

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 111
UNION PACIFIC RAILROAD COMPANY) Award No. 81
_____)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: January 7, 2008

STATEMENT OF CLAIM:

- (1) The Carrier, in disciplining Claimant H. Gandy, was in violation of Rule 21 of the current agreement when he was unjustly dismissed from service for being careless of the safety of himself or others as a result of the tamper he was operating colliding with a gang truck on December 12, 2006.
- (2) As a consequence of the violations listed in Part 1, the Organization requests that Mr. Gandy be restored to service with all his seniority rights and vacation rights restored unimpaired, and that the level against him be reduced to a less severe level of discipline. The Organization also requests that Mr. Gandy be compensated for all lost wages from the date he was pulled from service until the date he is returned.

FINDINGS:

Public Law Board No. 6402 upon the whole record and all of 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 15, 2006, Claimant was notified to report for a formal investigation on December 28, 2006, concerning his allegedly failing to properly operate ATS 9401, resulting in a collision with Gang Truck 60127 on December 12, 2006, in violation of Rule 1.6. The hearing was held as scheduled. On January 11, 2007, Claimant was advised that he had been found guilty of the charges and had been dismissed from service.

The Organization contends that Carrier violated Rule 21(c)(1) because the notice of investigation did not specify the charges with sufficient precision. Specifically, the Organization objects that the notice failed to specify which subsections of Rule 1.6 Claimant was alleged to have violated. The notice, however, advised Claimant of the precise nature of his conduct that was the subject of investigation, i.e., "that while employed as Machine Operator, on Gang No. 8765, at Pryor, Oklahoma, near Milepost 458, Cherokee Subdivision, at approximately 2:00 p.m., on December 12, 2006, you allegedly failed to properly operate ATS 9401, resulting in a collision with Gang Truck 60127." Such statement of charges was sufficiently precise to enable Claimant and the Organization to prepare their defense and complied with Rule 21.

There is no dispute that on the date in question, Claimant was operating tamper ATS 9401 and collided with Gang Truck 60127. Furthermore, there is no dispute that Claimant was writing in his spiral notebook, calculating his production, while operating the tamper and looked up too late to stop short of the gang truck. Although there is evidence that other factors may also have contributed to the accident, such as the failure to notify Claimant that the gang truck was operating on the track in the area covered by Claimant's track warrant, the failure to display red flags on the truck, that Claimant was performing the duties of Surfacing Gang Foreman in addition to operating the tamper, none of these factors negate or excuse the fact that Claimant was inattentive to operation of the tamper because he was writing his production in his notebook instead of devoting his complete attention to where he was going and to what lie on the track ahead. We conclude that Carrier proved the charge by substantial evidence.

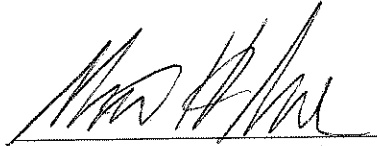
Accordingly, we consider the penalty imposed. Carrier argues that a violation of Rule 1.6 calls for dismissal in accordance with its UPGRADE policy and urges that dismissal was appropriate in light of Claimant's prior record which included a prior dismissal in April 1996. However, we note that Claimant had 23 years of service and at the time of the incident was at UPGRADE Level 0. Moreover, after being reinstated in 1996, Claimant had no further discipline until the incident at issue in the instant case. Given that Claimant's actions were careless but not willful and that Claimant had 23 years of service and had a perfect disciplinary record in the prior ten years, we find that the penalty of dismissal is excessive. Claimant shall be reinstated to service with seniority unimpaired but without compensation for time out of service.

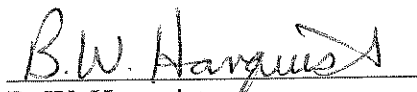
AWARD

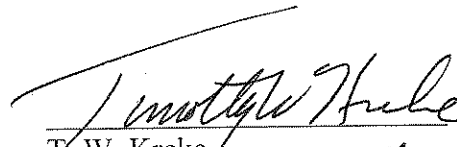
Claim sustained in accordance with the Findings.

ORDER

The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto


Martin H. Malin, Chairman


B. W. Hanquist
Carrier Member


T. W. Kreke
Employee Member

March 12, 2008

Dated at Chicago, Illinois, February 29, 2008