

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 45

)

) Award No. 43

)

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 System Welder Helper B. B. Rowe for his alleged use of illegal and unauthorized drug as evidenced by the positive test result of the FMCSA Random Drug and Alcohol test administered on July 19, 2002 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File J-0248-68/1346054).
2. As a consequence of the violation referred to in Part (1) above, System Welder Helper B. B. Rowe shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered and have his record cleared of this incident.

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 July 26, 2002, Carrier notified Claimant that he had tested positive for an illegal drug during a random drug test and offered Claimant the opportunity to waive investigation, accept the penalty of dismissal and enter into an agreement that would provide for his conditional reinstatement. Claimant rejected the offer. On August 2, 2002, Carrier notified Claimant to appear for an investigation on August 15, 2002, concerning his alleged use of an illegal and unauthorized drug as evidenced by his positive drug test. The hearing was postponed twice and

held on September 19 and 23, 2002. On October 8, 2002, Claimant was notified that he had been found guilty of the charge and dismissed from service.

The record reflects that on July 19, 2002, Claimant tested positive for methamphetamine. Claimant was informed of the positive test result by the Medical Review Officer on July 25, 2002. Claimant denied illegal drug use and maintained that he requested that the lab test the split sample. Claimant testified that he faxed such a request to the lab on August 2, 2002.

Initially, we observe that the hearing officer conducted this investigation in an exemplary manner. When Claimant's testimony was inconsistent with documentation submitted by the MRO. The hearing officer recessed the hearing and made arrangements to reconvene by telephone conference on a subsequent day when the MRO was available to testify. Furthermore, the Organization offered evidence that Claimant faxed a request to test the split sample to the lab on August 2, 2002. Evidence also indicated, however, that the lab had no record of receiving such a request. Claimant testified that he had called the lab prior to the hearing and that an individual named Melissa confirmed to him that she received the fax but also advised that the lab had no record of the request. The hearing officer advised Claimant that he would hold the record open to enable Claimant to obtain a written statement from Melissa to that effect. There is no evidence in the record that Claimant ever submitted such a written statement or that Claimant provided any further evidence concerning any attempt to obtain such a statement.

Under the circumstances, we see no reason to overturn the decision made on the property not to credit the evidence that Claimant requested that the split sample be tested. Furthermore, even if Claimant made such a request, it would have been untimely, as such requests were required to have been made within 72 hours of notification of a positive test result. Claimant was notified of the positive test result on July 25 and claimed to have made the request on August 2, outside the 72 hour requirement. Accordingly, we conclude that Carrier proved the charge by substantial evidence.

Under the circumstances, we find the penalty of dismissal to be excessive. We shall order Carrier to reinstate Claimant on a last chance basis, with seniority unimpaired but without compensation for time held out of service. Reinstatement shall be subject to the following conditions:

- Claimant must contact Carrier's Employee Assistance Counselor within seven days of being notified of his reinstatement. The Employee Assistance Counselor shall evaluate Claimant to determine whether he may safely be returned to service and the course of treatment he should follow.
- If the evaluation indicates that Claimant can be returned to service safely, Claimant shall be returned to service on a probationary basis. Claimant shall follow the course of treatment recommended by the Counselor.
- If the evaluation indicates that Claimant cannot be returned to service safely,

Claimant shall not be returned to service but shall follow the course of treatment recommended by the Counselor while out of service. Once the Counselor's evaluation determines that Claimant can be returned to service safely, Claimant shall be returned to service on a probationary basis and shall continue to follow the course of treatment recommended by the Counselor.

- If at any time during the twelve month period following Claimant's return to service, or at any time prior to Claimant's return to service but while under treatment, Claimant fails to follow the course of treatment established by the Counselor, Claimant shall revert to a dismissed status without the need for further investigation or other disciplinary proceeding.
- If Claimant successfully completes the twelve month period following his return to service, his probationary status shall terminate.

AWARD


Claim sustained in accordance with the Findings.

ORDER

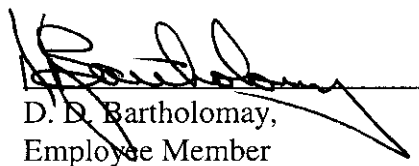
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, May 22, 2004