

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 6302**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

and

**UNION PACIFIC RAILROAD COMPANY**

)  
) Case No. 86  
)  
) Award No. 85  
)

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 Assistant Foreman B. James, III for alleged violation of the April 8, 2004 letter of reinstatement was unjust, unwarranted and in violation of the Agreement (System File J-0448-61/1415164).
2. As a consequence of the violation referred to in Part (1) above, Assistant Foreman B. James III shall be reinstated with all rights, be paid for all time unjustly withheld from service starting on November 26, 2004, that benefit provisions be allowed as if he had worked and any mention of 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 February 19, 2004, Carrier advised Claimant that it had found him to have forfeited his seniority and employment pursuant to Rule 48(k). On April 8, 2004, Carrier, the Organization and Claimant entered into an agreement providing for Claimant's reinstatement on a leniency basis. The conditions of Claimant's leniency reinstatement included the following:

If at any time during the eighteen (18) month period commencing with the date you return to service you are in violation of being absent without proper authority, you may be reverted back to the status of a dismissed employee without the benefit of a hearing

pursuant to the Collective Bargaining Agreement. Other rule violations will be handled in accordance with the UPGRADE Discipline Policy.

Claimant was absent on November 26 and 27, 2004. On November 29, 2004, Carrier notified Claimant that he had reverted back to the status of a dismissed employee. The Organization then filed a claim on Claimant's behalf.

During argument before the Board, the Organization argued that Carrier had not filed a submission in this case. Citing NRAB Third Division Award No. 36338, the Organization maintained that the claim must be sustained on this ground alone.

In Third Division Award No. 36338, the Organization filed several claims challenging the Carrier's failure to call and work several claimants for certain positions on certain specified dates. The Carrier did not file a submission. The Board held:

In this docket the Carrier failed to file an Ex Parte Submission, and its failure to do so leaves the positions, assertions and proofs of the Organization, which adequately support its claim that the Agreement was violated, unchallenged and uncontroverted. The claim must therefore be sustained as presented. (Underlining in original.)

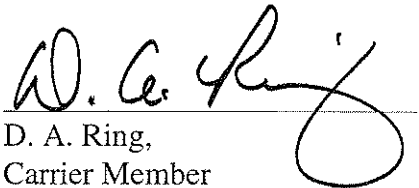
In the instant case, Claimant submitted a letter in which he explained that he was incarcerated and was not released until November 26, 2004. Upon his release, Claimant called his supervisor who informed him that he had lost his job. It has been uniformly held that incarceration does not justify an employee's failure to protect his assignment. Thus, unlike Award No. 36338, where "the positions assertions and proofs of the Organization" adequately supported the claim, in the instant case, Claimant's own letter establishes that the claim lacks merit. Accordingly, we find that Award No. 36338 does not control the instant case. The leniency reinstatement agreement was self-executing with respect to unauthorized absences during the 18 months following reinstatement and Claimant's absences on November 26 and 27, 2004, justified Carrier's reverting him to the status of a dismissed employee.

Claim denied

AWARD

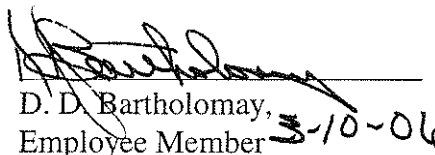


Martin H. Malin, Chairman



D. A. Ring,  
Carrier Member

3-10-06



D. D. Bartholomay,  
Employee Member 3-10-06

Dated at Chicago, Illinois, February 27, 2006