

PUBLIC LAW BOARD NO. 5850

**Award No.
Case No. 262**

PARTIES TO DISPUTE:

(Brotherhood of Maintenance of Way Employees

**(The Burlington Northern Santa Fe Railroad (Former
ATSF Railway Company)**

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement on April 12, 2004, when it terminated the Claimant, Mr. T. M. Valdez's, seniority pursuant to a Letter of Understanding Dated July 13, 1976, for being absent from work without authority for more than 5 consecutive days.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately return the Claimant to service, remove any mention of this incident from his personal record, and make him whole for all wages beginning March 31, 2004.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

On April 12, 2004, the Carrier wrote Claimant advising him his seniority was terminated pursuant to an Agreement that provides for termination if the individual is absent more than 5 working days without authority.

The Agreement also provides that should Claimant dispute the termination, he could within 20 days of the date of the termination letter request an investigation.

The investigation was held on June 8, 2004. The Carrier believed that Claimant

did not establish that Claimant had authorization to be off and so advised Claimant their determination to terminate his seniority was consistent with the existing Agreement.

Claimant was on an assignment working four ten hour days, Monday through Thursday.

Claimant was off March 31, 2004, at least through April 7, 2004, the requisite number of days for Carrier to initiate termination proceedings.

Of all the five day cases that have been before this Board, there has been no doubt about the unauthorized absences, but in this case, there is some doubt concerning the decision of the Carrier to terminate.

Carrier's Supervisor who was the Carrier witness testified that he could not permit Claimant to work on the track because of his mental state. The same official stated he had a conference with Claimant on March 31, at which time he encouraged Claimant to contact the EAP office and secure a medical leave. He also did advise Claimant that if he took the days off he requested without a leave authorized by the EAP, Claimant would be considered as being off without authorization.

Claimant admitted he knew that his absence would be considered as unauthorized, but he took the time off anyway due to his depression and family matters.

Claimant testified that as far as he knew, the EAP was only for drug and alcohol problems which he did not have, thus he made no effort to seek a leave through them.

At this juncture, the Board would have sustained Claimant's case, but then when evidence was provided by the Carrier showing Claimant changed his absences as recorded by his Supervisor from unauthorized to authorized, he was committing fraud to maintain his seniority. That act by and of itself clearly shows Claimant was fully

cognizant that his absences were not authorized. Why Claimant perpetuated this fraud only he knows, but such an act convinces this Board that Carrier's decision to terminate was in accordance with its Agreement rights to do so.

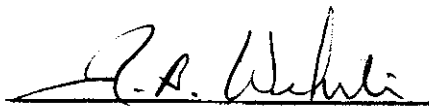
AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.


Robert L. Hicks, Chairman & Neutral Member


Rick B. Wehrli, Labor Member


William L. Yeck, Carrier Member

Dated: December 10, 2004