

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 211, (Case No. 220)**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION - IBT RAIL CONFERENCE**

vs

UNION PACIFIC RAILROAD COMPANY

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
P. Jeyaram, Carrier Member

Hearing Date: June 19, 2012

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- 1. The dismissal (Seniority Termination) of Mr. M. A. Watson for violation of Agreement Rule 48(k) in connection with being absent without proper authority for five (5) consecutive work days (March 19, 22, 23, 24 and 25, 2010) is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File J-1048U-254/1546022).**
- 2. As a consequence of the violation referred to in Part 1 above, we request that Mr. Watson shall be immediately reinstated to service with the Union Pacific Railroad with all seniority, vacation and Agreement rights unimpaired. He must be compensated for all time lost from the date of his forced removal from service by the Carrier until he is returned to service. Compensation is to include all straight time and overtime hours he would have worked absent the violation of the Collective Bargaining Agreement."**

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.

It is undisputed that the Claimant in this case was absent from work for over five days as he was incarcerated from March 13 through 26, 2010. The Carrier removed the Claimant from its service on the basis that he had absented himself from work for five consecutive days, and had voluntarily relinquished his seniority in accordance with Rule 48(k) of the Agreement.

Rule 48(k) of the Agreement states in pertinent part the following:

"Employees absenting themselves from their assignments for five (5) consecutive working days without proper authority will be considered as voluntarily forfeiting their seniority rights and employment relationship, unless justifiable reason is shown as to why proper authority was not obtained...[e]mployees who voluntarily forfeit their seniority rights and employment relationship pursuant to this section and who desire to furnish a reason why proper authority was not obtained, may request a conference with the Carrier Officer involved."

In accordance with the above Rule Claimant requested a conference to contest his removal from service. The conference was held and the Carrier determined that Claimant's excuse of "wrongful incarceration" was not a justifiable reason for his absence and reiterated that he had voluntarily forfeited his seniority.

It is the position of the Organization that the Claimant was not absent without authorization, but instead Manager Track Maintenance B. W. Hansen had provided "tacit" authorization for his absence when his father called the Supervisor and explained the situation. It further argued that even if he had not received authorization to be absent (which he did) he had a justifiable reason for being absent as he was arrested and jailed for a charge that was eventually reduced and where he pleaded "no contest" to be able to move on with his life and employment. According to it, Rule 48(k) uses term "justifiable reason" and incarceration that was based upon a charge that was later reduced clearly falls within being a "justifiable reason". The Organization concluded the Carrier had erred in its termination of the Claimant's seniority and it requested that decision be overturned and the claim sustained as presented.

It is the Carrier's position that Claimant absented himself from work for five consecutive workdays due to being incarcerated. It argued the Claimant did not obtain authorization to be absent, and there is no evidence in the record to suggest that Claimant's father obtained permission from a Carrier Manager for Claimant to remain away from work. It asserted the Claimant had the opportunity to provide the Carrier with his justification for being absent. It further argued that the Carrier considered Claimant's rationale for being absent and found it lacking and properly determined that his incarceration was not adequate justification and properly applied Rule 48(k) in terminating the Claimant. It closed by asking that the claim remain denied.

Before addressing the merits of the case the Board notes that the Organization argued that Carrier's Exhibit "B, page 6" was "de novo" as it was never presented on the property. After a careful review of the record the Board had determined that the Organization is correct and the exhibit was not considered in the resolution of the dispute.

Turning to the merits the Board finds that the Organization argued in its letter of March 11, 2011, in pertinent part the following:

"...In the instant case, Claimant was arrested on what he testifies as false charges. Under advice of attorney, he chose not to fight the charge and plead no contest. The court disposition is enclosed with this correspondence. While some may project guilt upon such a plea, it is understood in legal circles that "no contest" is not an admission of guilt. Given Claimant testifies the charges were not true, his incarceration may have well been unjustified...."

In the Carrier's final declination it responded to the Organization's aforementioned argument as follows:

"First and foremost, the Claimant was not wrongfully convicted. He pleaded no contest and was found guilty. Please see the attend Journal Entry. Nolo contendere or no contest pleas means the Claimant does not contest the charges against him and accepts the courts punishment, if any. The purpose of entering a no contest plea is often to avoid being sued civilly for essentially confessing to a crime, which is the basis of a guilty plea. In practical effect, there's no significant difference between a "no contest" and a guilty plea...."

The Organization never argued that the Claimant was innocent, but instead inferred that he might be and the only reason he accepted the "no contest" plea was to get on with his life whereas the Carrier concluded he was guilty.

The question at issue is a two part question. The first question is: Was the Claimant's incarceration a justifiable reason for being absent from work? The second question is: Was tacit approval given by the Carrier for Claimant's absence?

We will answer the latter question first. The Claimant and his father contended that Claimant's father contacted Track Supervisor B. W. Hansen and explained to him the Claimant had been incarcerated and Hansen gave "tacit" approval for the Claimant to be absent from work. As proof of that approval the Claimant offered his father's cell phone record which verifies that the Claimant's father called Mr. Hansen's phone several times while his son was in jail. Review of that document reveals that most of the calls were one to two minutes in length. The cell phone record proves the Claimant's father called and/or attempted to call Track Supervisor Hansen, but it does not prove that Hansen gave the Claimant an approved leave. Claimant's argument becomes even less persuasive because Hansen's letter of April 14, 2010, specifically stated in pertinent part:

"Therefore, in absenting your assignment without proper authority on the dates listed above, you are now considered as having voluntarily forfeited your employment with the Union Pacific Railroad Company." (Underlining Board's emphasis)

As the author of the aforementioned letter it is clear that Hansen did not believe that he had ever suggested or inferred that the Claimant had been given "tacit" approval to be absent while being jailed. The Board has determined based upon the evidence provided there is no proof that the Carrier afforded the Claimant a Leave of Absence while incarcerated.

We will next respond to the first question as whether or not incarceration is a justifiable reason for being absent from work. There is no dispute that the Claimant entered a plea of nolo contendere to the charges. Under the charge section of the Journal Entry and Order issued by the County Court of Lincoln County, Nebraska, it states: **"Plea: No Contest Found: Guilty"**.

In Third Division Award No. 21624 the definition of nolo contendere was debated between the parties. The Board determined in pertinent part the following:

"...Petitioner contends that nolo contendere plea as entered by claimants in this case was not admission of guilt, per se. In these circumstances, we do not agree. The definition of nolo contendere as found in Black's Law Dictionary is:

'NOLO CONTENDERE. Lat. I will not contest it. The name of a plea in a criminal action, having the same legal effect as a plea of guilty, so far as regards all proceedings on the indictment, and on which the defendant may be sentenced. U.S. V Hartwell, 3 Cliff. 221, F. Cas. No. 15,318.'

From this plea, a guilty verdict was entered and sentence passed accordingly. There is nothing in the record to indicate that this definition of nolo contendere had any meaning other than "the same legal effect as a plea of guilty."
(Underlining Original Award's emphasis)

The Board is convinced that the reasoning and logic of Award No. 21624 is on point with the instant case and should be followed. Claimant made a deal to get on with his life, but in making that deal he professed that he was guilty.

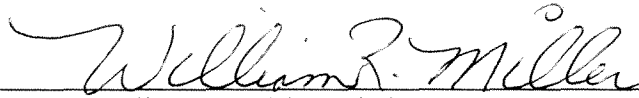
The Organization argued that in a similar case, Award No. 34 of this same Board, it was determined that incarceration was a justifiable reason for being absent from work and should be followed in this case as well. The Board does not dispute the reasoning of Award No. 34, but finds that it is not applicable to the subject dispute as it stated in pertinent part:

"...In the instant case, the dismissal was the result of a hung jury in which in which a majority of the jurors voted to acquit Claimant and a review of the evidence by the prosecutor who determined that there was no reasonable likelihood of conviction should Claimant be retried...."

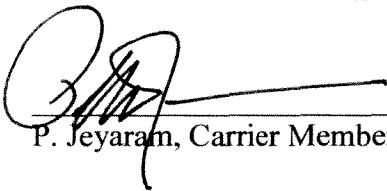
In Award No. 34 the Board found that Claimant should not have been found responsible for his incarceration and consequent absence without authorization because there was no proof that he was guilty of a crime, thus his incarceration by authorities was in error. The key difference in the instant case is Claimant was not wrongfully jailed as he admitted his guilt. Substantial evidence was adduced during the handling of the dispute that the Carrier met its burden of proof that Claimant's alleged "justifiable reason" for being absent account of incarceration was not adequate justification nor was he given "tacit" approval to be absent. The Board finds and holds that the Carrier properly applied Rule 48(k) and appropriately determined that Claimant voluntarily relinquished his seniority.

AWARD

Claim denied.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: Oct 10, 2012