

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 65

)

) Award No. 67

)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: February 16, 2005

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier dismissed Jackson R. Yokoyama pursuant to Rule 48(L) because of his leaving work early without authority on August 23, 2003 (System File J-0348-79/1385354 D).
2. As a consequence of the violation referred to in Part (1) above, Employee Jackson R. Yokoyama shall be reinstated to service with seniority and all other rights unimpaired and compensated for all time lost.

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 September 3, 2003, Carrier notified Claimant that he was dismissed from service pursuant to Agreement Rule 48(L). Rule 48(L) provides:

Employees need not be granted a hearing prior to dismissal in instances where they refuse to work, voluntarily leave the work site without proper authority or involuntarily leave their job as a result of apprehension by civil authorities, willfully engage in violence or deliberately destroy Company property. Such employees may, however, make request for a hearing relative to their dismissal, and request therefore must be made within fourteen (14) calendar days from date of removal from service.

On September 8, 2003, the Organization requested a hearing on Claimant's behalf. By letter dated September 24, 2003, Carrier notified Claimant that the hearing was scheduled for

October 1, 2003. By a second letter also dated September 24, 2003, Carrier notified Claimant that the hearing was postponed to October 15, 2003. Both letters were sent in the same envelope by certified mail, return receipt requested. The receipt reflected that Claimant received the letters on September 29, 2003.

The hearing was held on October 15, 2003. On October 31, 2003, Carrier notified Claimant that his dismissal had been upheld.

The Organization contends that Carrier violated Claimant's due process rights by unilaterally postponing the hearing from October 1, 2003 to October 15, 2003. We cannot agree. The letter purporting to schedule the hearing for October 1 and the letter purporting to postpone the hearing to October 15 were sent in the same envelope. To regard this as a unilateral postponement is to elevate form over substance. Claimant received the two letters at the same time. From Claimant's perspective, when he received the envelope he knew that the hearing was scheduled for October 15; prior to that he was unaware of any date set for the hearing. We see no violation of Claimant's procedural rights.

Accordingly, we turn to the merits of the case. There is no question that Carrier proved Claimant's guilt by substantial evidence. Claimant admitted that on August 23, 2003, Claimant left the job site before his authorized quitting time and that he did so without proper authority. Indeed, on the prior day, members of Claimant's gang inquired whether they could leave early the following day because it was the last day of their compressed half and were expressly told that they could not. Claimant's foreman discovered Claimant's early departure when he sought Claimant out to provide a written statement concerning an incident that occurred earlier in the day, and was unable to find him. The foreman called Claimant on his cell phone and instructed Claimant to return to the job site to provide the statement but Claimant refused to do so. Not only did Carrier prove Claimant's guilt by substantial evidence; the evidence in the record cannot reasonably support any other conclusion.

Claimant's dismissal for leaving early without authority was sanctioned by the express language of Agreement Rule 48(L). Moreover, Claimant's offense was aggravated by his refusal to return to the job site to give the written statement when so instructed by his foreman. Under the circumstances, we cannot say that the penalty was arbitrary, capricious or excessive.