

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 38

)

) Award No. 24

)

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 dismissal of Trinidad Gonzalez for alleged violation of Union Pacific Rules 1.6(1) and 1.6(2), 70.3 and Chief Engineers Bulletin Instructions Concerning Lock Out Tag Out was without just and sufficient cause and in violation of the Agreement.
2. As a consequence of the violations referred to in Part (1) above, Trinidad Gonzalez shall be reinstated to service with seniority and all other rights unimpaired, have his record cleared of the incident and be compensated for all wage loss suffered.

FINDINGS:

Public Law Board No. 6402, 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 May 5, 2003, Carrier notified Claimant to report for an investigation on May 13, 2003. The notice charged Claimant with alleged blatant disregard of safety rules, gross negligence and violation of Lock Out Tag Out while working on ATS 9815 on May 2, 2003. The hearing was postponed to and held on May 27, 2003. On June 13, 2003, Carrier informed Claimant that he had been found guilty of the charges and was dismissed from service.

The investigation resulted from an incident that occurred on May 2, 2003. ATS 9815 broke a hydraulic hose above the work heads on top of the machine. Claimant climbed to the top of the machine and located one end of the broken hose. The Machine Operator obtained a replacement hose and Claimant secured one end into place but could not locate the other end of the broken hose. The Machine Operator then located the other end of the broken hose by pulling on the hoses. The two employees conferred and concluded that the best way to secure the second end of the replacement hose was to lower the work heads so that the Machine Operator could stand on the work heads and reach the location safely.

Claimant was holding the unsecured end of the replacement hose when the Machine Operator powered on the machine, which had been locked out and tagged out, to lower the work heads. The resulting hydraulic pressure caused Claimant to lose control of the hose end he was holding and the hose struck Claimant in the legs injuring him.

The Manager Track Maintenance, who investigated but did not witness the incident, introduced a written statement provided by the Machine Operator. The Machine Operator's statement asserted that he told Claimant he was going to cut the power on, crank the machine and let the heads down. The hearing officer interrupted the MTM's testimony to call the Machine Operator as a witness, but asked him only to verify that the written statement was his and to read the statement into the record. Claimant testified and denied that the Machine Operator ever stated that he planned to turn on the machine's power. Claimant further testified that the heads were already halfway down, i.e. they were not locked, and therefore they could be lowered by releasing a lever without turning on the machine's power. Claimant further testified that the Machine Operator did not say that he was going to power the machine back on and Claimant did not expect him to do so.

The difference between Claimant's testimony and the Machine Operator's written statement is crucial. If the Machine Operator never indicated that he was going to power on the machine and Claimant reasonably believed that the Machine Operator was going to lower the heads by releasing the lever, then culpability for the accident would rest solely with the Machine Operator. If, the Machine Operator told Claimant he was going to power on the machine, then both employees would share culpability for the accident.

The hearing officer, however, never recalled the Machine Operator to testify first hand to the incident (as opposed to simply verifying the authenticity of his statement). By failing to recall the Machine Operator, the hearing officer failed to afford Claimant and his representatives an opportunity to cross-examine the Machine Operator with respect to the crucial differences between his written version of the incident and Claimant's testimony. (We note that Claimant's written statement did not indicate any mention by the Machine Operator of an intent to power on the machine.) Under these circumstances, we are compelled to conclude that Claimant was not afforded a fair hearing. Furthermore, the Machine Operator's written statement, standing alone against Claimant's testimony, cannot provide substantial evidence of Claimant's culpability.

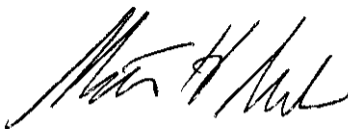
Accordingly, Claimant must be reinstated to service with seniority unimpaired and compensated for all wage loss suffered. During handling on the property, the Organization also claimed that Claimant be reimbursed for expenses incurred in attending the investigation. It is not clear whether the Organization is still claiming such expense reimbursement. We have already held that such a claim for expense reimbursement lacks any support in the Agreement. PLB 6402, Award No. 10. Accordingly, to the extent that the Organization still seeks expense reimbursement, that part of the claim is denied.

AWARD

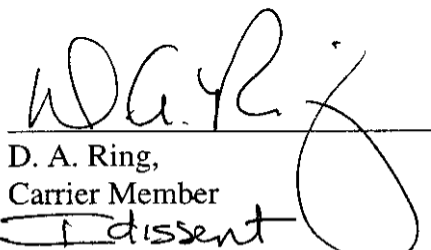
Claim sustained in accordance with the Findings.

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.

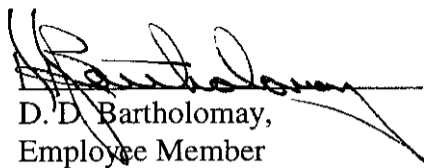


Martin H. Malin, Chairman



D. A. Ring,
Carrier Member
I dissent

Dated at Chicago, Illinois, June 29, 2004.



D. D. Bartholomay,
Employee Member