

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 25
)
) Award No. 2
)

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 dismissal of Mr. W. Taylor for his alleged dishonesty in the filing of an injury report on March 19, 1999 was without just and sufficient cause based on an unproven charge and in violation of the Agreement (System File MW-99-294/1203337-DMPR).
2. As a consequence of the violation referred to in Part (1) above, Mr. W. Taylor shall be reinstated to service with seniority and all other rights unimpaired, compensated for all wage loss suffered and have his record cleared of this incident.

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 March 30, 1999, Carrier notified Claimant to report for an investigation on April 6, 1999. The notice charged Claimant as follows:

While working as Laborer on Gang 9167, in the vicinity of Sarita, Texas on February 9,

1988, at approximately 9:00 A.M. you allegedly hurt your arm while removing ballast from the man cart. This injury was not reported until March 19, 1999.

Following several postponements, the hearing was held on June 22, 1999. On July 15, 1999, Carrier informed Claimant that he had been found guilty of violating Rules 1.6 and 1.2.5, and was dismissed from service.

The Organization raises a number of procedural arguments. We find that none of the procedural errors alleged by the Organization provide grounds for overturning the discipline, except for one. The Organization contends that Carrier violated the Agreement by failing to give Claimant notice of all charges against him. We agree.

Rule 12, Section 1(b) provides:

At a reasonable time prior to the investigation he shall be advised of the precise charge in writing and the time, date and place set for the investigation. The employee shall have a reasonable opportunity by this notice to secure the presence of necessary witnesses and representation if he so desires. A copy of the notice directing the employee to report for investigation shall be furnished to the local chairman, but failure to furnish the local chairman with a copy of the notice shall not constitute a violation of this agreement or provide a basis for a contention that the notice to the employee to report for investigation was defective.

The purpose of the notice is to advise the employee of the charges he will face at the investigation. The notice must contain sufficient information to enable the employee to prepare a defense. Carrier found Claimant guilty of violating Rules 1.2.5 and 1.6. Rule 1.2.5 requires employees to report personal injuries that occur on duty or on company property immediately. Rule 1.6 provides that employees shall not be dishonest. The notice clearly advised Claimant that he was being investigated for failing to report his alleged injury in a timely manner, even though it did not expressly mention Rule 1.2.5. However, there is nothing in the notice that even remotely suggests that Carrier was investigating Claimant for dishonesty. The notice says nothing about the content of Claimant's injury report; it mentions only the report's timing. A reasonable person cannot infer from the notice that was sent to Claimant that he was under investigation for alleged dishonesty. Accordingly, any discipline premised upon the Rule 1.6 violation may not stand.

Therefore, we turn to the alleged Rule 1.2.5 violation. We find Carrier proved this violation by substantial evidence. Claimant testified that in early February 1998, he was sitting in the man car, felt that he was sitting on a piece of ballast which was uncomfortable, threw the piece of ballast out of the car and felt a tingling in his arm. Claimant, who had arthritis, did not believe he was injured at the time. Rather, he attributed the tingling to his arthritis.

By May 1998, the pain became so intense that Claimant went to the hospital emergency room where x-rays were negative. Two weeks later, in early June, Claimant had an MRI which

showed a torn rotator cuff. Claimant had surgery to repair the tear in late June. Claimant apparently advised his doctor of the February incident involving the ballast. Nevertheless, Claimant did not file an injury report until the following March.

The Organization contends that it was reasonable for Claimant to believe that his arthritis was the source of his physical problem and therefore it was reasonable for Claimant to not file the injury report because he did not believe he was injured on the job. We agree, that Claimant's attribution of his pain to his arthritis provides a reasonable explanation of Claimant's initial failure to file an injury report. However, by June 1998 at the latest, Claimant knew that his pain was not due to arthritis but was due to a torn rotator cuff. Claimant advised his doctor of the February incident but Claimant still did not file an injury report with Carrier.

Claimant testified that even in June, he still believed he had not suffered an on-duty injury. However, Claimant gave no rational explanation for that belief. We find that Carrier proved by substantial evidence that Claimant violated Rule 1.2.5 when he delayed filing an injury report from June 1998 until March 1999.

The final issue presented by this claim is whether the penalty of discharge is arbitrary, capricious or excessive. In evaluating the penalty, we consider only the Rule 1.2.5 violation, i.e. the late filing of the injury report. Clearly, discharge for filing an injury report late is excessive. Carrier's own UPGRADE policy provides for discipline at Level 2, an alternate assignment and development of a corrective action plan. Accordingly, we shall order Carrier to clear Claimant's record of the Rule 1.6 violation, reduce his discipline to UPGRADE Level 2, reinstate him to service with seniority unimpaired and compensate him for the wage loss he suffered as a result of the discharge.

AWARD

Claim sustained in accordance with the Findings.

PLB 6402
Awd 2

ORDER

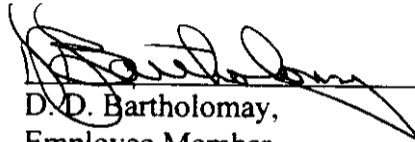
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto



Martin H. Malin, Chairman



C. M. Will,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, March 7, 2002.