

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 77
)
) Award No. 77
)

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

Hearing Date: September 15, 2005

STATEMENT OF CLAIM:

1. The dismissal of Track Foreman R. P. Pruenda for his alleged violation of Rule 1.5 and Carrier's Drug and Alcohol Procedures was without just and sufficient cause and in violation of the Agreement (System File W-0448-153/1398878D).
2. Track Foreman R. P. Pruneda shall now be reinstated to service with seniority and all other rights unimpaired and compensated for 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 November 18, 2003, Carrier notified Claimant to report for an investigation on December 2, 2003. The notice charged Claimant with allegedly violating Rule 1.5 and Carrier's Drug and Alcohol Policy as evidenced by a positive drug test on November 12, 2003. The hearing was postponed to January 15, 2004. Neither Claimant nor an Organization representative appeared at the hearing. After delaying the hearing for approximately one hour and attempting to locate Claimant without success, Carrier proceeded with the hearing in absentia. On January 30, 2004, Carrier notified Claimant that he had been found guilty of the charges and dismissed from service.

The Organization contends that Carrier violated Rule 48 by proceeding with the hearing in absentia. The Organization maintains that Claimant was precluded from attending the hearing


because he was caring for his ill parents. Regardless of whether Claimant's need to care for his ill parents prevented him from attending the hearing, the record is devoid of any evidence that Claimant made any effort to contact Carrier or the Organization to request a further postponement. The record also contains no evidence that Claimant's parents' illnesses precluded him from contacting Carrier or the Organization to make such a request and we consider it highly unlikely that Claimant was precluded from telephoning or otherwise contacting Carrier or his representative. Claimant simply chose not to attend the hearing without contacting anyone and may not now complain about the hearing proceeding in absentia.

The record established that on November 12, 2003, Claimant backed a Carrier vehicle into another Carrier vehicle and, as a result, was properly subjected to a reasonable cause drug test. The record further established that the drug test fully complied with all required procedures and safeguards, that Claimant's urine specimen tested positive for cocaine, that Claimant requested that the split sample be tested at a different lab, and that the split sample also tested positive for cocaine. Carrier clearly proved the charges by substantial evidence.

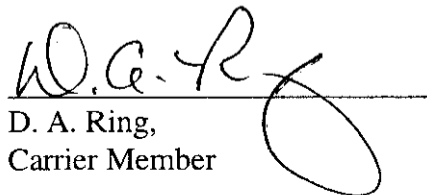
Accordingly, we turn to the penalty imposed. The record reflected that on August 19, 2002, Claimant tested positive for marijuana. On August 29, 2002, Claimant was offered a one-time opportunity to return to service on a leniency basis. Claimant accepted the offer. One of the conditions of Claimant's return to service specified that if he violated Carrier's Drug and Alcohol Policy again within ten years, he would be dismissed permanently. Claimant returned to service on December 12, 2002. The positive test for cocaine occurred less than one year following his return to service. Under the circumstances presented, we cannot say that the penalty imposed was arbitrary, capricious or excessive.

AWARD

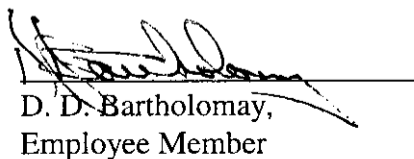
Claim denied



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, January 20, 2006