

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 28
)
) Award No. 1
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
C. M. Will, Carrier Member

Hearing Date: January 21, 2002

STATEMENT OF CLAIM:

1. The discipline (withheld from service and subsequent dismissal on June 6, 2000) of Mr. J. W. Colvin for alleged violation of Union Pacific Operating Rule 1.5 of the General Code of Operating Rules effective April 10, 1994, Union Pacific Railroad Drug and Alcohol Policy effective March 1, 1997 and the Transportation Code of Federal Regulations Title 49, Part 382, Section 205 (alcohol) in connection with FHWA random alcohol test administered on April 17, 2000 at Giddings, Texas was unwarranted, without just and sufficient cause and in violation of the Agreement (System File MW-00-129/1240001 MPR).
2. As a consequence of the violation referred to in Part (1) above, all references related to the June 6, 2000 charge letter shall be removed from Mr. J. W. Colvin's personal record, he shall be reinstated to service with seniority and all other rights unimpaired and compensated for all loss of time and for his personal expenses incurred in connection with attending the May 22, 2000 investigation.

FINDINGS:

Public Law Board No. 6402, 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 April 18, 2000, Carrier notified Claimant to report for an investigation on May 16, 2000, in connection with his allegedly violating Rule 1.5 as evidenced by a positive test result on an FHWA random alcohol screen on April 17, 2000. The hearing was postponed to and held on May 22, 2000. On June 6, 2000, Carrier informed Claimant that he had been found guilty of the charge and was dismissed from service.

The Organization raises a number of procedural arguments. We have reviewed the transcript of the hearing carefully and find that Claimant was afforded a fair and impartial investigation. None of the procedural errors alleged by the Organization provide grounds for overturning the discipline.

The following facts are not in dispute. On April 17, 2000, Claimant was subjected to an FHWA random alcohol screen. Claimant tested positive for alcohol, with blood alcohol readings of .101 and .108. Claimant was on the property during regular working hours when the test was administered. Claimant sought to take the rest of the day off because of a dentist appointment, but the Manager Track Maintenance required him to complete the test first.

The evidence thus established that Claimant was in violation of Rule 1.5. Rule 1.5 provides, in relevant part:

The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property.

Accordingly, we find that Carrier proved, by substantial evidence, that Claimant violated Rule 1.5. There remains the question of penalty. The record reveals that Claimant had thirty-five years of service at the time of the incident and there is no evidence of any prior discipline. Furthermore, the record reveals that Claimant was attempting to take the day off because of a need to go to the dentist due to a toothache. It appears that Claimant may have been confused concerning the proper procedure for obtaining the day off. Claimant acknowledged that he had been drinking the night before but came onto the property anyway because, he maintained, he had not been able to reach his supervisor by phone. By so doing, Claimant made himself subject to testing, although he may have been confused concerning this. Under these circumstances, we find that the penalty of dismissal was excessive.

We shall order Carrier to reinstate Claimant on a last chance basis, with seniority unimpaired but without compensation for time held out of service. Reinstatement shall be subject to the following conditions:

- Claimant must contact Carrier's Employee Assistance Counselor within seven days of being notified of his reinstatement. The Employee Assistance Counselor shall evaluate Claimant to determine whether he may safely be returned to service and the course of treatment he should follow.
- If the evaluation indicates that Claimant can be returned to service safely, Claimant shall be returned to service on a probationary basis. Claimant shall follow the course of treatment recommended by the Counselor.

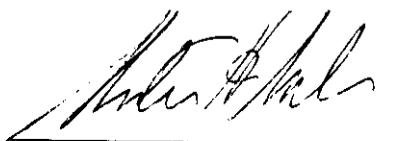
- If the evaluation indicates that Claimant cannot be returned to service safely, Claimant shall not be returned to service but shall follow the course of treatment recommended by the Counselor while out of service. Once the Counselor's evaluation determines that Claimant can be returned to service safely, Claimant shall be returned to service on a probationary basis and shall continue to follow the course of treatment recommended by the Counselor.
- If at any time during the twelve month period following Claimant's return to service, or at any time prior to Claimant's return to service but while under treatment, Claimant fails to follow the course of treatment established by the Counselor, Claimant shall revert to a dismissed status without the need for further investigation or other disciplinary proceeding.
- If Claimant successfully completes the twelve month period following his return to service, his probationary status shall terminate.

AWARD

Claim sustained in accordance with the Findings.

ORDER

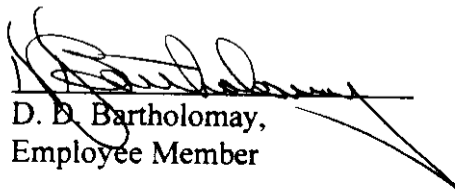
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto



Martin H. Malin, Chairman



C. M. Will,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, February 28, 2002.