

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 92
)
) Award No. 75
)

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

Hearing Date: September 15, 2005

STATEMENT OF CLAIM:

1. The dismissal of Mr. G. Montoya for alleged violation of Carrier Rule 1.15 was unjust, unwarranted and in violation of the Agreement (System File D-04-12D/1401134).
2. As a consequence of the violations referred to in Part (1), Foreman G. Montoya shall be rescinded in its entirety, and that claimant be placed upon a proper Medical Leave of Absence with all seniorities intact, until such time as it can be demonstrated that claimant has attained such a mental and emotional state of being that he can safely be restored to active service in whatever capacity may be deemed proper for him, based upon seniority, qualifications and abilities.

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 August 4, 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 August 18, 2003, the Organization requested a hearing on Claimant's behalf. By letter dated September 4, 2003, Carrier notified Claimant that the hearing had been scheduled for September 22, 2003. The Notice charged Claimant with violating Rule 1.15 (absenteeism). Following several postponements, the hearing was held on January 20, 2004. On February 3, 2004, Carrier notified Claimant that his dismissal had been upheld.

The record reflects that on July 28, 2003, at 7:15 or 7:30 a.m., Claimant reported for duty at Roper, Utah. He was assigned to provide flag protection for grading contractors at Riverton, Utah. Claimant never reported to Riverton. Around 9:30 a.m., one of the Track Supervisors received a call from a Special Agent who was looking for Claimant and who could not locate Claimant at Riverton. The Track Supervisor called Claimant's cell phone and Claimant advised that he was at a Chevron gas station having lunch and doing something else and would be back at the flagging site in fifteen minutes. However, Claimant never appeared at the flagging site and had no further contact with Carrier as of August 4, when Carrier issued the Rule 48(l) notice.

As reflected in the record developed at the hearing, Carrier acted appropriately in issuing Claimant the 48(l) notice on August 4, 2003. Furthermore, the record established that Claimant violated Rule 1.15. Accordingly, we turn to the penalty imposed.

Carrier urges the Board to follow our decision in Case No. 65, Award No. 67. In Award No. 67, we denied the claim of an employee who was dismissed under Rule 48(l) when he voluntarily left the job site without authority. The offense in Award No. 67 was aggravated by two facts. First, the claimant left early even though on the prior day members of the claimant's gang had asked if they could leave early the next day and were told expressly that they could not. Second, when the claimant's foreman noticed that the claimant had left early, the foreman called the claimant's cell phone, instructed the claimant to return to the job site and the claimant refused to do so.

In contrast, the record in the instant case contains substantial evidence in mitigation of the severity of the offense. At the time of the incident, Claimant had almost twenty-seven years of service with Carrier. For at least two months prior to the incident, Claimant was receiving psychiatric treatment. On August 4, 2003, Claimant was admitted to Highland Ridge Hospital, suffering from extreme depression and anxiety disorder. Claimant testified that he could not recall anything between the time he left the Track Supervisor's office on July 28 and his admission to the hospital on August 4. He testified, "The only thing I remember is that my parents found me and took me to Highland Ridge because they seen I was in suicide."

Claimant's totally inexplicable behavior between July 28 and August 4, 2003, thus appears to be as much a medical matter as a disciplinary matter. Under these circumstances, we find that Claimant's dismissal was excessive and that the situation called for a combination of disciplinary and medical action. Accordingly, we shall order that Claimant be reinstated with seniority unimpaired but without compensation for time held out of service. The time held out of service shall be carried on Claimant's record as a lengthy suspension. Claimant's reinstatement

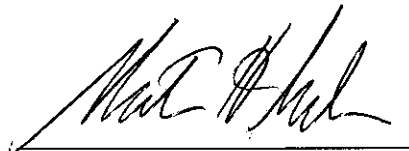
shall be to a medical leave of absence. Claimant shall not return to active service until released by his treating medical professionals and until he complies with any reasonable conditions that Carrier may require to ensure Claimant's physical and mental fitness to perform his duties.

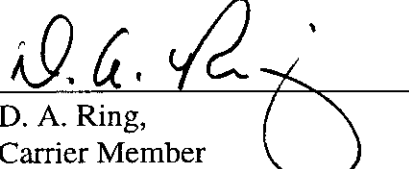
AWARD

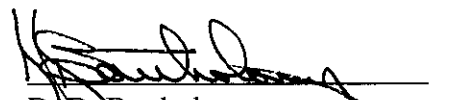
Claim sustained in accordance with the Findings.

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

I dissent

D. A. Ring,
Carrier Member
12-7-05


D. D. Bartholomay,
Employee Member 12-7-05

Dated at Chicago, Illinois, November 28, 2005