

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 53
)
) Award No. 33
)

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

Hearing Date: November 15, 2004

STATEMENT OF CLAIM:

1. The dismissal of Machine Operator Eddie S. Frazier for his alleged carelessness and negligence for his safety when he failed to lockout/tagout the SDAG 9901 before making repairs on September 18, 2003 was without just and sufficient cause, based on unproven charges and in violation of the Agreement (System File CE100703R/1384268).
2. Machine Operator Eddie S. Frazier shall now be allowed the remedy prescribed in Rule 21(f).

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 23, 2003, Carrier notified Claimant to appear for an investigation on October 16, 2003, concerning his alleged failure to lockout/tagout the SDAG 9901 before making repairs on September 18, 2003. The hearing was held as scheduled. On October 31, 2003, Claimant was notified that he had been found guilty of the charge and dismissed from service.

The Organization has advanced numerous procedural arguments. We have reviewed all of those arguments and the transcript and find that Claimant was afforded a fair and impartial hearing and that none of the procedural arguments provides a basis for setting aside the discipline.

The record reflects that on the day in question, Claimant was one of two employees operating the SDAG 9901, a spiker. A spike jammed in the machine. Claimant used his hook and a mallet in an attempt to clear the machine, but Claimant's hook was bent in the machine. Claimant did not properly lockout/tagout the machine. Claimant testified that the other operator, who had greater experience than Claimant, advised Claimant that complete lockout/tagout was not necessary when clearing a jammed spike. Consequently, Claimant only turned the power off at his joystick. When Claimant was unable to clear the jam with the hook and the mallet, he reached in with his hand. He did not tell the other operator that he was placing his hand in the machine. According to Claimant, the other operator could not see Claimant's hand in the machine and turned on Claimant's joystick in an effort to reset and clear the machine. Claimant suffered injuries to his hand as a result.

There is no question that Carrier proved the charge by substantial evidence. Carrier's rules clearly required that Claimant completely lockout and tagout the machine. Claimant admitted that he did not do so.

The critical questions concern the involvement of the other operator. The Organization requested that Carrier produce the other operator as a witness. Carrier declined, stating that it was the Organization's responsibility to produce its own witnesses. That may be so, but once Claimant testified to the involvement of the other operator, it was incumbent on Carrier to call the other operator as a witness if Carrier desired to rebut Claimant's testimony. Carrier failed to do so, Claimant's testimony as to the other operator's involvement stands un rebutted, and we accept Claimant's testimony with respect to these points.

However, we observe that the most serious safety violation occurred when Claimant placed his hand in the machine without first locking and tagging out. There is no indication in the record that when the other operator told Claimant that complete lockout/tagout was not needed to clear a jammed spike he expected Claimant to place his hand in the machine, or expected Claimant to do anything other than clear the spike using his hook and mallet. Claimant admitted that he never told the other operator that he was placing his hand in the machine and that the other operator could not see Claimant's hand in the machine when he turned the power on at the joystick. It was Claimant who decided to place his hand in harm's way without following lockout/tagout procedures. It was Claimant who was primarily responsible for the accident.

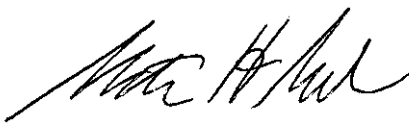
The other operator was disciplined at UPGRADE Level 3, which was later reduced to Level 2. The Organization contends that Claimant's dismissal cannot stand in light of such disparate treatment. We do not agree. As discussed above, Claimant's violation of safety rules was by far more serious than the other operator's culpability. Furthermore, the record reflects that Claimant was a very short-term employee, with only approximately a year and a half of service. In that brief tenure, Claimant was dismissed for violation of Rule G and then reinstated. There is no indication that the other operator's record was comparable to Claimant's. On the record presented, we are unable to find that the two employees were similarly situated. Therefore, we are unable to find any disparate treatment that would warrant disturbing the

penalty imposed on Claimant.

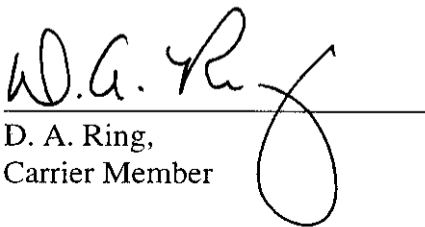
Claimant committed a very serious breach of safety rules. In light of the seriousness of the offense and Claimant's prior record, we are unable to say that the penalty of dismissal was arbitrary, capricious or excessive.

AWARD

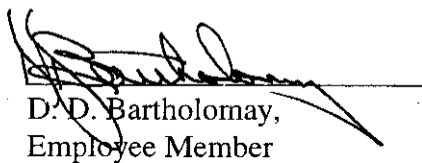
Claim denied.



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, January 28, 2005