

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 141
UNION PACIFIC RAILROAD COMPANY) Award No. 137
_____)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: June 18, 2008

STATEMENT OF CLAIM:

- (1) The dismissal of Mr. Enrique Delatorre for alleged violation of his personal program signed September 9, 2006 in connection with his failure to cooperate with the Employee Assistant Program (EAP) is unjust, unwarranted and in violation of the Agreement (System File J-0648-10/1469399).
- (2) As a consequence of the violation outlined in Part (1) above, Mr. Delatorre shall have his personal record cleared of all charges and be reinstated with all back pay, seniority unimpaired and all other rights due to him by the collective bargaining agreement.

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 July 21, 2006, Carrier notified Claimant to report for an investigation on August 15, 2006. The notice charged that Claimant tested positive for an illegal substance on July 13, 2006. The notice also offered Claimant the option of waiving investigation and returning to service under a One Time Return to Service Agreement. Claimant accepted the offer and signed the waiver agreement on July 24, 2006. One of the conditions of Claimant's reinstatement was that

he comply with his Personal Program as developed through the EAP and that failure to so comply within twelve months following his return to service would revert Claimant to the status of a dismissed employee without benefit of a further hearing. On September 8, 2006, Claimant received his personal plan and on September 15, 2006, the EAP Manager released Claimant to return to service.

The record concerning the subsequent developments that led to the instant claim is far from a model of clarity. On December 4, 2006, the EAP Manager sent Claimant a letter confirming their conversation of the same date in which Claimant allegedly admitted recent use of alcohol and advising that this violated Claimant's Personal Program and constituted non-cooperation with the EAP, and that the non-cooperation would be reported to the Director Track Programs. On the same date, the EAP Manager so notified the DTP of Claimant's alleged non-cooperation. Claimant was then removed from service.

Carrier asserts that Claimant was notified orally that because of his non-cooperation with the EAP, Claimant was reverted back to the status of a dismissed employee. However, the record does not contain a statement from the DTP or any other evidence in support of this assertion. On the other hand, the record also does not contain any denial from Claimant that he was notified orally that he had reverted back to the status of a dismissed employee.

By letter dated December 28, 2006, the Organization requested an unjust treatment conference pursuant to Rule 48(n) of the Agreement. Rule 48(n) provides:

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 of the 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.

By letter dated February 15, 2007, the Organization reiterated its request for a Rule 48(n) conference. The letter enclosed a statement from Claimant's Alcoholics Anonymous sponsor attesting to Claimant's sobriety and indicating that Claimant could be misunderstood because of Claimant's accent and his "wording of sentences." The Organization infers from the sponsor's statement that the EAP Manager misunderstood Claimant's statement and that Claimant did not in fact admit to recent consumption of alcohol. However, the record contains no statement from Claimant denying the admission or explaining what he did say to the EAP Manager.

By letter dated February 21, 2007, Carrier denied the request for a Rule 48(n) conference on two grounds. First, Carrier maintained that because Claimant reverted back to the status of a dismissed employee, he was not in service at the time of the request for the conference and, therefore was ineligible for a Rule 48(n) conference. Second, Carrier maintained that the request

was submitted more than twenty days following December 4, 2006, the date on which, according to Carrier, Claimant notified that he had reverted back to a dismissed status.

In March 2007, however, Carrier recalled Claimant to service. By letter dated March 22, 2007, Carrier notified Claimant that pursuant to a conversation on the prior date, Claimant was disqualified as an Assistant Foreman and was to exercise his seniority under the Agreement. Carrier maintains that the recall was a mistake because Claimant remained in the status of a dismissed employee. The Organization maintains that the recall demonstrates that Claimant never reverted back to the status of a dismissed employee and remained in service and eligible for a Rule 48(n) conference. By letter dated April 17, 2007, the DTP “confirmed the previous advice” to Claimant that he had violated the waiver agreement and reverted back to the status of a dismissed employee.

The instant dispute raises a number of interesting questions. These include: Whether an employee who reverts back to the status of a dismissed employee for alleged violation of a waiver agreement may utilize the unjust treatment procedures of Rule 48(n)? What Carrier must do to establish the employee’s reversion back to a dismissed status? What effect, in any, on the employee’s status should be accorded to Carrier’s failure to notify the employee of his status in writing? When does the twenty-day limitations period for requesting a Rule 48(n) conference begin to run?

However, we find it unnecessary to answer any of the above questions to resolve the instant dispute. We consider it prudent to reserve those questions unless and until they are posed on a much clearer factual record. As indicated above, the record in the instant case is not a model of clarity with respect to Claimant’s status and with respect to what, if anything, Claimant told the EAP Manager concerning alcohol. Both parties share in the responsibility for the lack of clarity in the record. Under these circumstances, we conclude that the appropriate resolution to this dispute is to require Carrier to reinstate Claimant to service but without compensation for time out of service. Upon reinstatement, Claimant will remain subject to the conditions of the waiver agreement.

AWARD

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
OCTOBER 6, 2008
Dated at Chicago, Illinois, September 30, 2008
T. W. Kreke, Employee Member
Employee Member
Oct. 6, 2008