

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 46
)
) Award No. 47
)

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

Hearing Date: March 23, 2004

STATEMENT OF CLAIM:

1. The dismissal of System Assistant Foreman T. Joe for his alleged unauthorized absences on January 27 and 28, 2003 as well as unauthorized absences on May 17, 2002, June 5, 2002 and July 13, 2002 which is three (3) repetitions of the same offense within a thirty-six (36) month period was without just and sufficient cause and excessive and undue punishment (System File J-0348-57/1360619).
2. System Assistant Foreman T. Joe shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

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.

On February 12, 2003, Carrier notified Claimant to appear for an investigation on February 20, 2003, concerning his alleged absences without authority on January 27 and 28, 2003. The notice further advised Claimant that he was previously absent without authority on May 17, 2002, June 5, 2002, and July 13, 2002, and that under Carrier's UPGRADE policy he was subject to dismissal for three repetitions of the same rule infraction during a 36-month period. The hearing was held as scheduled. On March 3, 2003, Claimant was notified that he had been found guilty of the charge and dismissed from service.

The record reflects that Claimant's gang completed its work in Casa Grande, Arizona and was told to report to Indio, California on January 27, 2003. Claimant and a coworker rode in a car driven by another coworker. They stopped in Phoenix to visit a friend and planned to complete the drive to Indio the evening of January 26. Claimant testified that the drive from Phoenix to Indio would take three and a half to four hours.

Claimant testified that at around 8:00 p.m. on January 26, he realized that the driver had left. He waited expecting the driver to return for Claimant and the other coworker. When the driver did not return at 4:30 a.m. on January 27, Claimant realized he would not make it to Indio in time to report for work and telephoned his supervisor. The supervisor told him to "get your stuff together, make it as soon as possible, we'll work something out." Claimant did not testify to making any efforts to find alternate transportation to Indio, even though he acknowledged that it was his responsibility to report to work. He waited in Phoenix until the coworker returned. He testified that they arrived in Indio in the early morning of January 28. He found a room and stayed there, reporting to work on January 29. He made no further efforts to contact his supervisor until he reported on January 29.

The Organization contends that the supervisor authorized Claimant's absences. If all the supervisor had said was, "get your stuff together, make it as soon as possible," he would not have expressly or impliedly authorized the absence. However, by adding, "we'll work something out," the supervisor communicated that the matter would be handled without formal discipline. Thus, we find that a reasonable person in the position of Claimant would have understood that his failure to report on time on January 27 was authorized.

Although we find that Carrier failed to prove the charge with respect to January 27, 2003, by substantial evidence, we also find that Carrier proved the charge with respect to January 28, 2003, by substantial evidence. A reasonable person would not interpret the supervisor's statement to authorize Claimant's continued absence beyond January 27. Claimant apparently made no efforts to get to work beyond waiting and hoping that his coworker would return for him. Furthermore, when Claimant realized that he would not be able to report for work in a timely manner on January 28, he made no effort to contact his supervisor. Indeed, when he arrived in Indio the morning of January 28, he neither reported to the job site nor contacted his supervisor. He simply found a room and waited to the next day to report. Claimant cannot be said to have complied with his supervisor's direction to "make it as soon as possible."

Although there was some dispute in the hearing concerning whether Claimant was absent without authority on June 5, 2003, and whether the letter he received that date should count under the UPGRADE provision concerning three violations of the same rule within thirty-six months, there was no dispute that Claimant received discipline Level 1 on February 19, 2002, for being absent without authority on February 17, 2002, and discipline Level 2 on July 15, 2002, for being absent without authority on July 13, 2002. Thus, even if we disregard the alleged June 5, 2002, absence, January 28, 2003, marked Claimant's third discipline for being absent without authority within ten months. Claimant's dismissal was in accordance with Carrier's UPGRADE and we see no reason to disturb the penalty.

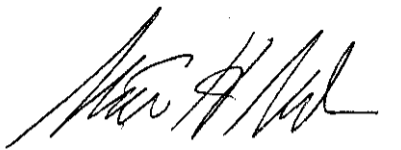
The Organization has raised several procedural objections, none of which have merit. The notice advised Claimant of the dates of his alleged absence without authority, advised him of the dates of his alleged prior rules violations and advised him that under the UPGRADE he was vulnerable to dismissal for three repetitions of the same rule violation within a thirty-six month period. We can think of no detail necessary for Claimant to prepare a defense that was omitted from the notice.

The Organization objected that the supervisor who signed the notice and removed Claimant from service was covered by an ARASA-Carrier collective bargaining agreement. Although he was not a member of management, he was Claimant's immediate supervisor and he testified that he had authority to initiate discipline. The Organization points to no Agreement provision or other authority that would preclude the supervisor from initiating discipline and, in the absence of such, it is certainly Carrier's right to determine the supervisor's authority.

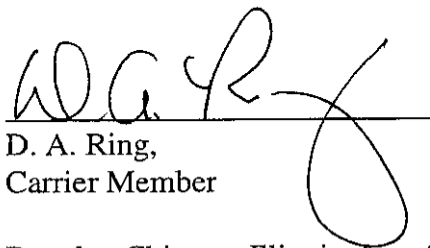
Finally, the Organization objected to Claimant's being withheld from service pending investigation. It is well established that Rule 48(o) authorizes Carrier to withhold an employee from service pending investigation of flagrant or serious violations and that repeated absences without authority qualifies for such treatment. See PLB 6089, Award No. 3.

AWARD

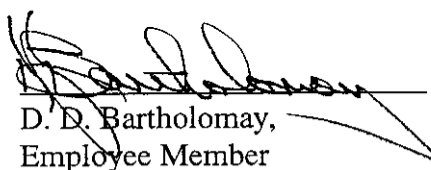
Claim denied.



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, June 29, 2004