

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 42
)
) Award No. 25
)

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 Machine Operator Hector Ramirez for alleged insubordination, quarrelsome menacing and hostile actions toward a supervisor on March 20, 2003, was without just and sufficient cause and in violation of the Agreement (System File MW-03-210/1366960).
2. As a consequence of the violations referred to in Part (1) above, Machine Operator Hector Ramirez 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 March 26, 2003, Carrier notified Claimant to report for an investigation on April 7, 2003. The notice charged Claimant with being quarrelsome, menacing, insubordinate and hostile toward a Track Inspector when the Track Inspector gave him working assignments on March 20, 2003. The hearing was held as scheduled. On April 22, 2003, Carrier informed Claimant that he had been found guilty of the charges and was dismissed from service.

We have reviewed the record thoroughly and find that none of the procedural arguments raised by the Organization warrants setting aside the discipline. We further find that Carrier proved the charge by substantial evidence.

On March 20, 2003, Claimant was working as a Machine Operator on Surfacing Gang No. 3576. The other members of the gang were a Track Foreman and another Machine Operator. At the end of the day, the Track Inspector told the gang to meet him at a gas station so that he could give them instructions. When the gang and the Track Inspector met, the Track Inspector advised the gang of the need to work on their rest days and of a change in the method of handling their per diem expenses. Claimant, who already had a dispute with Carrier over per diem expenses, became upset.

As testified to by the Track Inspector, the Track Foreman and the other Machine Operator, when the Track Inspector advised Claimant of the need to work on his rest days and of the new procedures for handling per diem expenses, Claimant cursed, said he would not comply, lunged at the Track Inspector, was nose-to-nose with the Track Inspector and struck the Track Inspector's vehicle with either his open hand or his fist. The Track Inspector continued to address Claimant in a calm voice, did not curse back but did instruct Claimant to back off. Nevertheless, Claimant persisted in his outburst.

Claimant testified that the Track Inspector cursed at him and provoked him. Carrier found the testimony of the other three witnesses to be more credible than Claimant's testimony and, as is our usual practice, because we sit in an appellate capacity and did not have the opportunity to observe the witnesses' demeanor, we defer to the credibility determinations made on the property.

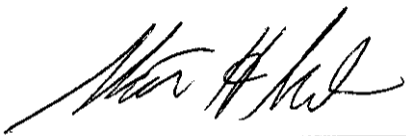
Having found that Carrier proved the charge by substantial evidence, we must address the penalty assessed. Although there was no physical contact between Claimant and the Track Inspector, Claimant's behavior went beyond mere disrespect and discourtesy. Claimant's conduct was violent (i.e. his striking the Track Inspector's vehicle) and threatening. The Track Inspector testified that he found Claimant's behavior threatening and feared for the safety of his family. A reasonable person confronted with such an outburst would have reacted similarly. Carrier need not tolerate such behavior, nor is Carrier required to maintain an employee who engages in such behavior in its employ. The penalty of dismissal was not arbitrary, capricious or excessive.

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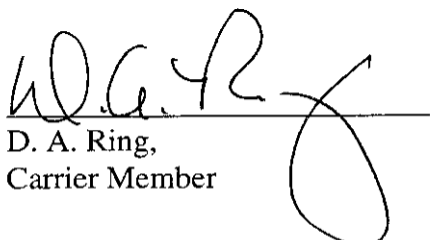
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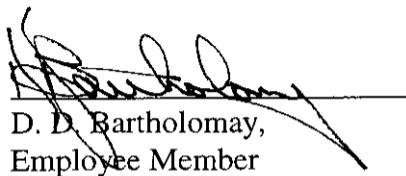
Claim denied.



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, June 29, 2004.