

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 131
UNION PACIFIC RAILROAD COMPANY) Award No. 106
_____)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: April 22, 2008

STATEMENT OF CLAIM:

1. The dismissal of Track Machine Operator J. G. Valdez for alleged violation of Rule 1.6(3) (Conduct - Insubordinate) in connection with the allegation that he allegedly failed to attend a medical examination on October 1, 2007 is unjust, unwarranted based on unproven charges and in violation of the Agreement (System File MW-97-153/1490777 MPR).
2. As a consequence of the violation outlined on behalf of Mr. Valdez, the Organization requests that the charges be dropped and all rights be due to him, from October 11, 2007 and on a continuous basis, under the Missouri Pacific Agreement, because the Carrier has failed to meet the burden of proof at the investigation held on October 17, 2007, in Del Rio, Texas.

FINDINGS:

Public Law Board No. 6402 upon the whole record and all of 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 October 11, 2007, Claimant was notified to report for a formal investigation on October 17, 2007, concerning his alleged insubordination when he failed to attend a medical examination on October 1, 2007, despite being notified by letter dated September 13, 2007, that he was required to do so. The hearing was held as scheduled. Claimant did not appear and the hearing proceeded in absentia. On October 26, 2007, Claimant was advised that he had been

found guilty of the charge and had been dismissed from service.

The Organization contends that Carrier violated Rule 21 of the Agreement by holding the hearing in absentia. There is no dispute that Claimant received notice of the hearing. The Second Vice Chairman appeared at the hearing, advised that Claimant was at a doctor's appointment which had been scheduled for a month and would be unable to attend and asked for a postponement. The hearing officer requested documentation of the doctor's appointment but the Second Vice Chairman was unable to supply any. The hearing officer denied the postponement request and the hearing proceeded in absentia.

We are unable to say that the hearing officer was arbitrary or capricious or otherwise abused his discretion in denying the postponement request. The Second Vice Chairman was unable to provide documentation or any other substantiation of the claimed doctor's appointment. In light of Claimant's history of ignoring notices from the Carrier, discussed below, we cannot say that the hearing officer acted improperly in expecting some substantiation of the claimed doctor's appointment. Accordingly, we hold that Carrier did not violate Rule 21 by holding the hearing in absentia.

The record reflects that Claimant was off work for medical reasons. By letter dated April 3, 2007, Carrier notified Claimant to report for a medical examination on April 17, 2007. The letter was delivered to Claimant on April 9, 2007. Claimant, however, did not report for the medical examination as instructed.

By letter dated June 13, 2007, Carrier again instructed Claimant to report for a medical examination on June 28, 2007. Although the Postal Service left notice for Claimant of the certified mail letter, Claimant failed to claim the letter and, eventually, the Postal Service returned it to Carrier.

By letter dated July 19, 2007, Carrier instructed Claimant to report for a medical examination on August 3, 2007. The record reflects that the letter was delivered to Claimant on July 24, 2007. However, Claimant did not report for the exam as instructed.

By letter dated August 14, 2007, Carrier instructed Claimant to report for a medical examination on August 30, 2007. The letter advised Claimant that if he failed to report, he would be considered insubordinate and subject to disciplinary action. The record reflects that notice of the certified letter was left by the Postal Service on August 20, 2007, but the letter was not delivered until September 1, 2007.

By letter dated September 12, 2007, Carrier again instructed Claimant to report for a medical examination on October 1, 2007. The letter again cautioned Claimant that failure to report would be considered insubordination and subject him to disciplinary action. Notice was left by the Postal Service on September 15, 2007 and another notice was left on September 25, 2007. The letter was delivered on September 27, 2007. The letter was also sent via UPS Second Day Air, which delivered it on September 17, 2007, "signed by Valdez." Claimant did not report

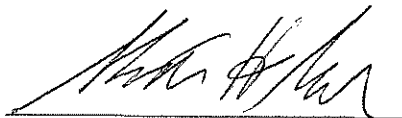
for the medical examination as instructed resulting in the charges before us in the instant case.

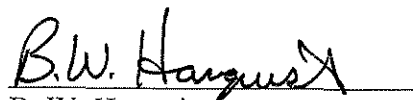
The Organization contends that Carrier failed to prove Claimant's insubordination because it did not provide evidence that Claimant actually received the letters. However, the evidence of record from the Postal Service showed that, except for the second letter, every letter instructing Claimant to report for a medical examination was delivered and the UPS records showed that the final letter was signed for by "Valdez." Moreover, although notice of the second letter was left for Claimant by the Postal Service, the letter was never claimed. A reasonable inference may be drawn from this evidence that Claimant was aware of the instructions to report for a medical examination and chose not to comply. There is no evidence to the contrary. We conclude that Carrier proved the charge by substantial evidence.

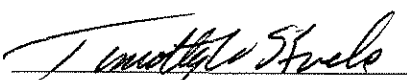
Insubordination is a very serious offense and is usually dismissible. Dismissal was in accordance with Carrier's UPGRADE policy. We cannot say that the penalty was arbitrary, capricious or excessive.

AWARD

Claim denied.


Martin H. Malin, Chairman


B. W. Hanquist
Carrier Member *Sept 17, 2008*


T. W. Kreke
Employee Member *Sept 17, 2008*

Dated at Chicago, Illinois, August 31, 2008