

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 73
)
) Award No. 59
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: January 25, 2006

STATEMENT OF CLAIM:

1. The dismissal of Trackman Thomas Perry on June 25, 2004, for his alleged violation of a reinstatement agreement dated August 21, 2003, was without just and sufficient cause and in violation of the Agreement (System File MW-05-16/1416081).
2. As a consequence of the violation referred to in Part (1) above, Trackman Thomas Perry shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

FINDINGS:

Public Law Board No. 6402, 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 August 13, 2003, Carrier charged Claimant with violation of Rule 1.6(3), insubordination, due to his allegedly playing cards on company time despite having been told not to do so. On August 21, 2003, Carrier, Claimant and the Organization General Chairman entered into an agreement whereby Claimant acknowledged responsibility for the alleged incident and Claimant was reinstated without compensation for lost time and with a discipline record of UPGRADE Level 3. Claimant also agreed as follows:

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

On June 9, 2004, Claimant sustained an on-duty personal injury, On June 25, 2004, Carrier notified Claimant was follows:

Subsequent to your personal injury of June 9, 2004, a review of your work history for Union Pacific Railroad has been conducted. This review shows that, in the past five years, you have suffered a total of five personal injuries or occupational illnesses. A review of your peers, more specifically the ten active UPRR employees above and below you on the Arkansas Trackman Seniority Roster, shows that the average number of personal injuries and/or occupational illnesses for your peers is 0.8 for the same five year period.

It is apparent from this review that you are not capable of complying with Union Pacific's expectation that all employees work safely each and every day. As a result of the latest incident and above, your behavior is considered to be in violation of Union Pacific Rule 1.1.2 Alert and Attentive, and Rule 1.6 Conduct (1) Careless of the safety of themselves and others. This is in violation of item (3) of your letter agreement dated August 21, 1003, from Cecil Martinez, UPRR Manager of Track Programs (copy attached). As a result of this violation, you are now reverted to the status of a Dismissed Employee of Union Pacific Railroad. Please quickly arrange to return all company property that is in your possession.

The Organization contends that Carrier violated Rule 21 of the controlling Agreement by dismissing Claimant without first affording him a fair and impartial investigation. 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 rule violation, he "may be reverted back to the status of a dismissed employee without benefit of a hearing." Clearly, Claimant waived his right to a hearing for the probationary period.

We observe that the instant probationary reinstatement agreement is markedly different from other such agreements that have been used by this Carrier. Other probationary reinstatement agreements used by this Carrier have provided that if there are specified types of rule violations during the probationary period, the employee "shall" or "will" revert back to the status of a dismissed employee. Such agreements are self-executing – they leave no room for discretion. The instant agreement, in contrast, provides that Claimant "may" revert back to the status of a dismissed employee. The instant agreement gives Carrier discretion concerning the handling of incidents arising during the probationary period.

Our role is limited to determining whether Carrier abused its discretion in reverting Claimant back to the status of a dismissed employee. Carrier's discretion is broad in this regard. It need not afford Claimant a hearing and need not prove the alleged rule violations by substantial

evidence. It will be a rare case where Carrier's decision will be found to be an abuse of discretion.

After careful consideration of the record and the positions of the parties, the Board is compelled to conclude that this is one such rare case where Carrier abused its discretion. The record reflects only that Claimant sustained a personal injury on June 9, 2004. There is absolutely no evidence in the record as to how that injury came about. The Board has no way of knowing whether Claimant was careless or whether he was just unlucky enough to be in the wrong place at the wrong time.

The only evidence in the record is that Claimant sustained five personal injuries in five years. There is no evidence about the nature of the prior personal injuries. Most significantly, there is no evidence that Claimant was ever even counseled about his safety record or on how to improve his record. To revert Claimant back to the status of a dismissed employee on such a thin record is an abuse of discretion.

On the other hand, Claimant is not entirely blameless for his predicament. Claimant was admittedly insubordinate on August 7, 2003, and agreed to accept reinstatement subject to the 18-month probationary period in lieu of dismissal. Furthermore, Claimant's record of personal injuries is markedly worse than his peers. Considering all of the facts and circumstances, and in light of the competing equities, we find that the appropriate resolution of this claim is to order Carrier to reinstate Claimant to service with seniority unimpaired but without compensation for lost time. Carrier is admonished to counsel Claimant and assist him to improve his safety record and to document its efforts in doing so. Claimant is admonished that he should make the most of this opportunity to demonstrate to Carrier that he is capable of working safely.

AWARD

Claim sustained in accordance with the Findings.

ORDER

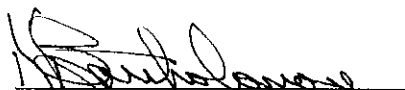
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto.



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



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

June 26, 2006

Dated at Chicago, Illinois, June 12, 2006