

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 57

)

) Award No. 38

)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: November 15, 2004

STATEMENT OF CLAIM:

1. The dismissal of Fuel Truck Driver E. L. Simon for his alleged dishonesty in connection with his inability to perform service following an injury was without just and sufficient cause, based on an unproven charge and in violation of the Agreement (System File MW-03-295/1390047D).
2. Fuel Truck Driver E. L. Simon 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. 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 September 9, 2003, Carrier, in accordance with Agreement Rule 21(a)(2), offered Claimant discipline of UPGRADE Level 5 for alleged dishonesty in reporting a personal injury and stating he could not work. On September 22, 2003, the Organization, on Claimant's behalf, rejected the offer of discipline. On September 25, 2003, Carrier notified Claimant to appear for an investigation on October 10, 2003. The notice alleged that Claimant violated Rule 1.6(4) by allegedly stating that he could not work after reporting a personal injury. The hearing was postponed to and held on October 31, 2003. On November 19, 2003, Claimant was notified that he had been found guilty of the charge and dismissed from service.

On December 17, 2003, the First Vice Chairman filed a claim on Claimant's behalf. On March 2, 2004, the First Vice Chairman wrote to the Manager Labor Relations advising that he

had not received a response to the claim and requested that the claim be paid as presented. On March 17, 2004, the Manager Labor Relations responded advising that a response had been mailed on January 29, 2004, and enclosing a copy of the response. The Organization continues to maintain that it never received the response prior to the enclosure with the Manager Labor Relations' March 17, 2004, letter.

Agreement Rule 22(a) provides:

All claims and grievance must be presented in writing by or on behalf of the employee involved, to the Officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim grievance be disallowed, the carrier will, within sixty (60) days from the date it is filed, notify whoever filed the claim (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance will be allowed as presented, but this will not be considered as a precedent or waiver of the contentions of the Carrier as to similar claims or grievances.

In the instant case, we have conflicting positions with respect to whether Carrier responded in a timely manner to the claim. Carrier maintains that it did so on January 29, 2004. The Organization maintains that it did not receive that response until it was included with Carrier's letter of March 17, 2004. It is well established that a statement by a Carrier Officer that Carrier mailed a claim denial in a timely manner, even when accompanied by a copy of the purported claim denial, is insufficient to establish timely mailing. *See, e.g.,* NRAB, Third Division Awards Nos. 31208; 31207; 28532; 25309; 25100; 17291. In accordance with these precedents and Rule 22(a), we must sustain the claim.

We note that the claim as presented on the property requested that Claimant be reinstated to his position and compensated for all time lost as of the date of his release to active service by his personal physician. The record does not contain any evidence that Claimant's personal physician ever released him to return to service without restrictions. If Claimant's physician does provide such a release, Claimant's return to service would still be subject to his passing a return-to-service physical examination by Carrier's physician. If Claimant's physician has not released him to return to service, then Claimant will not be entitled to compensation for lost wages.

We further note that the claim as presented on the property also sought expenses incurred by Claimant in attending the investigation. The claim as presented to this Board does not seek such expense reimbursement. We infer from the manner in which the claim was presented to this Board that the Organization has abandoned its request for expense reimbursement. Such abandonment is entirely appropriate as we already have held that the Agreement does not provide for reimbursement of expenses incurred in attending the investigation even when a claim is sustained. *See* Awards Nos. 10 and 11. Accordingly, in sustaining the claim, we do not sustain the claim, as presented on the property, for expense reimbursement.

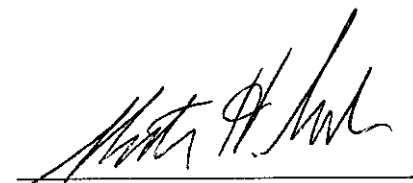
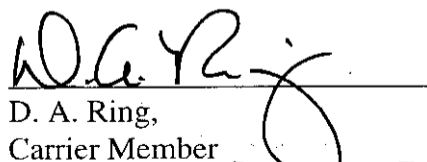
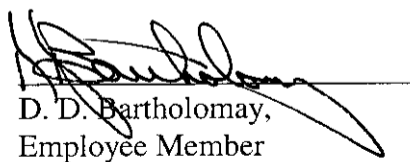
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AWARD

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

I dissent

3-31-05

Dated at Chicago, Illinois, March 14, 2005