

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 80
)
) Award No. 61
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: September 14, 2006

STATEMENT OF CLAIM:

1. The dismissal of Track Foreman Lee D. Eaton for his alleged failure to show just cause for his absence commencing May 5, 2005 was without just and sufficient cause, based on unproven charges and in violation of the Agreement (System File T05-22/1432255).
2. As a consequence of the violation referred to in Part (1) above, Track Foreman Lee D. Eaton shall now be returned to service with seniority and all other rights unimpaired and compensated for all wage loss suffered. His record shall be cleared and any reference to this incident removed from his personal file.

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 September 10, 2004, Carrier dismissed Claimant for numerous rules violations resulting from a collision in which the hi-rail truck he was operating ran into the rear of a test truck. In Case No. 68, Award No. 53, we denied the Organization's claim, thereby upholding Claimant's dismissal

The Carrier had previously offered to resolve the claim by reducing the dismissal to a five day suspension. Claimant rejected the offer. Thereafter, on April 29, 2005, Carrier notified Claimant that it had determined that the discipline assessed had served its purpose and instructed Claimant to report back to his former position within 48 hours of receipt of the notice. The notice warned Claimant that failure to report back would result in his being considered absent without authority.

Claimant refused to report back to work and notified Carrier that he would return if Carrier compensated him for all lost time, removed the disciplinary action from his file and agreed not to retaliate against him. By letter dated June 6, 2005, Carrier notified Claimant that he had been absent for more than thirty calendar days without authority and, in accordance with Rule 14 of the Agreement, instructed Claimant to show cause within seven days why Carrier should not terminate his employment. By letter dated June 12, 2005, Claimant responded reiterating that he would report back to work if Carrier compensated him for all wage loss suffered, cleared his disciplinary record and agreed not to retaliate against him and restored his character and reputation.

On June 20, 2005, Carrier notified Claimant to report for an investigation on July 14, 2005, in connection with the charge that he had been absent without authorization in excess of thirty calendar days. The hearing was held as scheduled. On July 25, 2005, Carrier advised Claimant that he was found guilty of the charge and dismissed from service.

It appears that Claimant rejected a settlement offer on his claim arising from his original dismissal and refused to return to service when instructed to do so. Consequently, his claim on the original dismissal proceeded to this Board and we denied the claim, upholding the dismissal. In light of our decision in Award No. 53, the instant claim is moot.

Nevertheless, we felt compelled to address Claimant's contention that he was not properly dismissed the second time. Rule 14 provides:

- (a) Employees who are continuously absent without authority from their position for a period of thirty (30) calendar days may be treated as having resigned and their names removed from the seniority roster.
- (b) Before an employee is considered as having resigned and his name removed from the roster, the employee will be notified at his last known address by Certified Mail - Return Receipt Requested that failure to return from service or show cause within seven (7) calendar days of receipt of the letter will be treated as a voluntary resignation and his name removed from all seniority rosters. A letter mailed to the last address of record with the Carrier will be considered delivered. A copy of such letter will be sent to the General Chairman.
- (c) If the employee responds to such letter within the time specified, the Carrier will have the option of allowing the employee to return to service for good cause shown or

citing him for formal investigation under the provisions of Rule 21 (Discipline and Investigations) of this Collective Bargaining Agreement.

(d) If the employee does not respond within the time specified, he will be considered as having resigned and his name removed from all seniority rosters.

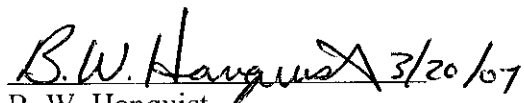
The record clearly establishes that after Claimant rejected Carrier's offer to settle his claim by reducing his dismissal to a five day suspension, Carrier unconditionally reinstated Claimant to service and ordered him to report. Claimant refused to report unless Carrier, in effect, granted his claim in its entirety. Claimant had no right to condition his reporting back to service on Carrier's granting his claim. Carrier's April 29, 2005, letter clearly advised Claimant that Carrier had unilaterally determined to reduce his dismissal and reinstate him to service. Claimant, at that point, was obligated to return to service and progress his claim for lost wages and removal of discipline from his file. Claimant chose not to do so and at that point was absent without authority. When his absence exceeded thirty calendar days, Carrier proceeded in accordance with Rule 14. Carrier handled this matter precisely as it was required to do under the Agreement. Were the claim alive, we would deny it on its merits, but, as indicated above, the claim is moot.

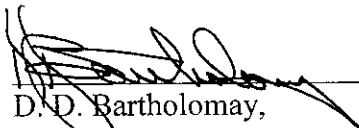
AWARD

Claim dismissed.



Martin H. Malin, Chairman

 3/20/07
B. W. Hanquist
Carrier Member


D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, February 27, 2007