

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
) Case No. 40
and)
) Award No. 38
UNION PACIFIC RAILROAD COMPANY)

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

Hearing Date: April 1, 2003

STATEMENT OF CLAIM:

1. The discipline (withheld from service on July 23, 2001 and subsequent Level 5 dismissal) imposed upon Mr. E. R. Pierce for alleged violation of Union Pacific Operating Rule 1.6 of the General Code of Operating Rules and Union Pacific Drug and Alcohol Policy, in connection with alleged failure to follow the Conditions for Return to Service and Remaining in Service as stated in the medical disqualification letter dated June 28, 2000, was arbitrary, capricious and in violation of the Agreement (System File J-0148-63/1287012-D).
2. As a consequence of the violation referred to in Part (1) above, Mr. E. R. Pierce shall now be returned service with all rights restored unimpaired immediately and he must be compensated for all time lost subsequent to July 23, 2001, that benefit provisions be allowed as if he had worked and any mention related to the unjust removal be removed from his personal record.

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 23, 2001, Claimant was notified to report for an investigation on August 10, 2001. The notice charged Claimant with failing to cooperate with the terms of his one-time opportunity to return to service in that he failed to follow certain conditions for his return to service. The notice was returned to Carrier marked "Moved, left no address." The investigation was postponed to August 28, 2001. Notice of postponement mailed to Claimant was returned marked, "Not delivered as addressed. Unable to forward." The hearing was held in absentia. On

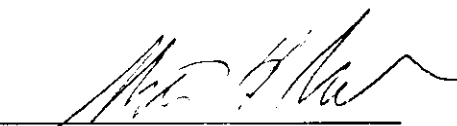
September 8, 2001, Carrier notified Claimant that he had been found guilty of the charges and dismissed from service.

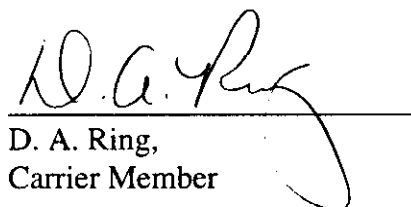
Two issues are raised in this case: whether Carrier violated the Agreement by proceeding in absentia and whether Carrier proved the charge by substantial evidence. The record reflects that the notices were sent to Claimant's last address of record. After the notice of the August 10 hearing was returned by the Postal Service, Carrier agreed to postpone the hearing to allow the Organization an opportunity to locate Claimant. Neither the Organization nor Carrier was able to locate Claimant. When Claimant failed to appear at the August 28 hearing, the Organization requested a further postponement. Carrier denied the request but did grant a brief recess during which the Organization still was unable to locate Claimant. Under these circumstances, it was proper for Carrier to proceed in absentia. Carrier discharged its obligations under the Agreement by sending the notices to Claimant's last address of record and by giving the Organization an opportunity to attempt to locate Claimant. However, the Agreement does not obligate Carrier to postpone the investigation indefinitely. After reasonable efforts failed to locate Claimant, Carrier acted in accordance with the Agreement by denying further postponement and proceeding in absentia.

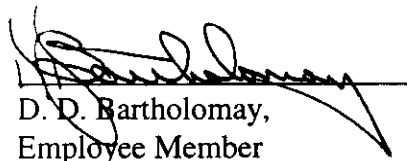
The record reflects that Claimant had been dismissed on January 26, 1998. On February 26, 2000, Public Law Board No. 6089 sustained the Organization's claim and ordered Carrier to return Claimant to service and compensate him for all wage loss suffered. In his return to work physical, Claimant tested positive for illegal drugs and was again dismissed from service. Carrier offered Claimant a one-time opportunity to return to service through Carrier's Employee Assistance Program. Claimant accepted the offer. However, Claimant failed to cooperate with the EAP. Based on this record, we find that Carrier proved the charge by substantial evidence. We further find that the penalty was not 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, September 26, 2003.