

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 94
)
) Award No. 97
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. K. Peitzmeier, Carrier Member

Hearing Date: August 8, 2006

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when it dismissed Undercutter Operator Ronald E. Kyle without the benefit of a fair and impartial investigation pursuant to Rule 48 following his injury on November 19, 2004 (System File J0448-68/1417920).
2. As a consequence of the violation referred to in Part (1) above, Undercutter Operator Ronald E. Kyle 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.

By letter dated July 18, 2003, Claimant was dismissed from service as a result of an incident on April 29, 2003. By agreement dated July 18, 2003, signed by Claimant and the General Chairman on August 7, 2003, Claimant agreed to withdraw his claims and accepted a leniency reinstatement. Pursuant to the agreement, Claimant was reinstated without compensation for lost wages and his discipline was reduced to a suspension for time served with his discipline status reflected as UPGRADE Level 3. Claimant also agreed:

2. Mr. Kyle 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 that Mr. Kyle commits a serious rule violation of the Carrier's rules during this probationary period, he may 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 December 6, 2004, Carrier notified Claimant that on November 19, 2004, he experienced a personal injury while working unsafely when attempting to tie down the conveyor on the undercutter which was still running, in violation of Rule 1.6(1). 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 statements from Claimant acknowledging that the undercutter was still running when he attempted to tie down the conveyor but contending that all employees on the gang performed the operation in the same way and that he was acting pursuant to his supervisor's instructions.

The instant case is governed by our Award No. 95, Case No. 100. In that case, we faced a claimant who had been charged with his third unauthorized absence in a 36-month period and faced possible dismissal under Carrier's UPGRADE. That claimant agreed to waive investigation, accept discipline at UPGRADE Level 3, and serve an 18-month probationary period during which specified types of rules violations would result in his reverting back to the status of a dismissed employee without a hearing. We held:

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.

Thus, as noted in Award No. 95, we employ a "highly deferential standard of review under such self-executing probationary reinstatement agreements." Were we to do otherwise, we would discourage Carrier from agreeing to leniency reinstatements, particularly in cases of employees who would otherwise be dismissed. *See* Public Law Board 6621, Case No. 17.

In the instant case, Claimant admitted that he attempted to tie down the conveyor while the undercutter was still running. Claimant, thus, admitted that he was not working safely. His claim that he was acting in the same manner as other members of the gang and that he had the approval of his supervisor do not change the fact that he was not working safely. Furthermore, Claimant offered no explanation of how, if he was paying careful attention to his safety, his vest got caught in the machine. We conclude that Carrier had sufficient evidence to conclude that Claimant did not work safely and violated Rule 1.6(1). A violation of Rule 1.6(1) is clearly a serious rule violation under the leniency reinstatement agreement. Accordingly, Carrier acted in accordance with that agreement when it reverted Claimant to a dismissed status without a formal

investigation.

AWARD

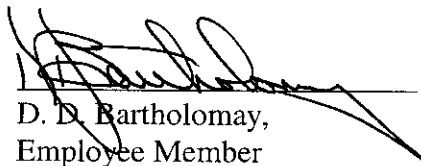
Claim denied.



Martin H. Malin, Chairman



D. K. Peitzmeier,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, December 18, 2006