

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 80

)

) Award No.80

)

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 Laborer Manuel Begay for his alleged violation of Rule 1.15 on May 22, 23 and June 2, 3, 4, 5, 6, and 7, 2004 was without just and sufficient cause, arbitrary and in violation of the Agreement (System File J-0448-59/1405487).
2. Laborer Manual Begay shall now be reinstated to service with seniority and all other rights unimpaired and compensated for wage loss suffered.

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 June 7, 2004, Carrier notified Claimant to report for an investigation on June 17, 2004. The notice charged Claimant with allegedly violating Rule 1.15 by being absent without proper authority on May 22, 23 and June 2, 3, 4, 5, 6 and 7, 2004. The hearing was held as scheduled. On July 6, 2004, Carrier notified Claimant that he had been found guilty of the charges and dismissed from service.

The Organization contends that Carrier violated Rule 48 by not providing Claimant with adequate notice of the hearing. We do not agree. The record reflects that Carrier mailed the notice of Claimant's last address of record on June 7, 2004, and that the Postal Service left a notice of attempted delivery on June 12, 2004. Claimant testified that he never received the

notice and that he first learned of the hearing on the day before the hearing. Claimant further testified that he shared the post office box with his sister and that his sister was prone to not giving him his mail. However, Carrier is not responsible for Claimant's arrangement or for the unreliability of Claimant's sister. *See, e.g.,* Public Law Board No. 6621, Case No. 8 (holding that the fact that the claimant's wife rather than the claimant signed for the hearing notice did not undermine the claimant's due process rights).

The record further reflects that the Hearing Officer offered Claimant and the Organization a recess to enable them to prepare. Claimant and the Organization asked only for a fifteen minute recess which was promptly given to them. Following the recess, they indicated that they were ready to proceed. Accordingly, we see no procedural basis for upsetting the discipline imposed.

There is no question that Claimant was absent on the dates charged and that he did not have authority for his absences. On May 22 and 23, 2004, Claimant was absent because he was incarcerated. Incarceration, however does not provide a justification for an employee's failure to protect his assignment.

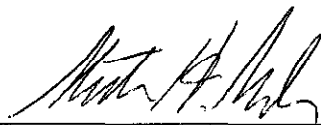
Claimant maintained that he was absent on the dates in June because he was engaged in spiritual healing under the direction of a Medicine Man. A note from the Medicine Man, dated June 4, 2004, entered into the hearing record states that on May 28, Claimant requested a ceremony; the Medicine Man prayed overnight with Claimant's family, and the Medicine Man instructed Claimant to stay at home for four days and not to travel to keep the ceremony sacred. Taking the Medicine Man's statement at face value, it is apparent that it does not account for the days in June that Claimant was absent without authority. We conclude that Carrier proved the charge by substantial evidence.

Accordingly, we turn to the penalty imposed. The record reflects that Claimant's discipline record was at UPGRADE Level 4.5 at the time of the absences. Consequently, the imposition of Level 5, dismissal, was warranted and certainly cannot be said to have been arbitrary, capricious or excessive.

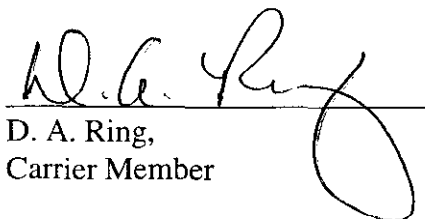
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AWARD

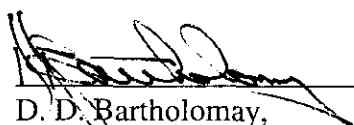
Claim denied



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, January 20, 2006