

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 194
AWARD NO. 192

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1530892

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

System File

J-0948U-258

STATEMENT OF CLAIM

1. The Carrier's dismissal of Mr. Anthony Sanchez based upon an alleged violation of a leniency reinstatement agreement dated August 21, 2008 was unfair, unreasonable and without just cause and in violation of the Agreement.
2. As a consequence of Part 1 above, Claimant Sanchez shall be immediately reinstated to his former position with all rights unimpaired and made whole for all time lost as a result of the Carrier's unfair treatment and improper dismissal.

STATEMENT OF BACKGROUND

Claimant was first employed by the Carrier on June 26, 1976. In an incident that occurred on August 12, 2008, Claimant became quarrelsome, argumentative, and threatened bodily harm to a fellow employee. Subsequently, Claimant waived his right to a formal investigation and entered into a reinstatement agreement dated August 21, 2008, the terms and conditions of which were as follows:

1. ***Mr. Sanchez acknowledges responsibility for his actions and will waive the right to a hearing and accept dismissal from service as discipline as outlined in the Notice of Investigation dated August***

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20, 2008. His personal record will be corrected to reflect the discipline of dismissal for the violation of Rules 1.6, 1.7, and the Violence & Abusive Behavior in the Work Place Policy. Simultaneously, he will be accorded a leniency reinstatement to service predicated upon the conditions contained in this Agreement. There will be no pay for any time lost while held out of service. His seniority and vacation rights will be restored unimpaired. Any and all claims filed on his behalf will be withdrawn and dismissed in their entirety.

- 2. Upon his return to service, Mr. Sanchez's UPGRADE discipline status will be recorded as a Level 3 and he will serve an eighteen (18) month probationary period commencing with the first date he performs compensated service. If at any time during this probationary period, he commits a violation of a cardinal safety rule violation or a serious rule violation, he will be reverted back to the status of a dismissed employee without the benefit of a hearing. Any other rule violations will be handled in accordance with the Carrier's Discipline Policy.**

By letter dated September 4, 2009, slightly more than twelve (12) months into his probationary period of eighteen (18) months, Claimant was notified by Director of Track Maintenance, Gary L. Rethman that he was being reverted to dismissed status. The September 4, 2009 letter reads in pertinent part as follows:

The Carrier has obtained documentation on September 1, 2009 that you received a felony conviction on August 26, 2009 that involved a controlled substance. Conviction of a Felony is grounds for Level 5 (permanent dismissal) under the Carrier's UPGRADE Policy, dated May 1, 2008. As the conviction involved a controlled substance, it is also a violation of the Carrier's Drug and Alcohol Policy, Rule 1.5 (Section 6.1), which alone is grounds for Level 5 (permanent dismissal) under the Carrier's UPGRADE Policy. As both are serious rule violations and you are within your eighteen (18) month probationary period, you are in violation of the terms of the signed Leniency Agreement and are immediately returned to dismissed status without the benefit of a hearing.

In response to Carrier's reversion action, the Organization, by letter dated September 10, 2009 requested a conference pursuant to the provisions of Rule 48 (n) of the July 1, 2001 Controlling Agreement. Rule 48 (n) reads in whole as follows:

RULE 48 – DISCIPLINE AND GRIEVANCES

(n) An employee in service who feels he has been unjustly treated may request a conference through the General Chairman or other officer of the Organization. If the matter cannot be resolved in the interim, the representative may make written request for a conference to the appropriate Company manager involved and such request will contain the precise nature or cause of the complaint. Such request for conference must, however, be made within twenty (20) calendar days of the cause of complaint. If the asserted unjust treatment is left unresolved, it may be handled as a claim or grievance under the provisions of Rule 49.

Carrier responded to the Organization's request by letter dated September 22, 2009, wherein it rejected the request on grounds that a Rule 48 (n) conference could not be invoked because such a conference only applied to an "employee in service" which Claimant no longer was. The Organization responded by filing the subject claim and, as a result of the Parties' unsuccessful efforts to resolve the issue in dispute on the property, the claim comes now before the Board.

CARRIER'S POSITION

Carrier asserts that since Claimant's felony conviction involved a controlled substance which would be grounds for dismissal under GCOR Rule 1.6 (Conduct), as well as under its Drug and Alcohol Policy, Claimant's actions triggered the self-executing provisions of his leniency reinstatement agreement thus resulting in his being reverted to dismissed status. Carrier submits the Organization's position that Claimant possessed a right under the provisions of his leniency reinstatement agreement to a Rule 48 (n) conference is simply wrong predicated on a misapplication of the provisions set forth in Rule 48 (n). Carrier posits there is no basis upon which the provisions of Rule 48 (n) requires it to hold a conference for an individual who is not one of their employees relying on, in support of this position, the opening first sentence of Rule 48 (n) which states, "**An employee in service** who feels he has been unjustly treated may request a conference through the General Chairman or other officer of the Organization".

Finally, Carrier avers, had the Organization been inclined to challenge its finding that Claimant had been convicted of a felony drug possession, the Organization could have followed the established process provided by Rule 49 of the 2001 Agreement and filed a claim. This, the Organization did not do. As such, the Carrier respectfully requests that the Board reject the subject claim in its entirety.

ORGANIZATION'S POSITION

The Organization acknowledges that in signing the leniency reinstatement agreement, Claimant accepted the fact that certain of his due process rights would be denied him, specifically his right to a formal investigation hearing pursuant to the applicable provisions of Rule 48 of the Controlling Agreement, if, at any time during the eighteen (18) month probationary period, he committed a violation of a cardinal safety rule or a serious rule violation. However, the leniency reinstatement agreement preserved Claimant's right to a hearing under applicable provisions of Rule 48 should Claimant be alleged to be in violation of "any other rule". Moreover, the Organization asserts, nowhere in the terms and conditions of the leniency reinstatement agreement was Claimant precluded from asserting his due process right to a Rule 48 (n) unfair treatment conference. Additionally, the Organization asserts, for the leniency reinstatement agreement to become self-executing, Claimant must have committed either a cardinal safety rule or a serious rule violation and neither was the case here since his alleged conviction for possession of a controlled substance pertained to conduct outside the workplace and, in any event, Carrier never proffered substantive evidence that Claimant had, in fact, been convicted of such a charge. The Organization submits by the very nature of the terms and conditions specified in the leniency reinstatement agreement that Carrier is limited to what actions it can take under certain specified circumstances and if permitted to act beyond its limits, as it clearly did here, Carrier could do almost anything with respect to the application of a leniency reinstatement agreement. Thus, in the instant case, the Organization asserts, it is grossly unfair for the Carrier to simply state that the Claimant violated its rules but not provide Claimant the opportunity to an unfair treatment conference to develop the facts, particularly here in light of the fact that there is not a shred of probative evidence Claimant was in violation of any Carrier rule or, in any other way ran afoul of the terms and conditions of the leniency reinstatement agreement. In support of its position in this case and the arguments asserted, the Organization references Decision 5750 of Special Board of Adjustment (SBA) No. 18 which states in pertinent part the following:

While an employee can . . . waive his right to an investigation as a condition of a probationary reinstatement, the Carrier's right to take future disciplinary action is not unchecked. The Carrier must have a factual basis for their action and the Organization must have a vehicle to challenge those actions.

* * *

Thus, where a Carrier returned an employee to dismissed status the Organization may challenge that action. When challenged, the Superintendent is obligated to adequately investigate the matter and render his decision in writing. Moreover, the decision of the Superintendent must be supported by sufficient evidence to justify their action.

The Organization notes that in its refusal to convene an unfair treatment conference under the provisions of Rule 48 (n), Carrier left a record filled with accusation and devoid of any evidence sufficient or otherwise. The Organization argues putting aside the fact Carrier failed to produce any evidence to support its action of reversion of Claimant to dismissed status, specifically proof positive of Claimant's conviction, that even if Carrier could show that the modifications contained in the reinstatement agreement applied in this case, that is, that Claimant had allegedly violated the agreement by committing a serious rule violation, nothing in the reinstatement agreement states or implies Claimant waived his right to challenge unjust treatment through requesting an unfair treatment conference pursuant to the provisions of Rule 48 (n). In support of this latter position, the Organization references NRAB Third Division Award 27704 which in pertinent part states:

Rights under Article 48, Unjust Treatment, and Article 14 are too important to be waived by inference.

In summation, the Organization asserts that even if the Carrier did show that Claimant was convicted of a felony, which it did not, there are simply too many questions that do not have answers, such as: was Claimant in fact convicted?; and was it something that occurred off property? – if so, the Carrier would have to show that there was a nexus between the off-duty conduct and Claimant's employment relationship with the Carrier. In denying Claimant's request for an unfair treatment conference, the Organization submits Carrier revealed it was not interested in developing the facts

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.

Close scrutiny of the terms and conditions set forth in the leniency reinstatement agreement that was jointly agreed to by Carrier, the Organization, and the Claimant substantiates beyond any doubt that the circumstances under which he would be reverted to a dismissed status would entail a commission on his part of a violation of a cardinal safety rule or a serious rule violation of Carrier's. The language of the leniency reinstatement agreement is completely devoid of any mention or reference to any off-duty conduct engaged in by Claimant during his probationary period of eighteen (18) months that would be construed as having a nexus relationship to either a cardinal safety rule or a serious rule violation of Carrier's or for that matter, any other violations of Carrier's rules. The Board is convinced that had the Parties that is, the Carrier and the Organization contemplated such a circumstance they would have included such in

the terms and conditions comprising the leniency reinstatement agreement. The fact that they did not, cannot now be read into the agreement retroactively. As much as the Carrier would like for the Board to adopt the position that a nexus exists between possession by Claimant of a controlled substance that occurred while Claimant was in off-duty status, aside from any conviction that might have resulted from this conduct and commission by him of a serious rule violation, the Board is unable to make such a connection. Our inability to make such a connection, validates the Organization's position that Claimant did not violate the terms and conditions of his leniency reinstatement agreement and therefore his reversion to dismissed status was improper.

As to the matter of whether Carrier improperly denied Claimant his contractual right to an unfair treatment conference pursuant to Rule 48 (n), based on the foregoing finding, the Board finds this matter to be moot. However, the Board notes it does not concur in the Carrier's position that Claimant was not entitled to such an unfair treatment conference due to the fact that when the request was made for such a conference he had already been dismissed and considered to no longer be an "employee in service". First of all, the leniency reinstatement agreement did not include any term or condition barring Claimant from requesting an unfair treatment conference pursuant to the provisions of Rule 48 (n). As for Carrier's decision to deny Claimant's request, we find Carrier's rationale here to be inconsistent with its obligation to process claims filed by the Organization on behalf of employees after they have been summoned to an investigation and subsequently found guilty of charges that result in their dismissal. A dismissed employee is no longer an "employee in service" yet there exists an entire contractual procedure to provide such ex-employees with due process rights to challenge their dismissal. We find that an unfair treatment conference procedure to be parallel to the claims procedure in that a request to convene such a conference should not be denied on grounds the employee is deemed not to be an "employee in service" and, therefore, should be honored in circumstances such as those that prevail in this case.

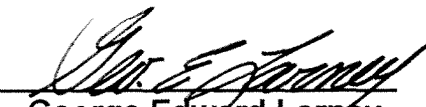
The Board rules to sustain the claim as presented and to award the remedy requested by the Organization. This Award is to become effective within thirty (30) days from the date signed by the Parties.

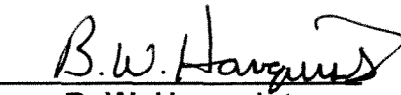
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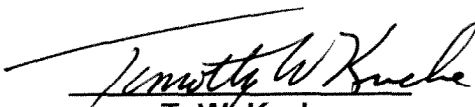
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CLAIM SUSTAINED


George Edward Larney
Neutral Member & Chairman


B. W. Hanquist
Dissent


T. W. Kreke

Chicago, Illinois

Date: September 12, 2011

**CARRIER'S DISSENT TO AWARD 192 OF
PUBLIC LAW BOARD 6302
REFEREE MALIN**

The issue advanced by the Organization on the property and advanced to the board was **"whether the Carrier was required to hold a Rule 48(n) conference"** as requested by the Claimant when he was reverted to a dismissed status as agreed upon by his leniency reinstatement after the Carrier specifically notified him that they had documentation that he was convicted of a felony. The remedy requested on the property was for the Carrier to hold an unjust treatment conference. At no time during the grievance process did the Claimant or the Organization dispute that he was in fact convicted of a felony or that it was a serious rule violation.

The board went outside the boundaries of the grievance and ruled on issues that were never advanced on the property and should not have been addressed by the Board. It took it upon its own to review the United States Supreme Court in the case, Consul. Edison Co. v. Lab. Bd., 305 U.S. 197 (1938) and inappropriately applied it to the case herein. Not only was this case not argued by either the Organization or the Carrier, but the case does support the majority's position. This case states:

"As Walls points out, the Last Chance Agreement contains no express waiver of a pre-termination hearing or of the right to due process pursuant to a termination decision. The Agreement does state that "[y]ou and your Union Representative may not grieve or arbitrate this matter if you fail to comply with these conditions." Since grievance and arbitration are post-termination processes, however, this clause does not conclusively waive Walls's rights to the pre-termination process.

However in Mr. Sanchez's case, he, the Organization and the Carrier had previously agreed to allow Claimant to accept dismissal and return to work on a leniency basis with the understanding he could return to work and be dismissed without the benefit of a hearing if he committed a serious rule violation within the 18 month probationary period. The conditions of the leniency reinstatement were very clear and understood by the parties. Clearly the Board ruled on issues that the Carrier was never allowed to respond to on the property such as providing the documentation that it informed the Claimant it had in its possession.

The Board went out of its way to render their own sense of industrial justice that was not grounded during the on the property handling. The Carrier has a long standing no tolerance policy which provide they do not employ convicted felons and the Board went above and beyond the issue filed in the initial grievance.

For all of these reasons the Award should not have been sustained. The only redeeming thing in this award is that it only addresses this specific case and therefore does not establish precedent. The Carrier dissents to the Award.

B. W. August

Carrier Member PLB 6302

September 8, 2011