

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 179, (Case No. 200)**

**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 Welder R. P. Lavin for failure to provide just cause for his continued absence from assignment without authority from July 15, 2010 through October 22, 2010 while he was on an approved medical leave of absence is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File CEI00111R/1546974).**
- 2. As a consequence of the violation referred to in Part 1 above, we request that Mr. Lavin have all seniority returned unimpaired and compensated for any and all hours that he would have been entitled to receive upon medical release as provided in Rule 12(f) of 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 indicate that on July 16, 2010, the Claimant informed Manager of Track Maintenance (MTM) J. Parker that he had injured his back and would be absent until July 19, 2010. On July 19th MTM Parker called the Claimant to follow-up with him. At that time the Claimant advised Parker he would be having surgery and would be off for an additional week. According to the Carrier, MTM Parker did not hear from the Claimant until November 22, 2010, when both were present at an Investigation.

On October 22, 2010, the Claimant was sent a letter which stated in pertinent part:

"This is to advise you that the Company's records indicate you have been absent from your assignment without proper authority since July 15, 2010.

Rule 14(a) of the agreement between the Brotherhood of Maintenance of Way Employees and the Union Pacific Railroad Company reads as follows:

'Employees who are continuously absent without authority from their position for a period of thirty (30) or more calendar days may be treated as having resigned and their names removed from the seniority roster.'

You have seven (7) days from receipt of this letter to show cause for your absences. Failure to do so will be considered a voluntary forfeit your seniority and employment with Union Pacific Railroad Company in accordance with Rule 14(a)."

On October 25, 2010, the Carrier received a letter from the Claimant's attorney, F. Daniel Petro wherein he stated that the Claimant's surgery was very painful and debilitating and due to pain and medication he was not able to communicate the extent of his condition to the Carrier. Petro went on to state that Claimant was in therapy and taking narcotic medication for injuries and was not yet fit to return to service which had been documented by a physician and sent to the Carrier's Medical Department.

Shortly, thereafter, Claimant was directed to attend a formal Investigation on November 5, 2010, which was mutually postponed until November 22, 2010, concerning in pertinent part the following charge:

"...for investigation and hearing to show just cause regarding your alleged continued absence from assignment without proper authority for more than thirty (30) days from July 15, 2010, through October 22, 2010."

On December 1, 2010, Claimant was notified that he had failed to provide just cause for his continued absence from assignment without authority and was considered to have resigned and his name had been removed from the seniority roster pursuant to Rule 14.

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 14 and the record shows that the Carrier was well aware of his status via the Medical Department and its Claims Agent. It further argued

that even if the Claimant did have an unauthorized absence as alleged, which the Carrier did not prove, termination of his seniority was exceedingly harsh discipline as Rule 14 was negotiated to address those employees who do not intend to continue their employment relationship with the Carrier by voluntarily failing to report to their assigned positions on a consistent basis and the Claimant did not fit into that category. The Organization maintained that the Carrier's decision was improper inasmuch as the Carrier (1) failed to provide a "fair and impartial" Hearing; (2) made multiple due process violations; (3) failed to meet its burden of proof especially when the record substantiates that on November 8, 2010, Claimant was granted a Medical Leave of Absence through December 1, 2010; and (4) issued excessive and unwarranted discipline. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carriers position that the transcript verifies that the Claimant did not have a reason for failing to secure proper authority from his Manager to be absent beyond July 19, 2010, therefore, the Claimant was absent without authority for over 30 days and his termination pursuant to Rule 14 was proper. It further argued there were no procedural errors on its part that deprived the Claimant of a "fair and impartial" Investigation, but it did assert that the Organization failed in its initial appeal to direct it to the proper Carrier Officer. It closed by asking that the claim remain denied.

The Board has thoroughly reviewed the record and is not persuaded that any procedural errors occurred by either party in the handling of the claim that denied the Claimant his "due process" Agreement rights, therefore, the dispute will be resolved on its merits.

The record indicates and the Carrier does not dispute the fact that Claimant suffered an injury nor does it refute that Claimant was in contact with the Carrier's Medical Department regarding his injuries and keeping them up-to-date on his medical condition. Additionally, the Carrier does not deny that the Claimant responded to the Medical Department when it requested information or documentation. Essentially, the Carrier argued that the Claimant failed to secure authority for his Medical Leave of Absence (MLOA) from his direct Supervisor and he did not keep him updated, thus he was in violation of Rule 14. Examination of Rule 14 reveals there is nothing in the Rule that requires an employee to secure his MLOA from his immediate Supervisor or that he must continually update that Supervisor on his medical condition. The record is clear that the Claimant was in contact with the Carrier via its Medical Department and Claims Agent who were well aware of the Claimant's medical status. The Claims Agent specifically wrote the Claimant's attorney on September 28, 2010, regarding the Claimant's medical condition with the following directions:

"...Please direct all future communication concerning this matter to our Dolton office, to the attention of

**S. C. Watson, Sr. Claims Representative
Union Pacific Railroad
350 E. Sibley
Dolton, IL. 60419**

I would hereby request that you forward any medical reports concerning Mr. Lavin so we may better evaluate his current condition. I appreciate your cooperation and would like the opportunity to discuss this matter with you at your earliest convenience."

Additionally, the evidence indicates that on November 8, 2010, the Medical Department wrote the Claimant and stated in pertinent part the following:


"Dear Mr. Lavin:

This is to advise you that you have been granted a Medical Leave of Absence. This leave is effective to December 10, 2010...."

On November 22, 2010, the day of the formal Investigation wherein the question at issue was whether or not the Claimant had over-extended his MLOA the issue was dead because the leave had been extended until December 10, 2010. It appears there was a lack of internal communication between various Carrier Departments for which the Claimant cannot be held accountable. Therefore, the Board finds and holds that the termination of Claimant's seniority was in error and Claimant shall be reinstated to service, with seniority intact and benefits unimpaired with full back pay in accordance with Rule 22(f) of the Agreement from the date he was certified by a medical physician as being fit for service.

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