

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 87
)
) Award No. 74
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: September 15, 2005

STATEMENT OF CLAIM:

1. The discipline (withheld from service on January 29, 2004 and subsequent Level 5 and dismissal on March 22, 2004) imposed upon Mr. A. Gaddy for alleged violation of Union Pacific Rule 1.1 Safety, 1.6 Conduct (1) and (2), 135.2.3 Apply and Remove Your Own Locks, Wire, Ties and Tags and Rule 135.3.2 A. Lockout/Tagout Procedures During Work on January 17, 2004 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-0448-102/1395918D).
2. As a consequence of the violation referred to in Part (1) above, Mr. A. Gaddy shall now be reinstated to service with all rights unimpaired and compensated for all time lost from the time he was withheld from service until he is returned to service.

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 29, 2004, Carrier notified Claimant to appear for an investigation on February 9, 2004. The notice alleged that Claimant violated Rules 1.1, 1.6(1) & (2), 135.2.3, and 135.3.2A in that Claimant allegedly was observed under the ATS 0005 on January 17, 2004, while it was running with no orange cones displayed and no lockouts on the battery switch, doors or ignition switch. The hearing was postponed to and held on March 2, 2004. On March 22,

2004, Claimant was notified that he had been found guilty of the charges and dismissed from service.

The Organization contends that Carrier violated Rule 48(a) by removing Claimant from service pending the investigation. In the Organization's view, the removal of Claimant from service constituted discipline without a fair and impartial hearing and reflected prejudgment of the ultimate merit of the charges. We do not agree. Rule 48(o) expressly allows Carrier to suspend an employee pending hearing for "serious and/or flagrant violations." In the instant case, the charges involved serious safety violations and Carrier properly relied on Rule 48(o).

The Organization maintains that Carrier failed to prove the charges by substantial evidence. The record reflects that on the day in question, the tamper that Claimant was operating developed a hydraulic leak. While waiting for the mechanic to arrive, Claimant attempted to locate the source of the leak. Claimant raised the machine's work heads and locked them in place, turned off the machine and attempted to locate the source of the leak. Claimant admitted that he was under the machine. The mechanic testified that when he arrived, Claimant was under the machine and the Assistant Foreman testified that he observed Claimant under the machine. Although the machine was not running, Claimant was in harm's way when he was under the machine and no orange cones were displayed, nor was the battery switch locked out.

Accordingly, although Carrier failed to prove that the machine was running when Claimant was underneath it, Carrier did prove that Claimant was under the machine without proper lockout and without the orange cones displayed. In so doing, Carrier proved by substantial evidence that Claimant violated the rules cited in the Notice of Investigation. However, considering the particular circumstances of the instant case, we find that the penalty of dismissal was excessive. Claimant shall be reinstated to service with seniority unimpaired but without compensation for time held out of service.

AWARD

Claim sustained in accordance with the Findings.

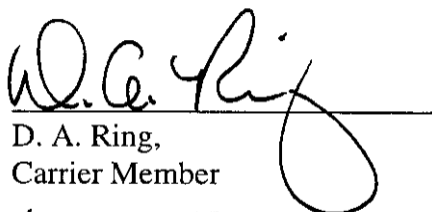
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ORDER

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

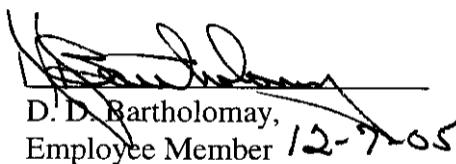


Martin H. Malin, Chairman



D. A. Ring,
Carrier Member

12-7-05



D. D. Bartholomay,
Employee Member 12-7-05

Dated at Chicago, Illinois, November 28, 2005