

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 178, (Case No. 199)**

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

vs

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific
Railroad Company)**

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
K. N. Novak, 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. Mendez without the benefit of a fair and impartial investigation for violation of Rule 13 of the Agreement in connection with his failure to return to duty following a medical leave of absence in connection with an on-duty personal injury is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File UP-239-WF-11/1547510).**
- 2. As a consequence of the violation referred to in Part 1 above, we request that Mr. Mendez be reinstated with all seniority, healthcare benefits and vacation rights unimpaired and all other rights due him by the Collective Bargaining Agreement."**

FINDINGS:

Public Law Board No. 6402, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employees 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.

The facts of the case indicate Claimant had been assigned to Gang 3338 as a Trackman, when he was granted a Medical Leave of Absence (MLOA) on May 25, 2010. The MLOA was to expire on June 11, 2010, but the Claimant continued to receive extensions of his MLOA wherein the Claimant was required to provide medical documentation to support the continued extensions. The last extension ended on December 8, 2010, and on December 10, 2010, the Claimant was sent a certified letter requesting medical documentation to support an extension of

his MLOA. The letter required the documentation be provided by December 31, 2010. The Carrier asserted it did not receive any response to that request.

On January 5, 2011, the Carrier sent a second certified letter to the Claimant and he was advised that his MLOA had ended and he needed to provide additional medical information by January 19, 2011, and according to it no response was provided by the January 19th deadline.

On March 8, 2011, the Claimant was sent a letter removing his seniority from the roster that terminated his employment with the Carrier per Rule 13 (d) which states:

"Employees who are granted formal leaves as provided herein and who do not report on or before the first work day following the termination of their leave of absence will lose their seniority, except in case the employee furnishes satisfactory evidence that he was unavoidably delayed. When returning from absence from any cause such employee will be required to notify his employing officer not later than the end of the work day prior to the day he expects to go to work."

The Claimant's MLOA ended on December 8, 2010, and he did not return to service and in the Carrier's opinion his seniority was properly removed.

It is the position of the Organization that the Carrier improperly terminated the Claimant's seniority by alleging that he failed to comply with Rule 13. It argued that the record shows that the Claimant was unable to return to service because of an on-duty injury that the Carrier was well aware that he could not return to service because he was not medically fit. It asserted that even if the Claimant may have been late does not change the fact that he was not medically qualified to return to work and under those circumstances he was not in violation of Rule 13. Additionally, it argued that the Carrier cannot deny that documentation provided by the Claimant was from a medical doctor that stated Claimant could not return to work until lumbar surgery was performed and provided a return to work date of January 2012. It also refuted the Carrier's argument that the Claimant's information sent by fax dated January 27, 2010, was not properly labeled was not correct as that document had the Claimant's social security number and name at the top of that document. Lastly, it argued the Claimant was entitled to a "fair and impartial" Hearing so that he could refute the Carrier's allegations. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carriers position that the Claimant's MLOA expired on December 8, 2010. The Carrier sent correspondence requesting additional medical documentation. The Claimant did not respond to the Carrier requests and Claimant failed to return to service. Therefore, according to

it, the facts prove the Carrier acted properly when it removed the Claimant's seniority per Rule 13. It closed by asking that the claim remain denied.

As previously stated the facts indicate that on October 22, 2010, the Claimant provided medical information to the Carrier's Health and Medical Department (H&M) after which he was granted a MLOA until November 18, 2010. On November 20th, the Claimant contacted H&M and explained he had appointment scheduled with a Neurosurgeon on December 8, 2010. His MLOA was extended until December 8, 2010.

On January 5, 2011, the Carrier sent a second certified letter to the Claimant that advised him that his MLOA had ended and he needed to provide additional medical information by January 19, 2011. The Carrier did not receive any response by January 19th from the Claimant.

On March 8, 2011, Carrier sent Claimant a letter removing his seniority from the roster and terminating his employment in accordance with Rule 13. Shortly, thereafter, the Organization contacted the Carrier to inquire why the Claimant's seniority had been terminated. The Carrier explained that Claimant had not responded to any of the show cause correspondence nor had he provided additional medical documentation verifying his need for an extension of a MLOA. The Organization then provided a copy of a fax sent on January 27th to the H&M Department eight days after the last show cause deadline.

In the Carrier's declination letter of May 20, 2011, it stated in pertinent part the following:

"...the fax failed to identify an employee's name or identification number. Therefore, H&M was unable to place it on any file. Though the fax was late, H&M reviewed the information provided. The information stated the Claimant was to have surgery. It failed to say that surgery did take place or whether treatment was on going. H&M concluded the information provided did not warrant an extension of the MLOA till the present day....:

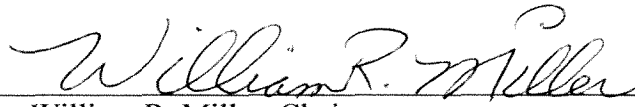
Review of the document faxed by the Claimant to H&M titled Supplemental Doctor's Statement had the Claimant's name in the top right hand corner with his Social Security Number. The document further stated that surgery was pending. The Claimant also provided a statement explaining why he did not fax the medical information until January 27th, however, that statement was not one of the Carrier's exhibits and there is no proof that it was exchanged between the parties, therefore, the Board has determined that it is "de novo" and it was not considered in the resolution of the dispute.

The record is clear that Claimant's request for an extended MLOA was not furnished in a timely manner, however it is equally clear that the documentation provided by a medical doctor stated that Claimant could not return to work until lumbar surgery was performed and suggested that the Claimant might be fit for service by January 2012.

Claimant was not without some guilt in failing to furnish the required information in a more expeditious manner, but the Board finds and holds that because of the unique circumstances of this case and on a non-precedential basis dismissal was not appropriate and it is reduced to a lengthy suspension that is corrective in nature. Claimant is to be reinstated to service with seniority intact and benefits unimpaired, but with no back-pay as there was no conclusive showing when and if he was medically fit. The Board also forewarns the Claimant that after reinstatement he needs to be careful to adhere to all Carrier Rules and directives.

AWARD


Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



K. N. Novak, Carrier Member



K. D. Evanski, Employee Member

Award Date: 10-23-2012