

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
) Case No. 121
 and)
) Award No. 107
 UNION PACIFIC RAILROAD COMPANY)
)

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 Carrier was in violation of Rule 21 of the Agreement when Mr. A. J. Noel was withheld from service for 47 days without being accorded a hearing.
2. As a consequence of the violation referred to in Part (1) above, the Organization requests that Mr. Noel be compensated for all wages lost while he was withheld from service from January 29, through March 16, 2007, and that his personal records are cleared of any and all information regarding his being withheld from service.

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.

In January 2007, Claimant's gang was working compressed halves, working the first eight days of the half. In the second half of January 2007, the gang worked overtime on January 24, 25, 26, and 27. Claimant was scheduled for overtime on January 28 and was scheduled to take a drug and alcohol test, but he did not report for work. The Manager Bridge Construction sent the tester to Claimant's motel room to administer the test. Claimant failed the test. Initially, Carrier notified Claimant for an investigation concerning his allegedly testing positive for alcohol. However, by letter dated February 2, 2007, Carrier cancelled the investigation. By separate letter dated February 2, 2007, the Manager Bridge Construction initiated a manager's referral of

Claimant to Carrier's Employee Assistance Program. Claimant complied with the referral and by letter dated February 26, 2007, the psychologist to whom the EAP referred Claimant notified the EAP that he was recommending that Claimant return to work. Claimant was scheduled for a return-to-work drug and alcohol test on March 2, 2007. By letter dated March 7, 2007, the EAP released Claimant to return to service. Claimant returned to service on March 17, 2007, for the second compressed half of that month.

As initially presented on the property, the claim maintained that Carrier violated Rule 21 by withholding Claimant from service without a fair and impartial investigation. However, Rule 21 applies only to disciplinary action. The manager's referral was not discipline. Rather it was an exercise of Carrier's right, indeed its duty, to ensure a safe working environment by having Claimant evaluated medically by the EAP. Such action may only be disturbed if it was undertaken arbitrarily or capriciously. Clearly, the Organization has failed to establish arbitrary or capricious action. In light of Claimant's failure to report for his scheduled overtime and drug and alcohol test and in light of his positive test on January 28, 2007, the manager's referral to the EAP for evaluation and, if necessary, treatment, was certainly justified.

When Carrier does refer an employee for medical evaluation, it is obligated to ensure that such evaluation is conducted expeditiously. As the claim progressed on the property, the Organization challenged whether Carrier acted expeditiously in the instant case. Of significance is that after his initial evaluation, the psychologist called Claimant back twice for further evaluation. The Organization asserted:

The doctor found no reason to withhold Mr. Noel from service and recommended only out-patient counseling which would be scheduled during his off hours so that he could continue working. Two or three sessions were recommended. Just enough to appease Carrier; however this did not satisfy the Carrier, and Mr. Noel was sent for a second evaluation where Dr. Cross informed Mr. Noel that the Carrier was concerned that he would show up to work under the influence of alcohol. Per the Carrier's request Dr. Cross again evaluated Mr. Noel. After the second evaluation the treatment recommended by Dr. Cross still did not satisfy the Carrier; therefore the Carrier required Mr. Noel to be evaluated for the third time. Finally, after the third evaluation, Dr. Cross recommended that Mr. Noel attend 15 AA meetings and finally this recommendation satisfied the Carrier.

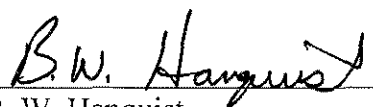
In response to the appeal, Carrier denied the assertions contained in the appeal, stating, "I do not find any validity to your opinionated assertions . . ." Thus, the record developed on the property consists of the Organization's assertion that Carrier interfered with the psychologist's evaluation and recommendation and Carrier's denial of those assertions. The Organization has the burden of proof. It has submitted no evidence supporting its assertions. It has submitted, for example, no documentation from the psychologist or even a written statement from Claimant detailing his interaction with the psychologist. Accordingly, we hold that the Organization has failed to carry its burden of proof and the claim must be denied.

AWARD

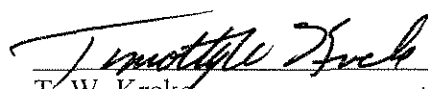
Claim denied.



Martin H. Malin, Chairman



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



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

Dated at Chicago, Illinois, September 8, 2008