

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 52

)

) Award No. 32

)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: March 23, 2004

STATEMENT OF CLAIM:

1. The dismissal of Machine Operator J. H. Robb, Jr., for allegedly being quarrelsome, discourteous and hostile in an altercation with another employee on September 10, 2003, was without just and sufficient cause, based on an unproven charge and in violation of the Agreement (System File MW-04-10/1382421-D).
2. As a consequence of the violations referred to in Part (1) above, Machine Operator J. H. Robb, Jr., shall be reinstated to service with seniority and all other rights unimpaired, compensated for all wage loss suffered and expenses incurred relating to this incident and have his record cleared of the incident.

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 September 18, 2003, Claimant was notified to report for a formal investigation on October 1, 2003, concerning his allegedly having been quarrelsome, discourteous and hostile when he entered into an altercation with a Truck Driver on September 10, 2003. The hearing was held as scheduled. On October 19, 2003, Claimant was notified that he had been found guilty of the charge and dismissed from service.

The critical issue before us is whether Carrier proved the charge by substantial evidence. The only witness against Claimant was the Supervisor of Tie Gang 9166. He did not witness the incident but he testified to the statement that Claimant gave after the incident. Claimant's statement was consistent with his testimony at the investigation. They reflect that on the date in

question. Claimant was requested to contact the Truck Driver because the Truck Driver was not answering his radio. Claimant, who was operating a double broom, honked his horn but the Truck Driver did not respond. Claimant then walked over to the truck and knocked on the door. Because the truck's windows were above eye level, Claimant could not see the Truck Driver. The Truck Driver rolled down the window and angrily told Claimant not to bother him because he was on the telephone. Claimant simply walked away.

Approximately ten minutes later, the Truck Driver approached Claimant and angrily told him never to knock on the truck door when the Truck Driver was talking on the phone. Claimant explained that he knocked on the door because the Truck Driver hadn't responded to the radio. The Truck Driver then told Claimant that if Claimant ever knocked on the door like that again, the Truck Driver would mess him up. Claimant again explained that he had to knock on the door because the Truck Driver had not answered his radio and the Truck Driver struck Claimant on the shoulder. Claimant stated that he was going to report the incident, walked away and did report it.

The record, as outlined above, contains no evidence that Claimant was in any manner aggressive, quarrelsome or discourteous. Indeed, we note that the Supervisor testified that he "was left confused in exactly who started what." Carrier argues that it takes two to Tango and therefore Claimant must share in the culpability for the incident. We do not agree. On the record presented, we cannot say that Claimant was anything other than an innocent victim of verbal abuse and a physical assault by the Truck Driver. We hold that Carrier failed to prove the charge by substantial evidence.

Carrier reinstated Claimant without prejudice to his right to progress this claim and Claimant returned to service on April 30, 2004. Consequently, the appropriate remedy is for Carrier to compensate Claimant for the wage loss he suffered while out of service and to remove the incident from Claimant's record. The Organization also claimed expenses incurred relating to the incident, but we have held that such expenses are not recoverable under the Agreement. See Award No. 10.

AWARD

Claim sustained in accordance with the findings.

ORDER

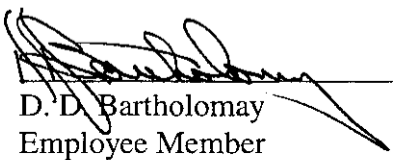
The Board, having determined that an award favorable to Claimant be made, hereby

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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, January 28, 2005