

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 47

)

) Award No. 48

)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: March 22, 2004

STATEMENT OF CLAIM:

1. The dismissal of Rail Equipment Operator A. A. Garcia for his alleged quarrelsome, argumentative, insubordinate and immoral behavior on February 3, 2003, was without just and sufficient cause, in violation of the Agreement, excessive and undue punishment (System File J-0348-58/1360622-D).
2. As a consequence of the violation referred to in Part (1) above, Rail Equipment Operator A. A. Garcia 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 6, 2003, Carrier notified Claimant to appear for an investigation on February 12, 2003, concerning his alleged quarrelsome, argumentative, insubordinate and immoral behavior on February 3, 2003, at Roper Yard and Mesa, Utah. The hearing was postponed to and held on February 25, 2003. On March 14, 2003, Claimant was notified that he had been found guilty of the charges and dismissed from service.

The record reflects that on February 3, 2003, Claimant was sitting in the front seat of a truck waiting to be transported from Roper Yard to the job site at Mesa, Utah. A foreman had his coffee and work materials in the front seat and asked Claimant to move to the back seat. Claimant responded by cursing at the Foreman, who cursed back and an argument ensued, after which Claimant moved to the back seat. Upon arrival at Mesa, the Foreman asked Claimant to

operate the speed swing because the machine operator who normally operated the speed swing was absent. Claimant responded by cursing the Foreman, although he eventually did operate the speed swing. Later that day, in the presence of the Foreman, Claimant used profane language to refer to the Foreman in a conversation with the Truck Driver. At the time of the incident, Claimant had almost twenty-five years of service with Carrier. On February 4, 2003, Claimant received a letter from the Engineering Supervisor counseling him about an incident where he used vulgar language on January 22, 2003. There is no evidence that Claimant had any prior formal discipline.

The record clearly reflects that Claimant was quarrelsome and argumentative on three separate occasions on February 3, 2003. On two of those occasions, the Foreman made simple requests and Claimant responded by cursing and causing a verbal altercation. Although the Organization argues that Claimant's actions were provoked by the Foreman, the record does not support that argument. Although the Foreman did curse at Claimant, testimony from the Foreman and two other employees who were present established that Claimant instigated the argument, cursing at the Foreman.

However, Carrier failed to prove the charge of insubordination by substantial evidence. The Foreman testified that he asked Claimant to move to the back seat of the truck and that he asked Claimant to operate the speed swing. The Foreman did not instruct Claimant to do so. Consequently, although Claimant was quarrelsome, argumentative and in being so was arguably immoral, Claimant was not insubordinate. We regard the charge of insubordination as the most serious of the charges for which Claimant was found guilty.


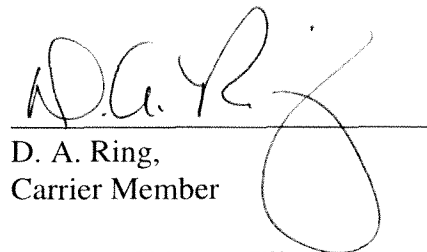
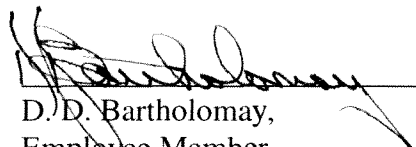
Considering Carrier's failure to prove the charge of insubordination, Claimant's length of service and the absence of evidence of any prior formal discipline, we shall order Carrier to reinstate Claimant to service, with seniority unimpaired, but without compensation for time held out of service.

AWARD

Claim sustained in accordance with the Findings.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto


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

Dated at Chicago, Illinois, June 29, 2004

**CARRIER MEMBER'S DISSENT
TO
AWARD No. 48 of PUBLIC LAW BOARD 6302
(Referee Malin)**

The Claimant in this case was dismissed from service for being quarrelsome, argumentative and insubordinate to his Foreman on February 3, 2003. The investigation revealed Claimant had cursed at his foreman and got in to an argument with him on several occasions. Claimant was also notorious for his utilization of profane language and had previously been counseled to no avail.

In rendering this decision the Referee has stated the *"record clearly reflects that Claimant was quarrelsome and argumentative on three separate occasions on February 3, 2003...Although the Foreman did curse at Claimant, testimony from the Foreman and two other employees who were present established that Claimant instigated the argument, cursing at the Foreman."* The Referee went on to state, *"However, Carrier failed to prove the charge of insubordination by substantial evidence.....We regard the charge of insubordination as the most serious of charges for which Claimant was found guilty."*

Because the Referee felt the Carrier failed to prove the charge of insubordination and based on the Claimant's length of service and absence of previous formal discipline the Referee has returned the Claimant to service without pay.

Under the Carrier's UPGRADE Policy being argumentative and quarrelsome are both rule violations that result in dismissal. Throughout the years, in this Industry, these violations when proven have always been considered to be serious rule violations resulting in dismissal. This is especially so when the infraction involves the employee being argumentative or quarrelsome to his Supervisor. Condoning of these type of rule violations directed at a Supervisor by an individual can only lead to chaos and therefore the Claimant should not have been reinstated with the Carrier. This Carrier moves the Referee has erred in the decision in this case. Therefore, I DISSENT


CARRIER MEMBER
PLB 6302.