

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 166
AWARD NO. 165

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

AND

ORGANIZATION

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

Carrier's File
1500470

System File
B-0819C-101

STATEMENT OF CLAIM

1. The Carrier violated Rules 3 and 19 of the Collective Bargaining Agreement effective November 1, 2001 when on December 21, 2007, Claimant Eddie Neal III was advised that, as a result of having violated General Code of Operating Rules (GCOR) Rules 1.6 (1) "Careless of Safety" and 1.6 (2) "Negligent" on December 7, 2007 while changing out a rail on the Milwaukee Subdivision mainline, he was being reverted to the status of a dismissed employee in violation of the Leniency Reinstatement Agreement of October 2, 2006 without first according him the benefit of a formal investigation.
2. As a consequence of Carrier's violation as set forth in Point 1 above, the Organization requests that Claimant be immediately reinstated to his former position as Class 2 Foreman of Gang 3259 with all rights unimpaired and compensated at his applicable rate of pay for all lost time as a result of his improper dismissal.

STATEMENT OF BACKGROUND

In May of 2006, Carrier charged Claimant while assigned as a Foreman on Gang #3244 at Northlake, Illinois with falsifying his payrolls on eight (8) separate dates in the months of March and April of 2006, specifically, failing to properly report payroll for time not worked. Carrier informed Claimant his actions constituted a possible violation of its GCOR Rules 1.6 (Conduct) and 1.113 (Reporting or Complying with Instructions), effective April 3, 2005. For various reasons not delineated in the record proceeding

before this Board, a formal investigation of the charge levied against Claimant was postponed from May of 2006 through the entire month of September of 2006, although representatives of the Carrier and the Organization continued to discuss Claimant's case. As a result of these discussions, Carrier and the Organization agreed to offer Claimant a leniency reinstatement agreement, the terms of which included the following:

- 1. You will waive the right to a hearing and accept dismissal from service as discipline. Your personal record will be corrected to reflect the discipline of dismissal for violation of Rule 1.6 (Conduct), and Rule 1.13 (Reporting or Complying with Instructions), of the General Code of Operating Rule of the Union Pacific Railroad. You will then be returned to service on a leniency basis after serving a one-year suspension June 1, 2007. The suspension is counted from the time you were removed from service (June 1, 2006). There will be no pay for any time lost while out of service. Your seniority and vacation rights will be restored unimpaired. Any and all claims associated with the Collective Bargaining Agreement filed on your behalf will be withdrawn and dismissed in their entirety. Notwithstanding the other provisions of this agreement, upon your return to service your UPGRADE discipline status will be recorded as a Level 3 and you will be subject to the terms of the Carrier's Discipline Policies for any future rule violations subsequent to an eighteen (18) month probationary period.**
- 2. You will be returned to service on a probationary basis for an eighteen (18) month period commencing with the first day of your return to service and drawing compensation. In the event you commit a serious rule violation or cardinal safety rule violation during this eighteen-month probationary period, you will be removed from service without a formal investigation as provided by the applicable Agreement Rule and you will revert back to the status of a dismissed employee. In addition, if you commit an action that is considered a serious rule violation under the Carrier's rules while serving the one-year suspension you will forfeit any right to return to service at the conclusion of the suspension. This can include, but is not limited to, being arrested, being convicted, or undertaking an action, which impacts the Carrier's good name. In the event Mr. Neal III disputes this removal from service he may request a hearing. Any other rule violations will be handled in accordance with the Carrier's Discipline Policy.**
- 3. At the end of the eighteen-month (18) probationary period, you will be required to continue to abide by all rules of the Carrier.**

4. ***You may be required to meet with the designated Carrier Manager or Supervisor prior to your return to service to reach a full and complete understanding as to the terms of this agreement, as well as future conduct and compliance with Carrier rules.***
5. ***You may return to your former position upon completion of serving the suspension as long as it is not held by a senior employee. In case a senior employee is holding your former position you may return to service through bidding, or recall to a position for which you currently hold seniority.***

It is further understood this handling is without prejudice to either of our respective positions and is neither to be considered a precedent nor to be cited in the future. It is also understood that you have conferred with your General Chairman prior to signing this agreement. If you and your General Chairman are agreeable to the above provisions, please so indicate in the space(s) provided below.

Claimant and his General Chairman both signed this Leniency Reinstatement Agreement effective as of October 2, 2006, and subsequently, pursuant to the provisions set forth in Items #1 and # 2 of this Agreement as set forth above, Claimant was returned to work on June 1, 2007 in the position of Class 2 Foreman regularly assigned to Gang 3259.

According to the Organization's account of the occurrence that resulted in the filing of the subject claim, on December 7, 2007, Claimant's manager, J. Goben informed him he would not be working as a foreman that day but instead he was being assigned to track inspector duties between Mile Posts 2.5 and 22.0 which meant that Claimant would be supervising a crew of welders in performing the work of changing out rail on the mainline that needed to be replaced. According to the Carrier's account of the events in question, Claimant, in his assignment as track inspector was in fact in a supervisory position or foreman role as the employee in charge. Specifically, incumbent upon Claimant in performing the duties of track inspector were the following responsibilities, to wit:

- ***In replacing rail, he was responsible to insure the job was completed and that Union Pacific standards and rules were complied with to include Federal Railroad Administration Regulations and Standards were met.***
- ***To insure the rail was the correct size, the applicable other track material was correct, inspect and insure the conditions of the track at the defect site remain in serviceable condition, the work was performed in a safe manner, and insure that maintenance standards were upheld.***

The Organization recounts that at approximately 4:30pm, Claimant received a call from a signal maintainer advising Claimant that there was a broken field weld at Mile Post 17.2. In response to that call, Claimant contacted Welders, M. Lopez and A. Corral and instructed them to meet him at Mile Post 17.2. Claimant determined what type of rail was needed to make the repairs and traveled to Bryn Mawr Yard to locate the replacement rail. During the interim time Claimant was away, Welders Lopez and Corral cut the damaged rail and prepared the work location for the rail repair. Upon his return to Mile Post 17.2 with the replacement rail, Claimant instructed Welder Lopez to make reference marks and finish the rail installation job. Claimant then continued to perform his duties of track inspection.

By letter dated December 21, 2007, Edward L. Benbow, Director Track Maintenance (DTM), informed Claimant, that it was brought to his attention that on December 7, 2007, on the Milwaukee Subdivision, while changing out a rail on the mainline, you failed to use reference marks before cutting continuous welded rail (CWR) and failed to reapply anchors. Your actions are in direct violation of Rule 1.6 (1) "Careless of Safety", and 1.6 (2) "Negligent of the Carrier's General Code of Operating Rules (GCOR). Since a violation of Rule 1.6 is a serious rule violation this is to advise that, effective immediately, you are reverted back to the status of a dismissed employee in line with the terms of the leniency reinstatement agreement dated October 2, 2006. You should arrange to return any company property in your possession.

In its submission before this Board, Carrier provided the following explanation regarding the seriousness of Claimant's infraction of GCOR Rules 1.6 (1) and 1.6 (2) pertaining to the failure to use reference marks:

Reference marks are a way of marking the rail to accurately measure if rail is added or taken out of the track, particularly in cold weather when the rail shrinks. By adding rail in the winter the risk of thermal misalignments in warmer weather is increased. The rail added in the winter has to be removed. The only way to keep a record of rail added is the use of reference marks which allows the foreman to get exact measurements then record the measurements in the computer. Thermal misalignments have caused injuries, cost the UP millions of dollars in repair costs and interrupted service to customers. All of the Class I Railroads have been required by the FRA [Federal Railroad Administration] to submit, to the FRA, a policy that defines requirements for measuring rail added. Failure to comply with the FRA subjects the railroad to hefty fines.

Additionally, Carrier explained that failure to use reference marks increases the chance of causing a derailment and that derailments caused by thermal misalignment cost it millions of dollars per derailment. In addition to failing to use reference marks, Carrier also asserted Claimant had violated other rules and standards, specifically, Claimant

failed to apply anchors according to standard, that is, back to pattern; failed to supervise and engage in the work performed by the gang [the crew of two (2) welders]; leaving the employees [the welders] under his supervision without notifying his MTM (Manager of Track Maintenance); and failure to make required reports.

Carrier submits it verified that Claimant committed the violations as charged and given the seriousness of those violations, Claimant failed to comply with the terms of his Leniency Reinstatement Agreement of October 2, 2006. Since Item #2 of the Leniency Reinstatement Agreement which Claimant entered into voluntarily provides for reversion to the status of a dismissed employee should he, during his probationary period commit a serious rule violation or cardinal safety rule violation, and given the fact that said Leniency Reinstatement Agreement is self-executing, Carrier maintains that under all the prevailing circumstances, it was justified in enforcing the Agreement by dismissing Claimant from service without benefit of a formal hearing into the charges levied against him.

The Organization argues that Carrier's action of reverting Claimant to the status of a dismissed employee is procedurally flawed given the delay of fourteen (14) days between the date the cited GCOR Rules were allegedly violated by Claimant and the date Carrier informed Claimant he was being dismissed from service, asserting Carrier's action was untimely as Rule 19 requires a hearing be provided within ten (10) days of an incident under charge. On the merits, the Organization refutes Carrier's contention that Claimant violated either of the two (2) GCOR Rules cited and that it strongly disagrees with Carrier's action of denying Claimant's request for a hearing. Additionally, the Organization maintains that even if Carrier could deny Claimant's request for a hearing, this does not relieve Carrier from the obligation and burden of proof to establish by substantial evidence that: (1) Claimant was in violation of Carrier rules and (2) that said violations were so serious that Claimant would not be afforded a hearing. The Organization submits that Carrier's entire case against Claimant is predicated solely on mere speculation which, by a long line of established arbitral authority bars a Carrier from using mere speculation as a basis upon which to impose discipline. The Organization contends that even if the reference marks were not made and the anchors were missing, the Carrier has failed to establish that it was Claimant's responsibility to make the reference marks and to re-apply the anchors to standard and too, it failed to establish how the Claimant's directing the welders to make the reference marks and finish the rail installation would result in the Claimant disregarding Carrier's interests or how Claimant disregarded the safety of his fellow employees. Moreover, the Organization contends that even if Carrier were able to prove by substantial evidence, which it has not, that Claimant did, in fact, violate the two (2) GCOR Rules it cited to dismiss Claimant from service, it cannot establish that said violations rose to the level of serious as referenced in the Leniency Reinstatement Agreement of October 2, 2007 as demonstrated by the fact Carrier waited fourteen (14) days to address the violations, the length of which indicates the violations were not serious, coupled with the fact that the

discipline imposed on the two (2) welders was a low Level 1 discipline of a "coaching session". Additionally, the Organization asserts that in giving the welders a Level 1 discipline for the same infraction of the two (2) GCOR Rules for which it dismissed Claimant, reflects a disparate treatment of Claimant by the Carrier.

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.

In our review of this case, the Board finds it advantageous to acknowledge the attributes of agreements known variously as Last Chance Agreements or, as here in this case, Leniency Reinstatement Agreement. A long line of arbitral authority has established the following with respect to these agreements that fall outside the controlling collective bargaining agreement and are entered into voluntarily between Carriers, Organizations, and employees who otherwise but for these agreements would be dismissed from service for commission of various offenses.

- **Such agreements supersede all provisions set forth in a mutually negotiated collective bargaining agreement. That is, for the term of the agreement, the provisions of the collective bargaining agreement are rendered inapplicable, thus making the terms of a Last Chance or Leniency Reinstatement Agreement controlling.**
- **Such agreements are time-limited. That is, the mutually agreed upon terms are also mutually agreed by the parties to terminate by a specified date.**
- **Such agreements are self-executing. That is, if the affected employee covered by the agreement fails to comply with the terms of the agreement, the terms automatically become enforceable resulting in the employee's permanent dismissal from service.**

The Board rejects the Organization's argument Carrier failed in its burden to prove the infractions of Rule 1.6 it charged Claimant with committing occurred, as the best evidence of their occurrence is the fact that Carrier issued discipline to the two (2) welders that were assigned to work on the track repair/replacement in question. The Board also rejects the Organization's argument that Claimant was not acting in a supervisory role on December 7, 2007 when assigned to perform track inspection duties as the record evidence clearly shows that Claimant exercised such supervisory authority when he called the two (2) welders to report to Mile Post 17.2 and then

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directed them to perform the repair/replacement of the track in question. The Board further rejects the Organization's argument that commission of the Rule 1.6 violations as shown to have occurred here rests solely with the two (2) welders as the record evidence establishes, without doubt, that the ultimate responsibility for seeing that the repair/replacement of the track in question was performed properly was that of Claimant's, as such was part of the duties of his track inspector assignment. Additionally, the Board rejects the Organization's defense of Claimant that even if he were to be considered as having some culpability in having infringed the two (2) GCOR 1.6 rules in question, such infraction of the rules cannot be deemed as having risen to the level of "serious" as the meaning of that term was intended when included in the Leniency Reinstatement Agreement, as we are persuaded that Carrier has shown by irrefutable evidence that failing to use reference marks and re-apply anchors has the potential to result in a future derailment causing millions of dollars of damage to equipment and track not to mention putting the safety of employees at great risk. Moreover, the Board does not agree with the Organization's further argument regarding the infraction of Rule 1.6 as not rising to the level of "serious" as referenced in the Leniency Reinstatement Agreement on grounds the two (2) welders were given only a Level 1 disciplinary action of a coaching session as this disciplinary action appears to be commensurate with their level of responsibility within the context of the entire surrounding circumstances. In conjunction with this argument asserted by the Organization, the Board rejects the defense that Claimant suffered disparate treatment in that the discipline assessed the welders was a Level 1 coaching session whereas, the discipline assessed Claimant was reversion to the status of a dismissed employee, as this defense ignores the difference between the level of responsibility the welders had in this matter as opposed to the much greater level of responsibility Claimant had and too, it ignores the difference in standing in the matter of discipline between the welders and Claimant in that, the welders were not under the terms of a Leniency Reinstatement Agreement whereas, Claimant was under such terms.

In view of our finding that Claimant was culpable in infracting GCOR Rules, Rule 1.6 (1) and Rule 1.6 (2) and that infraction of these two rules were "serious" within the meaning of that term as referenced in the Leniency Reinstatement Agreement, we find the remaining contention put forth by the Organization that Claimant was entitled to a formal investigation prior to any disciplinary action being taken against him to be completely invalid given the clear and unambiguous language of the Leniency Reinstatement Agreement. Once it was determined that Claimant, in fact, committed infraction of the two (2) GCOR 1.6 Rules and that such infraction constituted serious rule violations as referenced in Item #2 of the Leniency Reinstatement Agreement, the terms of said Agreement became self-enforcing. Specifically, Item #2 of the Agreement could not be more clear, to wit: ***"In the event you commit a serious rule violation or cardinal safety rule violation during this eighteen-month probationary period, you will be removed from service without a formal investigation as provided by the applicable Agreement Rule and you will revert back to the status of a dismissed employee."*** Claimant was shown to have committed the two (2) GCOR Rules violation

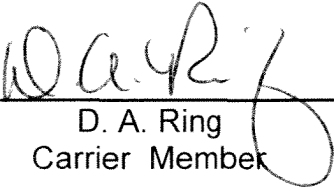
during the time his Leniency Reinstatement Agreement was in force, thereby rendering his contractual entitlement under the current November 1, 2001 Collective Bargaining Agreement to a formal investigation inapplicable. Given the self-executing nature of the Leniency Reinstatement Agreement, the foregoing cited language of Item #2 under the given circumstances became enforceable, thus resulting in reversion of Claimant's status to a dismissed employee.


Accordingly, we rule to deny the claim in its entirety.

AWARD

Claim Denied


George Edward Larney
Neutral Member & Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois
Date: April 13, 2010