

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 14
)
) Award No. 7
)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: May 12, 2000

STATEMENT OF CLAIM:

1. The Level 2 discipline assessed Foreman C. P. Lemesurier for his alleged failure to comply with instructions on October 30, 1996 when the gang he was supervising dumped rock through cuts on the Spokane Subdivision was without just and sufficient cause and in violation of the Agreement (System File D-287/1092146D).
2. Foreman C. P. Lemesurier shall now have any reference to this incident removed from his record.

FINDINGS:

Public Law Board No. 6302, 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 17, 1997, Carrier directed Claimant to report for an investigation on "January 27, 1996 (sic) . . . to develop the facts and place responsibility, if any, that while working as Foreman, on October 30, 1996, in the vicinity of Avers and Marango, Washington, you allegedly failed to comply with instructions when you allegedly unloaded ballast in a location instructed not to between MP 266 and MP 300 . . ." Following several postponements, the hearing was held on February 13, 1997. On March 5, 1997, Carrier informed Claimant that he had been found guilty

of the charge and assessed discipline at UPGRADE Level 2, a one day alternate assignment to develop a corrective action plan.

The primary dispute between the parties is whether Carrier proved the charge by substantial evidence. The following facts are not in dispute. On October 30, 1996, Claimant was assigned as system unloading foreman of Gang 9022. The gang was assigned to dump ballast ahead of a tie and surfacing gang. Claimant was instructed that the gang should not dump ballast in the rock cuts. Claimant held a job briefing during which he instructed the gang not to dump the ballast in the rock cuts. The gang was short handed that day. Normally, it would have two foremen and six laborers. That day, Claimant was the only foreman and there were only four laborers. Claimant did not ride the train with the gang and, consequently, he was not physically present when the ballast was dumped. Instead, Claimant drove the gang's van to the end point. The gang dumped ballast in the rock cuts, contrary to specific instructions not to do so.

The Board finds several matters in the record troubling. It is undisputed that the gang failed to comply with Claimant's instructions not to dump the ballast in the rock cuts. However, the four members of the gang who disregarded those instructions were not charged. Nowhere in the record of handling on the property did Carrier offer any explanation for not charging them.

At the beginning of the hearing, Claimant inquired as to how he was alleged to have failed to follow instructions when he instructed the gang not to dump ballast in the rock cuts. The hearing officer was unable to clarify the charge. He merely reiterated the language of the notice of charges.

It was not until the testimony of the track supervisor that a theory concerning Claimant's responsibility emerged. The track supervisor testified that had Claimant been on the ground with the gang, the dumping in the rock cuts would not have occurred because Claimant would have been there to stop it. Specifically, the track supervisor testified that Claimant should have had someone else move the van so Claimant could have remained with the gang. Similarly, the engineering supervisor testified that a foreman should be with his gang.

Claimant testified and acknowledged that under normal circumstances, the foreman should be on the ground with the gang. Claimant, however, also testified to the situation he faced on October 30, 1996. He was short handed and, specifically, the other foreman who worked with the gang was not there. Claimant testified that he was the most qualified person available to operate the radio in the van. He further testified that he could not maintain communications from the hand held radio had he remained on the ground because of interference in the rock cuts. He related that he knew that the gang members had dumped ballast many time before and had followed instructions regarding where to dump and where not to dump. Claimant explained his decision to drive the van and maintain radio communication as follows:

Because these men do what they were doing. They've been doing it all year. They - - there was no question about them knowing how, or how to dump ballast, or how not to dump ballast. The safety factor was in radio communication. It was not in terrain, as far

as walking, stumbling hazards, or anything else. The main concern for safety was the radio communication.

Thereafter, Carrier did not recall the track supervisor or the engineering supervisor to refute Claimant's rationale for his decision to drive the van rather than remain on the ground. Carrier did not call any other witness to refute Claimant's rationale.

Claimant was not charged with negligence in his decision to drive the van to maintain communications rather than to be on the ground with his gang. He was charged with failure to follow instructions to not dump ballast in the rock cuts. The record reveals that Claimant instructed his gang not to dump the ballast in the rock cuts and that Claimant could reasonably expect that the gang members would follow his instructions. Furthermore, the record reveals that the gang members who dumped the ballast in the rock cuts were not charged with failure to follow instructions and the record contains no explanation for this. Under these circumstances, the discipline assessed Claimant cannot stand.

AWARD

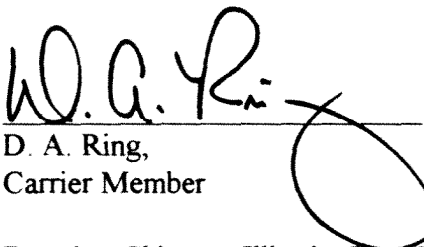
Claim sustained.

ORDER

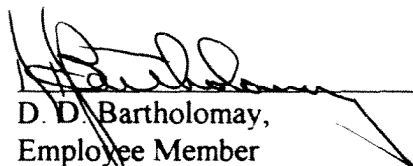
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, June 30, 2000.