

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 111
UNION PACIFIC RAILROAD COMPANY) Award No. 105
_____)

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

Hearing Date: June 4, 2007

STATEMENT OF CLAIM:

- (1) The discipline imposed upon Thomas D. Easler for an alleged violation of Union Pacific Rule 1.5 of the General Code was unwarranted in reference to the UPGRADE Policy, and Mr. Easler was not accorded a fair and impartial hearing as required by Rule 48(a) of the Agreement.
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be returned to service with all rights restored unimpaired immediately and be compensated for all lost time.

FINDINGS:

Public Law Board No. 6302 upon the whole record and all of 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 January 13, 2006, Claimant was notified to report for a formal investigation on February 1, 2006, concerning his allegedly having an illegal and unauthorized drug in his system as evidenced by a positive drug test on January 3, 2006, and allegedly working unsafely resulting in his personal injury on January 3, 2006. The Notice charged Claimant with alleged violations of Rules 1.1.2, and 1.5, Carrier's Drug and Alcohol Policy, and Safety Rule 80.1. Following two postponements, the hearing was held on March 17, 2006. On April 6, 2006, Claimant was advised that he had been found guilty of the charges and had been dismissed from service.

At the time of the incident that led to the investigation, Claimant had 34 years of service,

including 22 years as a Foreman. On the day of the incident, Claimant was the flagging foreman for contractors who were excavating a bridge. At approximately 2:30 p.m. the Contractor's Superintendent reported to Claimant that when the last train passed through, it may have caused the retaining wall to move. Claimant went to the bridge and leaned over to observe the condition of the wall and fell ten feet, suffering significant injuries. The Contractor had not erected fall protection; instead he had erected a fence that was to mark the bridge as a hazardous area. Claimant understood that the fence was not erected as fall protection but believed it would support his weight for a brief observation of the retaining wall. The fence post gave way under Claimant's weight causing his fall.

Claimant was transported by ambulance. En route to the hospital, he was administered morphine because he was in considerable pain. At the hospital, Claimant was treated for his injuries and administered a drug test. The drug test was positive for morphine and marijuana. The administration of the morphine en route to the hospital explained the presence of morphine in Claimant's system. Claimant admitted violating Rule 1.5 and Carrier's Drug and Alcohol Policy with respect to the positive test for marijuana. Thus, Carrier proved the charges related to the positive drug test by substantial evidence.

Claimant testified candidly that he understood that the fence erected on the bridge was not for fall protection but was merely intended to signal that the bridge was a hazardous area. Nevertheless, he believed, because the fence posts seemed solid to him, that the fence would support his weight if he leaned on it briefly to observe the retaining wall. Claimant thus admitted that he used the fence for a purpose that he knew it was not designed for. We conclude that Carrier proved the charges related to Claimant's accident by substantial evidence.

Sections 21-23 of Carrier's Drug and Alcohol Policy provide for a one-time opportunity to return to service for an employee dismissed for violation of the Policy who has had no prior violation of the Policy in the preceding ten years and who has had no other involved major rule violation. Claimant had no prior Drug and Alcohol violations; on the contrary, he had had numerous drug tests all of which had been negative. However, Carrier denied Claimant an opportunity to return to service because of the other rules violations related to his accident.

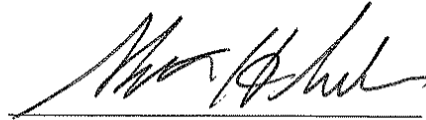
Carrier's application of Section 21 of the Drug and Alcohol Policy was technically accurate. However, Claimant's other rule violations must be considered in context. Claimant had 34 years of service and an excellent record. Carrier witnesses testified that Claimant was a very safe worker. Considering all of the circumstances peculiar to the instant case, we conclude that the discipline of dismissal without an opportunity to return to service was excessive. Carrier shall afford Claimant a one-time opportunity to return to service in accordance with Sections 21-23 of its Drug and Alcohol Policy

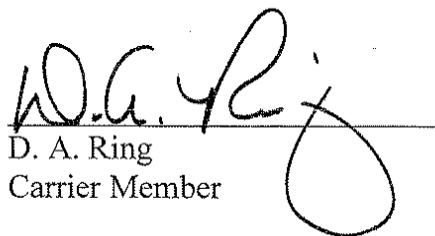
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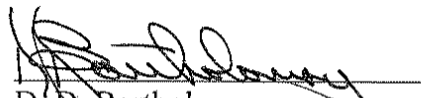
Claim sustained in accordance with the Findings.

ORDER

The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto


Martin H. Malin, Chairman


D. A. Ring
Carrier Member


D. D. Bartholomay
Employee Member 8-20-07

Dated at Chicago, Illinois, July 26, 2007

Aug 20, 2007