

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 6302**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

and

**UNION PACIFIC RAILROAD COMPANY**

)

) Case No. 99

)

) Award No. 91

)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: April 4, 2006

**STATEMENT OF CLAIM:**

1. Carrier violated the Agreement when it terminated the employment of Arc Welder Helper Richard W. Clark on February 9, 2005, without the benefit of a fair and impartial hearing as required by Rule 48 of the Agreement (System File C-0548-106/1423205).
2. As a consequence of the violation referred to in Part (1) above, Arc Welder Helper Richard W. Clark shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all straight time and overtime hours lost commencing June 23, 2004 and continuing until he is returned to service.

**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.

On February 9, 2005, Carrier terminated Claimant's seniority, relying on Rule 25(b). Rule 25(b) provides:

Employees granted leave of absence in writing by proper authority of the Company will retain their seniority. Employees failing to return before the expiration of their leave of absence will lose their seniority rights unless an extension has been obtained. When leave of absence or extension has been requested and is denied the employee will be so advised and required to return to service within five (5) calendar days after receipt of such

notice of forfeit all seniority rights.

Claimant's leave of absence began in September 2003. By letter dated June 1, 2004, Director Track Maintenance Paul Dannelly advised Claimant to attend a functional capacity examination on June 8, 2004. The letter further advised:

As soon as the Health Services Department has completed its evaluation and makes a determination about your ability to safely perform your job duties, I will advise you of the results. If you have any questions about your work status or the process in general, contact Jerry Parker at (702) 388-9203.

MTP Jerry Parker was Claimant's supervisor.

Claimant went for the functional capacity examination as instructed. On June 23, 2004, Claimant was released to return to duty with restrictions. The Health Services Department notified Claimant by telephone to contact his supervisor about returning to work. During handling on the property, the Organization submitted a written statement from Claimant averring that he initiated the June 23 telephone conversation with Health Services Department when he had not heard anything about the results of the functional capacity examination. Claimant's statement further related that he telephoned Mr. Dannelly about returning to work on June 23, 26 and 29, and July 1, 2, 5 and 22 and each time left a voice mail message. He also contacted the NPS Center and was advised by the NPS Specialist that she had left a message for Mr. Dannelly. Claimant further stated that he made further calls to Mr. Dannelly, leaving voice mail messages, on July 22 and August 4 and 12, and September 3. According to Claimant's statement, Mr. Dannelly never returned his calls. Carrier offered no statement from Mr. Dannelly or any other evidence refuting Claimant's representations.

The Organization argues that Claimant complied with instructions and faults Mr. Dannelly for not returning Claimant's telephone calls. Carrier, on the other hand, urges that Mr. Dannelly was not Claimant's supervisor and maintains that Claimant never contacted his supervisor, i.e. Mr. Parker, to make arrangements to return to work.

The record presents a claim by an individual who did not abandon his job, who wanted to return to service and made efforts to do so but was not successful because of confusion in communication. Our review of the record reveals that both Claimant and Carrier must share the responsibility for the situation.

Claimant's supervisor was MTP Parker and when Claimant was advised by Health Services Department to contact his supervisor to arrange to return to work, Claimant should have contacted Mr. Parker. Indeed, we note that Mr. Dannelly's June 1 letter advised Claimant to contact Mr. Parker with questions about Claimant's work status or the process in general. Even if Claimant initially was confused by the fact that Mr. Dannelly signed the June 1 letter and advised Claimant that he would be contacting Claimant with the results of the functional capacity exam, Claimant offered no explanation for why, when he was not able to reach Mr. Dannelly, he

did not try to contact Mr. Parker. The record reveals that during his leave of absence, Claimant was in contact with Mr. Parker. The record reveals that Claimant was also in contact with MTM Jeff Gale and with James Munro of the Superintendent's Office, but Claimant offered no explanation as to why he did not try to contact them. Had Claimant contacted Mr. Parker, as he was instructed to do, it is likely that Claimant would have returned to service.

On the other hand, there is absolutely no explanation from Mr. Dannelly as to why he ignored Claimant's numerous telephone calls that extended over a period of several months. We cannot fathom why a Director would ignore the efforts of an employee to return to work from a medical leave of absence. Had Mr. Dannelly returned Claimant's telephone calls or simply forwarded the message to Mr. Parker, it is likely that Claimant would have returned to service.

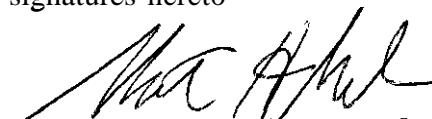
Considering that both parties share in responsibility for the miscommunications in the instant case, the Board finds that the most appropriate resolution of the claim is to require Carrier to reinstate Claimant to service with seniority unimpaired but without compensation for time out of service.

### AWARD

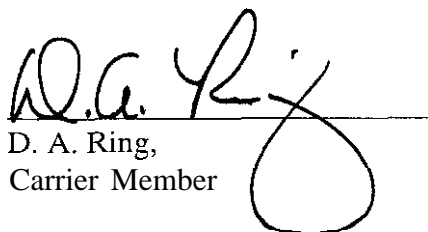
Claim sustained in accordance with the Findings.

### ORDER

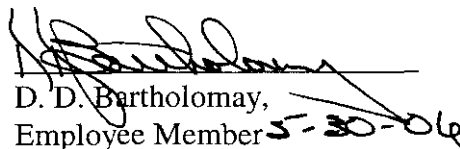
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto



Martin H. Malin, Chairman



D. A. Ring,  
Carrier Member



D. D. Bartholomay,  
Employee Member

5-30-06

Dated at Chicago, Illinois, May 22, 2006