

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 181, (Case No. 202)**

**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: September 18, 2012

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement when it failed/refused to timely return Machine Operator S. King, Jr. to service following a medical release for return to duty on February 24, 2011 and successful DOT re-certification on March 14, 2011 (System File UP-512-JF-11/1553168).**
- 2. As a consequence of violation of Part 1 above, Mr. King shall be compensated for eight (8) hours each day at his respective straight time rate of pay to begin March 14, 2011 and continuing until this matter is settled and he is reinstated to service."**

FINDINGS:

Public Law Board No. 6402, 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.

The Claimant was on a Medical Leave of Absence (MLOA) beginning April 11, 2010, which he was released from by letter dated February 28, 2011. Following his release to return to work, the Claimant had 20 days to place himself per Rules 13 (f) and 2 (e).

It is the Organization's position the Carrier violated the Agreement when it failed/refused to timely return the Claimant a Machine Operator to service following a medical release to duty on February 24, 2011, and successful DOT re-certification on March 14, 2011. It argued that the record verifies that the Claimant (1) timely attempted to displace following his return to service notification; (2) made multiple good-faith attempts to return to service as directed by the Carrier;

(3) was provided wrong, misleading and incorrect displacement information by the Carrier; (4) found his attempts to displace compounded by the Carrier's failure to provide proper information and by Carrier Supervisors who refused to meet with him, or abolished the position he wished to displace into; (5) took all steps which were expected of an employee and that he should not have been punished (placed on furlough) after having been released back to service and completed his DOT card requirements; and (6) Claimant actually displaced into a position which his seniority entitled him to on April 12, 2011, but was nonetheless unreasonably removed on the basis that he had somehow not properly exercised his authority. It concluded by requesting that the claim be sustained as presented.

It is the Carrier's position that under the clear language of the Agreement, the Claimant had 20 days to place himself on a position. According to it the Claimant had until March 19, 2011, to exercise his rights and he failed to exercise his rights in a timely manner and, therefore, he self-furloughed himself by his own actions and not the Carrier's. It argued the Claimant did not make any attempt to displace prior to March 31, 2011, more than 30 days after the date he was released to return to work which was well beyond the requirement set forth in Rule 13(f). It closed by asking that the claim remain denied.

There is no dispute between the parties that the clear language of Rules 13(f) and 2(e) requires employee returning from a Leave of Absence to place themselves within 20 days after their return. The actual dispute in this instance is whether the Carrier inappropriately prevented Claimant from exercising his seniority within 20 days after being directed to return to service resulting him being furloughed and unable to displace into positions that he held seniority.

The Organization argued it was Carrier actions that prevented the Claimant from displacing whereas the Carrier argued it was Claimant's inaction that resulted in his furlough. The Organization offered statements in proof of its position that the Claimant was pro-active in pursuit of his return to active service from two co-workers wherein they asserted they saw the Claimant come to Avondale on two occasions to get paper work, however, in opposition to the Organization's position the Carrier offered the following statement from MTM Gomez which stated in pertinent part:

"Mr. King first contacted me on via text message on 3-5 stating that he had his return to work letter. He began his d.o.t. process. He contacted me several times to get his paper work signed. I told him to come those particular days and he never showed up therefore letting his days lapse.

I have tried very hard to work with this employee. I am denying this claim. It is Mr. King's own fault that he let his days lapse also when Mr. King first contacted men he was afforded the opportunity to bump a trackman to get back to work until he got his DOT caught up. He was afforded every

opportunity to return and chose not to do so. Had several appointments with him that he chose not to show up for. ..." *(Underlining Board's emphasis)*

The co-workers statements lack specific dates as to when the Claimant came to the Carrier's facility in Avondale and they do not refute Gomez's statement that he told the Claimant to come to the office several times when Gomez was at the office and the Claimant failed to show. Nor does the record dispute Gomez's statement that he suggested and offered the Claimant an opportunity to immediately displace to a Trackman position until he attained his DOT certification which the Claimant refused.

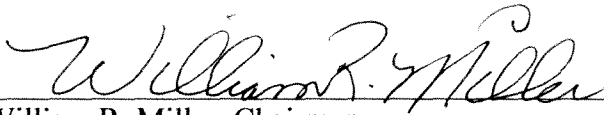
The Carrier also offered a timeline of text messages, which were obtained from Senior Claim Representative C. Spell and both parties provided a similar timeline of events surrounding the claim. Both timelines of events agree that MTM Gomez signed Claimant's DOT form on March 23, 2011. The Organization's timeline asserted that between March 24 thru 31, 2011, Claimant had multiple conversations with the Carrier's NPS Department regarding potential displacement opportunities and during those calls he was not advised that he had to displace by March 28th or revert to a furloughed status. The Carrier's timeline of events shows no activity between March 23 and 31, 2011, and both timelines agree that Claimant's displacement was denied on March 31. Review of the text messages sent between the Claimant and MTM Gomez indicates inaction on the part of the Claimant during the "return to work" process. On March 31st Claimant texted the following message: **"Rather come tomorrow I can bump tomorrow."** On that same date he texted two other messages one stated he could use another **"...day fixing damage from that storm..."** and his third message stated **"I don't know if u got my voice mail but I'm going to bump Monday."** By his own hand the Claimant displayed a lack of urgency. The question then becomes did he understand he had to make his displacement by March 28th.

The documentation presented on the property indicates the Claimant maintained seniority in over 22 classifications across various Carrier Sub-Departments and the record indicates he was offered multiple opportunities to complete his return to work process and was advised to displace to a Trackman position until he attained his DOT certification. With multiple seniorities including that of a Foreman one could infer that he should have understood the time limits regarding his displacement, however, conjecture is not proof. As to whether or not the Claimant knew he had to exercise his seniority by March 28th the record is unclear. The Organization asserts that the Claimant was provided wrong, misleading and incorrect displacement information which the Carrier denied, pointing to the fact that the Claimant never disputed MTM Gomez's written statement wherein Gomez suggested that Claimant displace to a Trackman position which indicates the Carrier had no aversion to the Claimant's return to service. The statements of the various parties have created an irreconcilable question of fact as to whether or not the Claimant understood his displacement requirements upon return from his Medical Leave

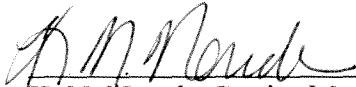
of Absence that the Board is unable to resolve. Because the Claimant had the burden of proof and failed to satisfy that requirement the Board finds and holds that the claim must remain denied.

AWARD

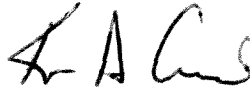
Claim denied.



William R. Miller, Chairman



K. N. Novak, Carrier Member



K. D. Evanski, Employee Member

Award Date: 11/11/12