

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 6302**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

and

**UNION PACIFIC RAILROAD COMPANY**

)  
) Case No. 89  
)  
) Award No. 86  
)

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 J. S. Cary for violation of Union Pacific Railroad Policies and Procedures for Ensuring Rule Compliance and Rules 1.6, 1.25 and 1.19 of the General Code of Operating Rules effective April 2, 2000, as modified by the System Special Instructions effective April 1, 2004, is unjust and unwarranted (System File D-04-30D/1412119D).
2. Because the dismissal of Assistant Foreman J. S. Cary is unjust and unwarranted, he shall be reinstated to service with all seniorities intact.

**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 17, 2004, Carrier notified Claimant to appear for an investigation on June 28, 2004. The notice alleged that Claimant violated Union Pacific Railroad Policies and Procedures for Ensuring Rule Compliance and Rules 1.6, 1.25 and 1.19 of the General Code of Operating Rules effective April 2, 2000, as modified by the System Special Instructions effective April 1, 2004 in that Claimant allegedly used a Carrier Wex Card assigned to vehicle unit 4068U for his personal use and was dishonest when he misappropriated Company funds for his personal use. The hearing was postponed to and held on July 20, 2004. On July 26, 2004, Claimant was notified that he had been found guilty of the charges and dismissed from service.

There is no question that Claimant appropriated a Carrier Wex Card from another employee's company vehicle and used the card to charge personal purchases. Claimant admitted his guilt at the hearing.

The critical question is the severity of the penalty. Theft, such as established in the instant case, is generally grounds for dismissal. Only in extremely rare circumstances is a lesser penalty warranted.

In the instant case, Claimant had almost ten years of service with no prior discipline. That factor, standing alone, however, would not mitigate the seriousness of the offense. However, the record in the instant case further established that Claimant was suffering from BiPolar Disorder (BPD). At the time of the incident, Claimant had stopped taking his medication (which itself can be a result of the disease), had been acting erratically and apparently was in a manic state. When in a manic state, an individual with BPD is subject to impulsive and rash behavior such as Claimant exhibited in the instant case.

Furthermore, Claimant's supervisor, the Manager Track Maintenance, averred:

I believe Jeff Cary would still be working here if he had taken his medication. He is Bi-Polar and was the best foreman I had while on his medication. It would be a shame not to read up and understand more about his sickness before you make a determination on whether he should come back or not.

I feel that as long as he is on his medication, he is a good employee. He needs to reassure the railroad he is taking his medication.

Under the circumstances, and without setting a precedent for future cases, we believe that Claimant should be given another chance. Claimant must recognize that BPD does not justify acts of misconduct, particularly misconduct as serious as that he committed in the instant case. Claimant must also realize that he must continue to take his medication regularly and get regular medical check-ups to ensure that his BPD remains under control.

Claimant shall be reinstated to service, with seniority unimpaired, but without compensation for time lost. Claimant's reinstatement is conditioned on his furnishing a release from his doctor and such other medical documentation as Carrier may reasonable require. Claimant's reinstatement is also conditioned on his passing a return to work physical and such other conditions related to his fitness for duty that Carrier may reasonably impose.


#### AWARD

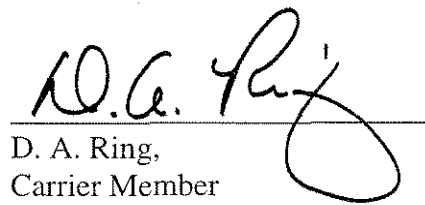
Claim sustained in accordance with the Findings.

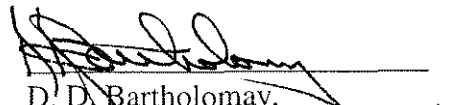
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**ORDER**

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

  
D. A. Ring,  
Carrier Member  
3-10-06

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

Dated at Chicago, Illinois, February 27, 2006