

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 201
AWARD NO. 193

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1530301

AND

ORGANIZATION

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

System File

J-0948U-261

STATEMENT OF CLAIM

1. The Carrier's dismissal of Mr. Phillip A. Silos based upon an alleged violation of a leniency reinstatement agreement dated April 6, 2009 was unfair, unreasonable and without just cause and in violation of the Agreement.
2. As a consequence of the violation referred to in Part 1 above, Claimant Silos 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 January 28, 1998 and thereafter, established and maintained seniority as a Maintenance of Way employee. On February 28, 2009, after completing his work, he allegedly violated GCOR Rule 1.6 (Conduct) by dishonestly paying himself for time not worked. At the time, Claimant was employed as a Section Foreman on Gang 4784, at North Platte, Nebraska. On April 3, 2009, Carrier dismissed Claimant for the charged violation of Rule 1.6. As violation of this rule constitutes a Level 5 discipline assessment under Carrier's UPGRADE Discipline Policy, Claimant opted to enter into a leniency reinstatement agreement. The following terms and conditions of Claimant's leniency reinstatement agreement were set forth in a letter dated April 6, 2010.

1. Mr. Silos acknowledges responsibility for his actions, accepts dismissal from service as discipline as outlined in the Notice of Discipline. There will be no pay for any time lost while 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 Any and all claims filed on his behalf will be withdrawn and dismissed in their entirety.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. Silos' UPGRADE discipline status will be recorded as a Level 3 and he will serve twelve (12) month probationary period commencing with the first date he performs compensated service. If at any time during the twelve (12) month probationary period, commencing with the date he returns to service, he is in violation of any serious rule violation or any cardinal safety rule violation, he will revert back to the status of a dismissed employee without the benefit of a hearing under the Collective Bargaining Agreement he is working. Any other rule infraction will be handled in accordance with the Carrier's Discipline Policy.
3. At the end of the probationary period Mr. Silos will be required to continue to abide by the rules as contained in the Union Pacific Rules and the Carrier's Policies.
4. Mr. Silos may be required to meet with his Manager or Supervisor to reach a full and complete understanding as to the terms of this agreement, as well as future conduct and compliance with the Carrier's rules.
5. It is understood that this agreement is on a non-precedent basis and will not be cited in the future, except as it relates to Mr. Silos.

Finally, through his signature, Mr. Silos stipulates that he has entered into this agreement with full knowledge and understanding of its terms. He further acknowledges that he has discussed the agreement with his Representative. Concurrently, he releases the Carrier and the Organization and its officers from any liability and/or responsibility in connection with not progressing any claims on his behalf that would otherwise arise from this incident.

Nearly seven (7) months into his probationary period of twelve (12) months, Carrier, by letter dated November 3, 2009 informed Claimant that under the terms and conditions set forth in his leniency reinstatement agreement he was being reverted to dismissal status. This letter stated in pertinent part the following:

On October 29, 2009 you were removed from service for violation of the Union Pacific EEO / AA Policy. Violation of the Union Pacific

EEO / AA Policy is a Level 5 violation and constitutes a serious rule violation. Therefore, you are immediately returned to the status of a dismissed employee pursuant to the terms of your leniency reinstatement.

In response, by letter dated November 10, 2009, the Organization requested an unjust treatment conference be convened in accord with Rule 48 (n) of the Controlling July 1, 2001 Agreement. Rule 48 (n) reads in whole as follows:

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 with 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.

By letter dated February 10, 2010, Carrier denied the Organization's request for a Rule 48 (n) conference on grounds that Rule 48 (n) clearly states in the opening sentence that Rule 48 (n) is applicable to "an employee in service", and noted that at the time the Organization requested the 48 (n) conference on Claimant's behalf, Claimant was no longer an employee in service. Carrier further asserted that even if Claimant were entitled to a 48 (n) conference, which he was not, he was clearly informed by the letter of November 3, 2009, that his reversion to dismissed status was due to his having violated the Carrier's EEO/AA Policy, a Level 5 violation under the UPGRADE Discipline Policy which constitutes a "serious rule violation" of the kind Claimant's Leniency Reinstatement Agreement prohibited.

According to the record evidence, employee Harvey Guy II, Division Truck Driver using Carrier's hotline reported in a call made the afternoon of October 15, 2009 the following:

During a job briefing, three (3) employees, Vic Hayes, Assistant Foreman, Dan Perlinger, Sectionman, and Darren Sterly, Assistant Foreman were told their jobs were being eliminated in five days. Sterly looked at Guy II, smiled and waved his hand to signal goodbye. Guy II believed Sterly did that, because Sterly, who has more seniority over Guy II, might try to bump Guy II and take Guy II's position. Moments after, Foreman, Phil Silos said to Guy II, "you better s*ck d*ck, if you don't want to get bumped". Guy II was offended by Silos' remark. Guy II believes Truck Driver, Mike Casillas, Foreman, Mike Didal, and Track Machine Operator, Tom Knapp, may have witnessed what Silos said.

Guy II discussed his concern with Bill Hill (title unknown), who told Guy II to write a statement of what happened.

Guy II would like this information addressed to make sure this doesn't happen again.

Guy II declined to provide additional information.

In a report of this reported incident, it was noted that no documentation was available relative to the incident. Two (2) weeks after this reported incident, Carrier charged Claimant with having violated the terms of his Leniency Reinstatement Agreement and reverted his status to dismissal.

In response to the Carrier's refusal to acquiesce to its request for a Rule 48 (n) conference, the Organization filed the subject claim now before the Board due to the Parties inability to resolve the matter on the property.

ORGANIZATION'S POSITION

The Organization submits that in denying Claimant's request for a Rule 48 (n) conference, it denied Claimant's due process right to confront his accuser, here employee Guy II and to give his account of the alleged incident. Additionally, the Organization notes that this report of the reported incident was never submitted as evidence on the property and therefore must be rejected by the Board as new evidence. In any event, even if this report were to be accepted as evidence in this proceeding, it is clear that a simple accusation cannot be deemed by the Board to constitute substantial evidence which is the required standard of proof by which a dismissal must be determined, even one that results from a reverted status. The Organization argues it was unjust of the Carrier to withhold this report of the reported incident during the handling of the claim on the property; but had Carrier advanced this evidence on the property, it would have shown that what was reported was just an allegation and, as such insufficient to support the charge Claimant had violated the serious EEO/AA Policy of Carrier therefore constituting commission of a violation of the terms of his Leniency Reinstatement Agreement.

CARRIER'S POSITION

Carrier's position has already been set forth elsewhere above.

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.

We find the central issue before us to be, whether Carrier improperly denied Claimant his contractual right as asserted by the Organization to an unfair treatment conference pursuant to Rule 48 (n), based on the prevailing circumstances as set forth above. The Board does not concur in the Carrier's position that Claimant was not entitled to a Rule 48 (n) conference due to the fact that when the request was made for such a conference he had already been reverted to a dismissed status and therefore deemed no longer to meet that part of the provision of Rule 48 (n), specifically, the requirement that he be an "employee in service". We find, as we did in Award No. 192, Carrier's rationale in denying Claimant's request for a Rule 48 (n) conference to be inconsistent with its obligation to process claims filed by the Organization on behalf of employees after they have been summoned to a formal investigation under the provisions of Rule 49 and subsequently found guilty of charges that result in their dismissal. A dismissed employee in this scenario that files a claim challenging the dismissal action is similarly situated to Claimant's status here as both circumstances result in the employee no longer being in the service of Carrier yet, under Rule 49 the ex-employee is entitled to exercise a due process right to grieve the dismissal action whereby, in denying Claimant to exercise a due process right to a forum of recourse, the unfair treatment conference, Claimant is prevented from disputing the basis upon which Carrier acted to revert his status to dismissal. Thus, we find that an unfair treatment conference under Rule 48 (n) to be parallel to the claims procedure under the provisions of Rule 49 in that, a request for a Rule 48 (n) conference should not be denied on grounds the employee is deemed not to be an "employee in service" and, therefore, such request should be honored in circumstances such as those that prevail in this case.

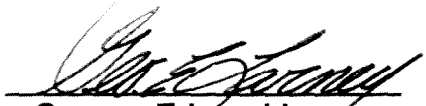
We further note that while the terms and conditions of Claimant's Leniency Reinstatement Agreement clearly provides that should his status be reverted to dismissal he is not entitled to a formal investigation regarding developing the fact circumstances of Carrier's decision to revert; nevertheless, the Leniency Reinstatement Agreement does not bar Claimant from the right to dispute the decision to revert by proffering his account of the incident that resulted in the reversion action. If the Parties intended to circumscribe Claimant's right to a Rule 48 (n) conference following a reversion action, the Board is persuaded the Parties would have included such a term and condition in the Leniency Reinstatement Agreement. The fact they did not include such a term and condition is further support for our finding in this case that Claimant was entitled to have his request for a Rule 48 (n) conference honored rather than rejected by Carrier.

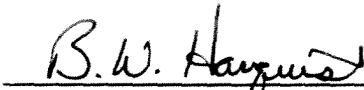
As to the Organization's position that Carrier advanced new argument we find this position to be valid. However, in light of now knowing the evidence upon which Carrier acted to revert Claimant's status to dismissal, if such had not been new evidence we would have ruled such evidence not to rise to the requirement of substantial evidence to support the reversion.

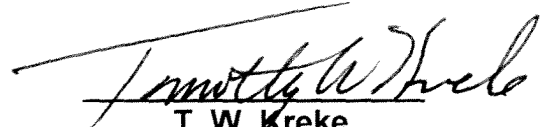
Based on the foregoing findings, we rule to sustain the claim as presented. This Award is to become effective within thirty (30) days from the date signed by the Parties.

A W A R D

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 193 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 in fact violated the Carrier's EEO Policy 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. Silos'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 long standing policies which provide they do not employ such caliber of persons 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