

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6089**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 16
)
)
) Award No. 18
)

Martin H. Malin, Chairman & Neutral Member
R. B. Wehrli, Employee Member
D. A. Ring, Carrier Member

Hearing Date: August 26, 1999

STATEMENT OF CLAIM:

1. The dismissal of J. A. Flagg was in violation of the Agreement, based on unproven charges and an abuse of discretion.
2. Claimant Flagg must be compensated for all wage losses incurred during his wrongful dismissal; and all charges and references to this incident must be expunged from his personal record. (System File J-9848.53/11305110)

FINDINGS:

Public Law Board No. 6089, 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 January 22, 1998, Claimant and another employee were assigned to drive Carrier's boom truck from Dunsmuir, California to Kearney, Nebraska. They were taking turns doing the driving. The other employee was driving the truck at the time of the incident in question. They were heading westbound on Interstate 80, having just picked up some material that had been left behind on the Wyoming side of the Port of Entry into Utah. The truck entered on the entrance lane, moved into the right lane and then into the left lane. It slowed to make a turn across the median to reverse directions and head east toward Nebraska. At the time it did so, the truck was struck by a westbound automobile that was traveling in the left hand lane. The other employee who was driving the truck was cited by the police for failing to yield to on coming traffic.

On February 5, 1998, Claimant was notified to appear for an investigation on February 20, 1998. The notice charged that "while a passenger in Union Pacific Boom Truck No. 82019, on

Interstate-80, you allegedly did not assist in the safe operation of this vehicle . . ." The notice further charged possible violation of Rules 1.6, 74.2, and 74.4.

The hearing was held as scheduled. On March 12, 1998, Claimant was notified that he had been found guilty of the charges and was dismissed from service. On April 5, 1999, Carrier advised Claimant and the Organization that it would reinstate Claimant to service without prejudice to his pursuit of this claim. Claimant returned to service on May 6, 1999. Consequently, what is at issue in this claim is the compensation Claimant lost during the period he was held out of service and whether the discipline should remain on Claimant's record.

The Organization contends that Claimant was not afforded a fair and impartial hearing. It argues that the hearing officer was biased against the Claimant. It further contends that Carrier failed to prove the charges by substantial evidence. In particular, the Organization notes that Claimant was a passenger at the time of the incident and was not responsible for the accident.

Carrier contends that it afforded Claimant a fair and impartial hearing. It further argues that it proved the charges by substantial evidence.

The Board has reviewed the record carefully. We find that Carrier failed to prove the Claimant's responsibility by substantial evidence. Accordingly, we sustain the claim and find it unnecessary to address the question of the hearing officer's alleged bias.

The record reveals conflicting testimony concerning whether it was legal in the State of Utah to cross the median of an Interstate highway to reverse direction. We assume that such a move was illegal. Nevertheless, we cannot find substantial evidence in the record developed on the property of Claimant's responsibility.

Claimant was not driving the truck at the time of the accident. Claimant testified that he could not see on coming traffic because the truck's mirrors were set for the driver's view and because the view out the rear window of the truck was obstructed by the boom housing and outriggers right behind the cab. There is no reason to doubt the accuracy of this testimony. Claimant further related that the other employee commented that the median looked like a good place to turn around but had begun the turn before Claimant had a chance to reply.

Nothing brought out in the investigation suggested anything that Claimant, as a passenger, could have or should have done to prevent the accident. At no time during handling on the property did Carrier suggest any theory as to how Claimant should have acted as a passenger. The notice of dismissal issued by the Manager Track Programs who had served as hearing officer merely reiterated the charge from the notice that Claimant "did not assist in the safe operation of this vehicle," and found that there was "more than a substantial degree of evidence . . . to warrant sustaining all charges . . ." During claim handling on the property, the General Director of Labor Relations stated:

"As a result of my review of the hearing transcript, I find that there was substantial

evidence adduced in the hearing to showing (sic) the Claimant failed to obey the Rules of the Carrier while operating a motor vehicle, causing an accident on January 22, 1998. . . . Had the vehicle operated by Mr. Jamison and Mr. Flagg not violated any traffic laws, in violation of the Carrier's rules, the State Patrol would not have issued a citation. Both employees are in the truck, and responsible for the safe operation of the vehicle."

It thus appears from the handling on the property that Carrier held the Claimant strictly liable for the actions of his co-worker who was driving the truck. Claimant's presence in the truck, standing alone, cannot establish the rules violations with which he was charged and cannot establish cause for discipline. There must be some action that Claimant should have taken and that he failed to take. We are unable to discern any contention by Carrier during handling on the property that Claimant did something he should not have done or failed to do something that he should have done. Our review of the investigation transcript and exhibits also does not disclose anything that Claimant could have or should have done to have prevented this accident.

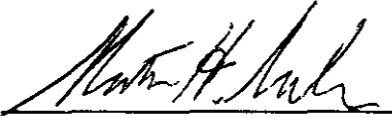
Accordingly, we conclude that Carrier's findings of guilt are not supported by substantial evidence. The claim must be sustained.

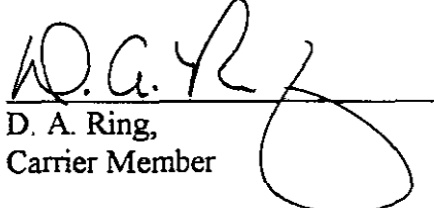
AWARD


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


R. B. Wehrli
Employee Member

Dated at Chicago, Illinois, February 21, 2000.