

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
) Case No. 49
and)
) Award No. 44
UNION PACIFIC RAILROAD COMPANY)

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 Sectionman B. R. Coons for his alleged late reporting of an injury and alleged altercation with a fellow employee was without just and sufficient cause, in violation of the Agreement and based on unproven charges (System File J-0348-69/1375881 D).
2. As a consequence of the violation referred to in Part (1) above, Sectionman B. R. Coons shall be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

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 June 2, 2003, Carrier notified Claimant to appear for an investigation on June 10, 2003, concerning his alleged late reporting of an injury allegedly sustained on or about March 20, 2003, and his alleged altercation with a fellow employee. The hearing was postponed to and held on June 12, 2003. On July 1, 2003, Claimant was notified that he had been found guilty of the charges and dismissed from service.

The record clearly contains substantial evidence that Claimant did not report the alleged injury until May 27, 2003, even though Claimant believed it occurred around March 20, 2003, and additional evidence suggested that it occurred around March 12, 2003. Accordingly, we hold that Carrier proved his charge by substantial evidence.

The record, however, does not contain substantial evidence of any culpable conduct on Claimant's behalf in connection with the alleged altercation. The alleged altercation occurred when Claimant was sitting in the rear seat of the section gang truck and the foreman pulled him out. Although testimony conflicted as to whether the foreman's actions were playful or malicious and as to whether Claimant was grabbed by the arm or by the neck, there is no evidence that Claimant provoked the action or otherwise actively engaged in an altercation with the foreman. Accordingly, we hold that Carrier failed to prove this charge by substantial evidence.

In light of Carrier's having proved only one of the two charges on which Claimant's dismissal was based and in light of other factors, including Claimant's length of service with Carrier, we conclude that the penalty of dismissal cannot stand. Claimant shall be reinstated to service with seniority unimpaired but without compensation for time held out of service.

AWARD

Claim sustained in accordance with the Findings.

ORDER

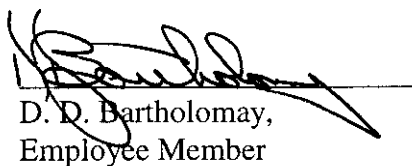
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, May 22, 2004