

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 57

)

) Award No. 57

)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: March 22, 2004

STATEMENT OF CLAIM:

1. The Level 2 assessed Trackman T. J. Castorena for his alleged falsification of an injury report, falsely reporting your actions which led to the injury and failure to follow doctor's instructions on March 27, 2003 was without just and sufficient cause, in violation of the Agreement, and based on unproven and disproven charges (System File J-0348-62/1367633).
2. As a consequence of the violations referred to in Part (1) above, Trackman T. J. Castorena shall now be reinstated to service with seniority and all other rights unimpaired, compensated for all wage loss suffered commencing March 31, 2003 and continuing until he is reinstated to service and have his record cleared of the Level 2 discipline.

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 April 2, 2003, Carrier notified Claimant to appear for an investigation on April 10, 2003. The notice charged that "while working as a Trackman, you allegedly falsified an injury report on March 27, 2003 near MP 529.0, Huntington Subdivision, when you falsely reported your actions which led to you sustaining a personal injury. Also you allegedly endangered the safety of yourself when after receiving doctor's instructions that prohibited heavy lifting, bending or stooping, you failed to follow those instructions." The notice continued, "Your alleged actions indicate a possible violation of Union Pacific Rules 1.6, Conduct subpart 4 Dishonest, effective April 2, 2000, Safety Rules 70.1 Safety Responsibilities, 75.1.1 Steps to Safe Lifting subpart 2,

80.1 Avoiding Slips, Trips and Falls, and 80.2 Precautions Against Slips, Trips and Falls, effective October 25, 1998, Operating Rules 1.1 Safety, 1.1.1 Maintaining a Safe Course, and 1.1.2 Alert and Attentive, effective April 2, 2000." Claimant was removed from service pending investigation on March 31, 2003.

The hearing was held as scheduled. On April 25, 2003, Claimant was notified that he had been found guilty of violating Rules 70.1 Safety Responsibilities, 75.1.1 Steps to Safe Lifting, 80.1 Avoiding Slips, Trips and Falls, and 80.2 Precautions Against Slips, Trips and Falls, and assessed discipline at UPGRADE Level 2, one day of alternative assignment with pay to develop a Corrective Action Plan. Claimant was reinstated to service effective April 24, 2003.

The record reflects that three different matters were inquired into during the investigation: whether Claimant's description of the incident that led to his on-duty injury was false, whether Claimant engaged in heavy lifting when setting up his camper despite doctor's instructions to refrain from doing so, and whether Claimant failed to work safely resulting in his injury. Claimant was exonerated of the first two matters and found guilty of the third. The notice clearly advised Claimant of when and how he was alleged to have falsified the injury report and when and how he was alleged to have failed to follow doctor's instructions. However, the notice contained not a single word concerning when, where or how he was alleged to have worked unsafely, the charge on which he was found guilty. The notice must state the alleged offense with sufficient particularity to enable Claimant to prepare a defense. With respect to the matter for which Claimant was found guilty, the notice failed to provide any information that would have enabled Claimant to prepare a defense. Accordingly, we find that the discipline may not stand.

The discipline must be set aside for a second reason. Carrier failed to prove Claimant's guilt by substantial evidence. The record reflects that Claimant was injured while using a plate hook to remove tie plates. Due to weather conditions, the tops of the cross ties were very slippery. The record is clear that Claimant was aware of the slippery conditions. Nevertheless, while performing his duties, Claimant stepped on a slippery spot and he fell and injured himself. There is absolutely no evidence in the record as to what Claimant could have done (short of refusing to work under those conditions) that would have prevented the accident. There is no evidence that Claimant was not working safely or that he ignored the slippery conditions of which he was aware. The record only establishes that Claimant fell and injured himself, but the fact of an accident alone does not establish culpability for the accident.

There remains the question of remedy. Claimant's record must be cleared of the Level 2 discipline. Claimant was withheld from service pending investigation and reinstated to service effective April 24, 2003. Claimant's entitlement to compensation for time held out of service depends on whether he was medically capable of performing service during the period that period. The record does not clearly indicate what Claimant's medical condition was during the period he was withheld from service. Therefore, we will remand this matter to the parties to determine whether Claimant was medically capable of performing service during the period he was withheld from service.

AWARD

Claim sustained in accordance with the Findings.

ORDER

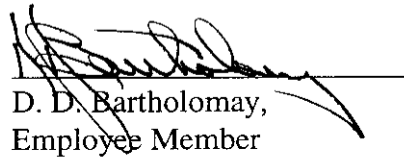
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, July 23, 2004