

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 6302**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

and

**UNION PACIFIC RAILROAD COMPANY**

)  
) Case No. 51  
)  
) Award No. 46  
)

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 Trackman Wesley R. Allen for his alleged involvement in conduct on July 16, 2003 that was contrary to Union Pacific rules was without just and sufficient cause, arbitrary and capricious (System File J-0348-71/137608 D).
2. As a consequence of the violation referred to in Part (1) above, Trackman Wesley R. Allen 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 July 24, 2003, Carrier notified Claimant to appear for an investigation on August 13, 2003, concerning that "you allegedly were involved in conduct on July 16, 2003, that was contrary to Union Pacific rules." The notice further charged a "possible violation of the current Union Pacific 1.6." The hearing was held as scheduled. On September 2, 2003, Claimant was notified that he had been found guilty of the charges and dismissed from service.

The critical question in the instant case concerns the sufficiency of the notice of investigation. Notice must advise the claimant of the matter under investigation with sufficient specificity to enabled the charged employee to prepare a defense. On its face, the notice charged

only conduct in violation of Union Pacific rules. It is impossible to tell from the face of the notice anything about the allegations against Claimant. Rule 1.6 does not add much to the specifics, as that rule prohibits a wide range of offenses, including carelessness, insubordination, quarrelsomeness, negligence, dishonesty, discourteousness, and immoral conduct.

However, the adequacy of the notice must be evaluated in light of all surrounding circumstances. The record reveals that the incident under investigation arose when Claimant was upset that he was required to work overtime when other employees had been excused from the requirement. Several witnesses testified that Claimant stated he was going to bring a shot gun and steel shot onto the property to remedy the situation. Law enforcement was called. Most significantly, Claimant testified:

The policeman asked me to leave, and I left and yes, I was sure. But I was happy because I got the day off. But then the further I drove towards home, the more concerned I was that this was going to happen. And I contacted the union the following day when I got home about it so I could get something resolved where I ain't off 5 months over it.

Thus, Claimant admitted that he knew exactly what incident was under investigation and knew when the incident occurred that it was likely that his conduct would be subject to investigation. Under these unique facts, we find that the facial inadequacy of the notice is not a basis for setting aside the discipline. However, Carrier is admonished that we will not hesitate to sustain claims in the future when presented with such inadequate notice.

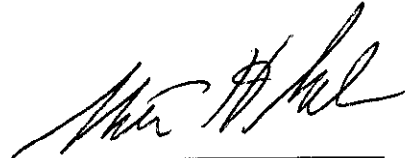
Turning to the merits, the testimony alluded to above provided substantial evidence in support of Carrier's finding of guilt. However, the witnesses also testified that they did not feel personally threatened when Claimant made the remarks. Furthermore, Claimant had 28 years of service and the record contains no evidence of any prior discipline. Under these circumstances, we find that the penalty of dismissal was excessive. Claimant shall be reinstated to service with seniority unimpaired but without compensation for time held out of service.

### **AWARD**

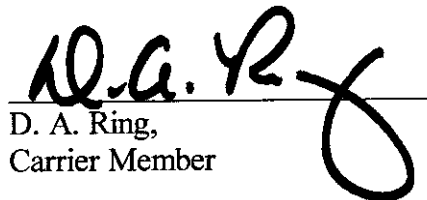
Claim sustained in accordance with the Findings.

**ORDER**

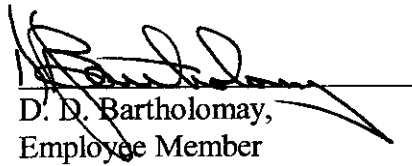
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto



Martin H. Malin, Chairman



D. A. Ring,  
Carrier Member



D. D. Bartholomay,  
Employee Member

Dated at Chicago, Illinois, May 22, 2004