncovered by the Track Inspector who was operating the test car. Another employee was riding in the test car. At MP 381.7, the test car stopped because a water line was clogged. The employee who was riding with the Track Inspector exited the test car and was repairing the clogged line when the Trackman riding in the hi-rail truck yelled to him to get out of the way. The employee got out of the way as the hi-rail truck crashed into the test car.

There is no dispute that the Track Inspector radioed Claimant that he was going to stop and that Claimant failed to stop the hi-rail truck and struck the test car. What is hotly contested is Claimant's responsibility for the accident.

Claimant maintained that he received the radio transmission that the test car was going to stop, acknowledged the information and hit the brake multiple times but, because the rail was wet, the hi-rail truck slid and would not stop. According to Claimant, he tried to downshift and the truck stalled. He tried to restart the truck while radioing the Track Inspector to move forward but when the Track Inspector did not answer, he told the Trackman to yell out the window to the tell the employee who was repairing the water line to get out of the way and then he struck the test car. Claimant gave a written statement to this effect to the Manager Track Projects who responded to the accident.

The Track Inspector testified that he radioed Claimant to advise that he was stopping but did not hear Claimant acknowledge the transmission. However, the Track Inspector elaborated that after he radioed Claimant, he received a call on his cell phone from another foreman and therefore could have simply not heard Claimant's acknowledgment on his radio.

Tapes from the Dispatching Center for the the date and time in question reflect the Track Inspector's radio to Claimant advising that he was stopping but do not reflect any responding transmissions from Claimant and do not reflect any transmissions from Claimant advising the Track Inspector that he could not stop the hi-rail car. The MTP testified that the tape had dead silence on it after the Track Inspector advised that he was stopping, thereby making it highly unlikely that a transmission from Claimant was "stepped on" by another transmission.<sup>1</sup>

The Trackman who was riding with Claimant gave the MTP a statement that generally corroborated Claimant's version of the events. However, according to the MTP, when they returned to the Oklahoma City headquarters and the Trackman was outside the presence of Claimant, he told the MTP that his statement did not relate how the accident occurred. The

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<sup>1</sup>The MTP offered to play the tape but Claimant and his representative declined the offer.

Trackman further advised the MTP that Claimant was on the telephone conducting transactions for his personal mattress business and was not paying attention to what was coming up ahead of him and at the last second made a panicked but unsuccessful effort to stop.

The Trackman testified that, at the time of the incident, he was a new hire who had worked with Claimant for two weeks. During that two-week period, Claimant frequently used his cell phone to transact business for his personal mattress business. On the day in question, according to the Trackman, Claimant was on the cell phone transacting personal business and then panicked when he realized how close they were to the test car, grabbing the radio and attempting to down shift simultaneously with the result being that the hi-rail truck stalled. At that point, the Trackman yelled a warning to the employee who was on the track repairing the test car's water line. The Trackman denied that Claimant told him to warn the other employee, but maintained that he gave the warning on his own initiative as Claimant was in a panic.

The issue, of course, is whether Carrier proved the charges by substantial evidence. One such charge was an alleged violation of Rule 70.3 regarding job briefings. The uncontradicted evidence in the record reflects that the Track Inspector held a job briefing with Claimant and that Claimant held a job briefing with the Trackman. There is no evidence of any deficiencies in these job briefings. Accordingly, we conclude that Carrier failed to prove the alleged violation of Rule 70.3 by substantial evidence.

With respect to the other alleged rule violations, whether Carrier met its burden of proof turns largely on the conflicting version of events related by Claimant and the Trackman. The Trackman's initial statement to the MTP corroborated Claimant's version of events. However, the Trackman changed his version of events later that day and related this second version of events at the hearing. The Trackman was a new hire who had worked with Claimant for only two weeks and there is no evidence of any motivation on his part to fabricate the second version of the events. On the other hand, it is a reasonable inference that, as a new hire, the Trackman may have been uncomfortable to provide that version in Claimant's presence.

Claimant's version of the incident is also contradicted by the dispatching center tapes. Those tapes reflect no acknowledgment by Claimant of the Track Inspector's transmission that he was going to stop the test car. The tapes also do not reflect any attempt by Claimant to radio the Track Inspector to warn him to move the test car forward. Although Claimant initially sought to show that his transmissions were "stepped on" by other transmissions and therefore not recorded, the MTP explained why this could not have been the case. Ultimately, Claimant was unable to explain why his alleged transmissions did not appear on the tapes. The absence of any acknowledgment by Claimant of the Track Inspector's transmission that he was stopping further corroborates the Trackman's testimony that Claimant was not paying attention but was focusing instead on the personal business he was transacting on his cell phone.

As an appellate body that does not observe the witnesses testify, we are in a comparatively poor position to resolve credibility conflicts. Instead, we generally defer to the assessment of witness credibility made on the property. In the instant case, the decision made on

the property was that the Trackman's testimony was more credible than Claimant's. We see no reason to deviate from our general approach and, therefore, we defer to the credibility assessments made on the property. We conclude that Carrier proved Claimant's responsibility for the accident. Furthermore, it is a reasonable inference that Claimant was intentionally dishonest when he gave his statement to the MTP because he wanted to cover up his conducting his personal mattress business while on duty. Accordingly, we hold that Carrier proved all charges except the job briefing charge by substantial evidence.

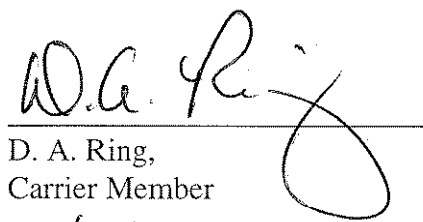
We turn to the penalty assessed. Our role is limited, We may only disturb the penalty if we find it to be arbitrary, capricious or excessive. Carrier proved that Claimant committed a number of very serious safety rule violations. Indeed, had the Trackman not taken it upon himself to warn the employee repairing the clogged water line, that employee could have been injured seriously, perhaps fatally. Furthermore, the offense was aggravated by Claimant's dishonesty in covering up his conduct of personal business while on duty. The penalty assessed was in keeping with Carrier's UPGRADE policy. Considering all of these circumstances, we see no reason to disturb the penalty of dismissal.

#### AWARD

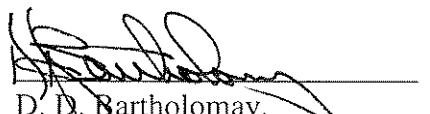
Claim denied.



Martin H. Malin, Chairman



D. A. Ring,  
Carrier Member  
4-4-06



D. D. Bartholomay,  
Employee Member 4-4-06

Dated at Chicago, Illinois, March 30, 2006