

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	)
	) Case No. 13
and	)
	) Award No. 1
UNION PACIFIC RAILROAD COMPANY	)

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

Hearing Date: May 12, 2000

STATEMENT OF CLAIM:

1. The discipline (withheld from service on March 25, 1997 and subsequent dismissal) of Sectionman G. W. Thornton on June 5, 1997 for 'violation of Rules 1.5 . . . ' was arbitrary, capricious and in violation of the Agreement (System File D-291/1080334D).
2. As a consequence of the aforesaid violation, 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 as a result of his being withheld from service beginning March 25, 1997 and his subsequent dismissal.

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 April 9, 1997, Carrier notified Claimant to report for an investigation on April 23, 1997, in connection with his allegedly violating Rule 1.5 as evidenced by a positive test result on an FHWA random drug screen on March 18, 1997. The hearing was postponed to and held on May 20, 1997. On June 5, 1997, Carrier informed Claimant that he had been found guilty of the

charge and was dismissed from service.

The Organization raises a number of procedural arguments. We have reviewed the transcript of the hearing carefully and find that Claimant was afforded a fair and impartial investigation. None of the procedural errors alleged by the Organization provide grounds for overturning the discipline.

The following facts are not in dispute. On March 18, 1997, Claimant was subjected to an FHWA random drug screen. Claimant tested positive for codeine. The night before, Claimant, who had been suffering from a cold, took Tylenol 3, a prescription medicine containing codeine. Claimant did not have a prescription for the medicine. The medicine was his father-in-law's.

The evidence thus established that Claimant was literally in violation of Rule 1.5. Rule 1.5 provides, in relevant part:

The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property.

The Tylenol 3 was a prescription drug and was not used as prescribed, because the prescription had been issued to the Claimant's father-in-law. Claimant had it in his bodily fluids while on duty.

The Organization, however, argues that Claimant did not knowingly ingest a prohibited substance. The Organization relies on testimony from Claimant and his wife to the effect that Claimant asked his wife for something to help his cold and his wife gave him her father's Tylenol 3 without telling him what it was. This testimony was not credited on the property. We find that Carrier's decision not to credit the testimony is supported by substantial evidence.

Specifically, the Medical Review Officer's notes reflect that when the MRO first spoke to Claimant, Claimant stated that he had taken Tylenol 3, that he had a prescription for the medication and that he would fax the prescription to the MRO. Subsequently, Claimant called back and told the MRO that the medication was his father-in-law's. Claimant maintained that he told the MRO that the Tylenol 3 was his father-in-law's the first time they spoke. However, Claimant conceded that he did call the MRO back and did not provide a credible explanation of why he did so if he had told the MRO that the medicine belonged to his father-in-law the first time they spoke.

Accordingly, we find that Carrier proved, by substantial evidence, that Claimant

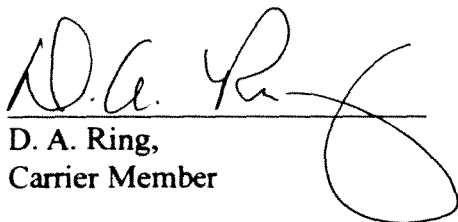
knowingly violated Rule 1.5. There remains the question of penalty. The record reveals that in May 1991, Claimant received a notice of investigation resulting from a positive drug test and from his being arrested by the Montana State Highway Patrol for criminal possession of dangerous drugs and of drug paraphernalia. Claimant waived investigation and accepted dismissal from service. He also waived any future right to utilize the By-Pass Agreement. Claimant agreed that, upon successfully completing any program that Carrier's EAP should require, he would be reinstated to service, subject to a one year probationary period and five years of follow-up testing. He also agreed to remain drug free indefinitely and to avoid any violation of Carrier's drug and alcohol rules. Despite this agreement, Claimant violated Rule 1.5. We cannot say that his dismissal was arbitrary, capricious or excessive.

AWARD

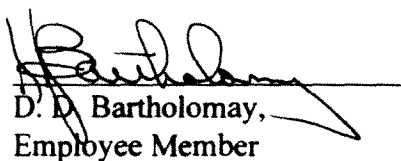
Claim denied.



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, May 31, 2000.