

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 124
UNION PACIFIC RAILROAD COMPANY) Award No. 121
_____)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: February 7, 2008

STATEMENT OF CLAIM:

- (1) The dismissal of BMWE employee K. L. Swartwood for allegedly being absent from service without proper authority on June 21, 22, 23, 24, 25 and 26, 2005, was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (System File RJ-0548-210/Carrier File 1445497).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record cleared of the June 27, 2005 forfeiture of seniority letter and he shall be compensated for all wage loss suffered.

FINDINGS:

Public Law Board No. 6302 upon the whole record and all of 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.

Carrier terminated Claimant's seniority pursuant to Rule 48(k). Rule 48(k) provides in relevant part:

Employees absenting themselves from their assignments for five (5) consecutive working days without proper authority shall be considered as voluntarily forfeiting their seniority rights and employment relationship, unless justifiable reason is shown as to why proper authority was not obtained.

The record reflects that from June 6 - June 26, 2005, Claimant was serving a sentence of incarceration for driving under the influence of alcohol. Claimant was approved to use vacation time for June 3 - 20, 2005. His Rule 48(k) termination of seniority was for absences beginning June 21, 2005.

Of particular significance is Claimant's absence on June 21, 2005. Claimant maintained that prior to his incarceration, he spoke with his manager and requested a leave of absence, was advised that he could not receive a leave of absence for serving a jail sentence and then requested and was granted a personal day for June 21. Carrier's records did not reflect a personal day for June 21.

Incarceration is not a valid reason for taking a personal day. However, there does appear to be confusion as to whether Claimant believed that he had an approved absence on June 21. Under the circumstances, and in accordance with prior precedent, *see, e.g.*, Public Law Board 6302, Case No. 21, Award No. 24, we find that it is appropriate to temper the harshness of a literal application of Rule 48(k) and award that Claimant be reinstated to service with seniority unimpaired but without compensation for time out of service. Claimant's reinstatement is conditioned on Claimant, within two weeks of being notified of his reinstatement, contacting Carrier's Employee Assistance Program, complying with all requirements imposed on Claimant by the EAP and complying with any reasonable requests by Carrier to document his compliance.

AWARD

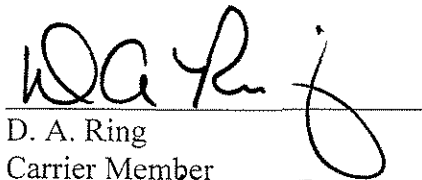
Claim sustained in accordance with the Findings.

ORDER

The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto



Martin H. Malin, Chairman



D. A. Ring
Carrier Member

June 6, 2008

Dated at Chicago, Illinois, May 31, 2008



T. W. Kreke, Employee Member
Employee Member