

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6089

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| BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES |) | |
| |) | Case No. 13 |
| and |) | |
| |) | Award No. 11 |
| UNION PACIFIC RAILROAD COMPANY |) | |

Martin H. Malin, Chairman & Neutral Member
R. B. Wehrli, Employee Member
D. A. Ring, Carrier Member

Hearing Date: August 26, 1999

STATEMENT OF CLAIM:

- (1) The discipline (withheld from service and subsequent dismissal) imposed upon Sectionman L. M. Rojas for alleged violation of ". . . Union Pacific Rule 1.5 with supplements, and 90.1 . . ." (emphasis in original) was arbitrary, capricious, unwarranted and in violation of the Agreement (System File D-270/1063827D).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to the Carrier's service with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered beginning January 16, 1997.

FINDINGS:

Public Law Board No. 6089, 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 January 16, 1997, Carrier notified Claimant to report for an investigation on February 3, 1997. The notice charged Claimant with violating Rules 1.5 and 90.1, in that he was convicted of felony possession of a controlled substance.

The hearing was held as scheduled. On February 19, 1997, Carrier notified Claimant that he had been found guilty of the charge and had been dismissed from service.

The Organization contends that Carrier violated the Agreement because it withheld Claimant from service pending the investigation. Carrier responds that it had the right to do so under Rule 48(o). This Board has recognized on numerous occasions that Rule 48(o) authorizes Carrier to withhold an employee from service pending investigation when charged with flagrant or serious violations. See PLB 6089, Awards 1, 2, 3, 4, 5, and 9. Clearly the violation alleged in the instant case was very serious. We find that Carrier acted within its rights under Rule 48(o).

On the merits, the Organization contends that Carrier failed to prove the charge by substantial evidence. The Organization urges that Claimant did not plead guilty and was not found guilty by a jury. Carrier responds that Claimant's plea of nolo contendere resulted in his conviction and that it is the conviction which established the Rules violations. We agree with Carrier. Rules 1.5 and 90.1 provide, in relevant part and in identical language: "The conduct of any employee leading to conviction of any misdemeanor involving moral turpitude . . . or of any felony is prohibited." Claimant's conviction established the violation conclusively.

The Organization also contends that dismissal was an arbitrary, capricious and excessive penalty. Carrier justifies the penalty based on the seriousness of the violation and its consistent practice of dismissing employees under such circumstances.

Conviction of felony possession of a controlled substance is an extremely serious offense. Under most circumstances, we would deny a claim challenging dismissal of even a long term employee. The instant case, however, presents facts and circumstances so unique, that after due consideration we have concluded that the penalty of dismissal is excessive.

Claimant was a long-term (17 years' seniority) employee with a good record. Standing alone, his length of service might not mitigate against the seriousness of the misconduct. However, the unique underlying facts and circumstances of this case are striking.

Claimant originally was charged with two counts of delivery of a controlled substance, alleged to have taken place in 1995. law enforcement authorities searched his home twice and found no drugs or other evidence of such a transaction. In addition, Claimant tested negative on all random drug screens to which he was subjected. Nevertheless, because an informant was prepared

to testify that Claimant was his partner in a drug trafficking operation, Claimant was vulnerable to possible conviction if he proceeded to trial.

Conviction of felony delivery would have resulted in Claimant being deported to Mexico. Such deportation would have been very costly to Claimant who was a homeowner and who was raising his thirteen year old stepson who had applied for United States citizenship. Consequently, Claimant accepted a plea agreement whereby he pled no contest to a charge of felony possession and received a sentence of probation. Conviction of felony possession would not result in deportation. Since his conviction, Claimant has successfully completed his probation.

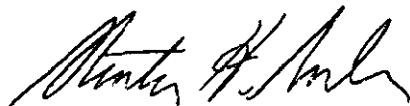
Considering all of the peculiar facts and circumstances presented in the instant claim, and without setting a precedent for any future cases, the Board finds that Claimant should be given one last opportunity to demonstrate that he can be a productive and rule abiding employee. Accordingly, Claimant shall be reinstated to service with seniority and other benefits unimpaired, but with no back pay or other compensation for time held out of service. Claimant's reinstatement shall be conditioned on his passing any reasonable physical examination, including a drug screen, that Carrier may require.

AWARD

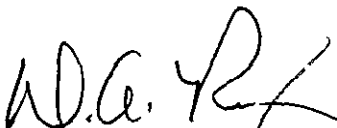
Claim sustained in accordance with the Findings.

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



R.B. Wehrli
Employee Member

Dated at Chicago, Illinois, September 30, 1999.