

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
and) Case No. 108
UNION PACIFIC RAILROAD COMPANY) Award No. 87
_____)

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

Hearing Date: January 7, 2008

STATEMENT OF CLAIM:

Claim on behalf of Dequincy Division, Foreman, C. A. Maida, for eight (8) hours each day at his respective straight time rate of pay to begin upon his release from his personal physician with regard to Carrier's letter dated May 1, 2006, signed by Marc A. Syring, Superintendent, Livonia Service Unit with regard to the Carrier terminating Claimant from active service as an agreement employee effective May 1, 2006, without affording him a fair and impartial investigation.

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 February 2006, Claimant was serving as Manager Track Maintenance in Beaumont, Texas. By letter dated March 2, 2006, Carrier notified Claimant that his employment was terminated, effective immediately, due to his failure to properly manage the process of scrap metal sales. The letter stated:

Please be advised that I am terminating you from employment with the Union Pacific Railroad effective immediately.

.....

Please immediately return all company property to Sr. Special Agent Steven

Paddy. He can be reached at (225) 338-2933. Company property is included, but not limited to, items listed on the attached. You are not to enter company property without the prior authorization of Sr. Special Agent Paddy.

On March 8, 2006, the Assistant General Chairman wrote to Superintendent Livonia Service Unit M. M. Whatley, the author of the March 2 letter, requesting a fair and impartial investigation for Claimant, citing Agreement Rule 21. Claimant was copied on this correspondence. On March 21, 2006, the Superintendent replied to the Assistant General Chairman, without copying Claimant:

[L]et me clarify my correspondence of March 2, 2006. Mr. Maida was terminated from the employment of the company as a non-agreement employee. Non-agreement employees do not fall under the auspices of any 'agreement,' and therefore, the company is not required to grant such an employee a hearing. Should Mr. Maida elect to exercise seniority to a union position, he certainly has a right to do so.

On May 1, 2008, Superintendent Livonia Service Unit M. A. Syring wrote to Claimant denying his verbal request for a leave of absence. The letter maintained:

[S]ince you did not exercise any seniority rights you may have held within thirty (30) days of March 2, 2006 you are no longer considered an employee of the Company and are considered as terminating your employment relationship and seniority rights. Consequently, the request for a leave of absence is invalid and declined.

The record reflects the following. On February 13, 2006, Claimant completed and gave to the Senior Claims Representative at Beaumont, Texas, a Report of Personal Injury or Occupational Illness, claiming on-duty aggravation of a prior injury. In light of Claimant's medical condition, Superintendent Whatley medically withheld Claimant from service. During handling on the property, the Organization represented that Claimant went to his personal physician and was advised that he needed to see a neurosurgeon. The Senior Claims Representative arranged an appointment with a doctor who advised Claimant to begin physical therapy and to be off work for eight weeks, beginning February 21, 2006. Carrier did not deny these representations and therefore we accept them as established fact.

There is no dispute that on March 17, 2006, Claimant called a GMS Supervisor about exercising seniority. The GMS Supervisor's statement avers:

Mr. Maida called on 3/17/06 and said he was currently on Med. Leave and would be returning to the craft when he was released. I told him he would have 30 days to exercise his bump after being released from Medical Leave and to call me and we would see what his options were when he was released.

There is much that is not clear from the record. It is not clear whether the GMS Supervisor had authority to bind Carrier so that Claimant would not have to contact his

supervisor concerning his medical condition and need for additional time off. It is also unclear from the record whether the Assistant General Chairman notified Claimant of the Superintendent's March 21 letter. What is clear is that Claimant, in fact, did call GMS about exercising seniority on March 17, 2006, and was advised that he would have thirty days from his release from medical leave to do so. Given the lack of clarity in the record concerning whether Claimant should have done more, and without setting a precedent for future cases, we conclude that the claim should be sustained.


It is also clear that at the time, Claimant was medically unable to perform service. Furthermore, on May 22, 2006, Carrier notified Claimant to report for a formal investigation concerning his alleged violation of Rule 1.6 in connection with the charges that also served as the basis for his dismissal as MTM. Following that investigation, Claimant was dismissed from service and his claim arising out of that dismissal is before this Board as Case No. 109. Thus, any entitlement to back pay for any period following Claimant's medical release to return to service depends on the outcome of Case No. 109. Accordingly, the only relief to which Claimant is entitled is to have the denial of his request for leave and the assertion that his seniority was properly terminated under Rule 18 overturned. He is not entitled to any monetary compensation on the instant claim.

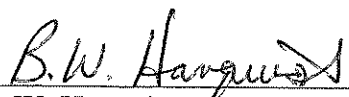
AWARD

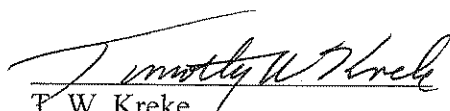
Claim sustained in accordance with the Findings.

ORDER

The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto


Martin H. Malin, Chairman


B. W. Hanquist
Carrier Member 4-9-08

 4-9-08
T. W. Kreke
Employee Member

Dated at Chicago, Illinois, March 31, 2008