

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 79
)
) Award No. 65
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: September 14, 2006

STATEMENT OF CLAIM:

1. The Level 3 (five day suspension) assessed Foreman Steve A. Deleon for his alleged failure to give a proper job briefing on June 6, 2005 was without just and sufficient cause and based on unproven charges (System File MW-05/116/1431544).
2. Foreman Steve A. Deleon shall now have his record cleared of this incident 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 June 27, 2005, Carrier notified Claimant to report for a formal investigation on July 11, 2005. The notice alleged that Claimant violated Rules 42.3, 70.3, 136.1 and 136.3, when on June 6, 2005, while working as Foreman on Gang 3064, he failed to give a proper job briefing at MP 283.95 and the Gang was nearly struck by Train UP 5086 which went into emergency. The hearing was postponed to and held on July 21, 2005. On August 16, 2005, Carrier notified Claimant that he had been found guilty of the charges and assessed discipline at UPGRADE

Level 3, a five day suspension.

The Organization raised a number of procedural objections that do not require discussion. It is sufficient to note that we have carefully reviewed the entire lengthy record and found that Claimant received a fair hearing.

The record reveals that on June 6, 2005, Claimant was working as Foreman on Gang 3064. Claimant and two laborers were removing planks at crossings so that a tamper and regulator could tamp and regulate through the crossings, after which the Gang would replace the crossings. The Gang completed work on a crossing at MP 287.60 and proceeded to MP 283.95. The tamper operator secured track and time. Claimant and the laborers removed the planks. The Tamper Operator and Regulator Operator completed their work. Eastbound Train UP 5806 was waiting to enter the work area. The Tamper Operator released the track even though Claimant and the laborers were replacing the planks. Train 5806 went into emergency and Claimant and the laborers narrowly got out of the way.

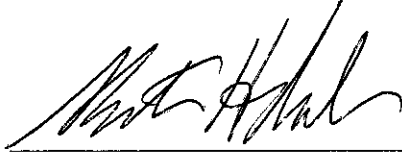
There is a great deal of conflicting testimony concerning whether the Tamper Operator secured track and time at Claimant's direction or on his own initiative, and whether the Tamper Operator notified Claimant when he was releasing the track. As an appellate body that does not observe the witnesses testify, we are in a comparatively poor position to resolve conflicts in the testimony. Consequently, we defer to factual findings made on the property as long as they are supported by substantial evidence, i.e. as long as a reasonable person could come to the same conclusion. However, even if we view the evidence in the light most favorable to Claimant, it is clear that Claimant failed to hold a complete and proper job briefing at MP 283.95. At most, while driving the truck to MP 283.95, Claimant told the two laborers who were in the truck with him, that they would do the same thing at MP 283.95 as they did at MP 287.60. It also appears that the laborer who was seated in the back seat of the truck did not hear everything that Claimant stated. Indeed, the Manager Track Maintenance testified that when he arrived at the scene and spoke to Claimant, Claimant admitted that he had not held a job briefing and was at a loss to explain why. A major purpose of the requirement of holding job briefings is to avoid mix-ups in communication and misunderstandings such as the one that occurred here, a misunderstanding that luckily did not have fatal consequences.

We conclude that Carrier proved the charges by substantial evidence. The penalty imposed was in keeping with Carrier's UPGRADE and was not arbitrary, capricious or excessive.

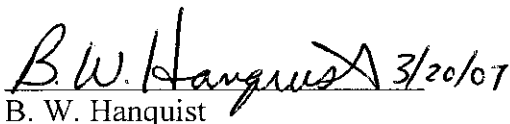
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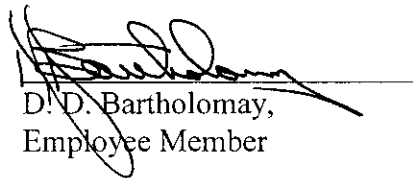
Claim denied.



Martin H. Malin, Chairman



B. W. Hanquist
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, March 8, 2007