

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 6302**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

and

**UNION PACIFIC RAILROAD COMPANY**

)

) Case No. 100

)

) Award No. 95

)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: April 4, 2006

**STATEMENT OF CLAIM:**

1. The Carrier violated the Agreement when it dismissed System Gang Track Subdepartment employee Christopher Toledo on February 26, 2005 without the benefit of a fair and impartial investigation pursuant to Rule 48 (System File J-0548-57/1424323).
2. As a consequence of the violation referred to in Part (1) above, Mr. Christopher Toledo shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered. Also, his record shall be cleared of this incident.

**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 January 27, 2004, Claimant was notified by Carrier to report for an investigation concerning his alleged failure to report for duty on January 20, 2005. Claimant was advised that because the incident was his third violation of the same rule within a thirty-six month period, he was subject to possible dismissal. By agreement dated February 2, 2005, signed by Claimant and the General Chairman on February 3, 2005, Claimant waived his right to investigation and accepted dismissal from service as discipline. Pursuant to the agreement, Claimant was reinstated without compensation for lost wages and his discipline status was recorded as UPGRADE Level 3. Claimant also agreed:

3. Mr. Toledo is being returned to service on a probationary basis for an eighteen (18) month period commencing with the first day he returns to service and draws compensation. In the event Mr. Toledo violates the absenteeism rule, any cardinal safety rule or commits any serious rule violations during the eighteen month probationary period, he will be removed from service without a formal investigation as provided by the applicable Agreement Rule and he will revert back to the status of a dismissed employee.

By letter dated February 28, 2005, Carrier notified Claimant that on February 24, 2005, he was insubordinate when he entered into an altercation with his Assistant Foreman and intentionally struck the Assistant Foreman with his elbow. Consequently, Carrier reverted Claimant back to the status of a dismissed employee.

The Organization contends that Carrier violated Rule 48 of the controlling Agreement by dismissing Claimant without first affording him a fair and impartial investigation. During handling on the property, the Organization submitted a statement from Claimant denying that he struck the Assistant Foreman. The Organization maintains, that in light of this statement, Carrier was obligated to hold a hearing to determine the facts.

We do not agree. In settlement of charges pending against him, Claimant agreed, as condition of reinstatement, to serve an 18 month probationary period, during which time, for any absenteeism rule violation, any cardinal safety rule violation or any serious rule violation, "he will be removed from service without a formal investigation as provided by the applicable Agreement Rule and he will revert back to the status of a dismissed employee." Clearly Claimant waived his right to a hearing during the probationary period.

Under the reinstatement Agreement, Carrier was not obligated to hold a hearing and was not obligated to prove the charge by substantial evidence. Of course, Carrier may not fabricate a charge as a ruse to dismiss Claimant. However, as long as the allegations are supported by some evidence, the Board must deny the claim.

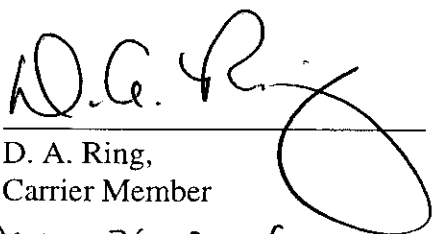
Although the record would have been stronger had Carrier introduced a statement from the Assistant Foreman, we nevertheless find that there is sufficient evidence to trigger the reinstatement agreement. It is apparent from the February 28, 2005, letter that the Assistant Foreman reported that Claimant intentionally struck him with the elbow. Furthermore, Claimant's own statement admitted that on February 25, 2005, the Track Foreman asked Claimant about his altercation the prior day with the Assistant Foreman and on February 26, 2005, in the presence of the Track Supervisor, the Assistant Foreman stated that Claimant had struck the Assistant Foreman in the stomach with both of his elbows. Given the highly deferential standard of review under such self-executing probationary reinstatement agreements, we find that although the evidence could have been stronger, it is sufficient to support invocation of the agreement. Accordingly, the claim must be denied.

AWARD

Claim denied.

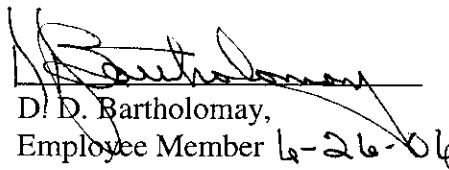


Martin H. Malin, Chairman



D. A. Ring,  
Carrier Member

June 26, 2006



D. D. Bartholomay,  
Employee Member 6-26-06

Dated at Chicago, Illinois, June 12, 2006