

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
and) Case No. 10
UNION PACIFIC RAILROAD COMPANY) Award No. 10
_____)

Hearing Date: November 12, 2008

1. The dismissal of Machine Operator Kelvin Dean Rodgers for violation of GCOR Rule 1.15 (Duty - Reporting or Absence) in connection with his absence from work on May 11, 2007 is unjust, unwarranted, based on unproven charges and in violation of the Agreement (Carrier's File 1485878 SPW).
2. As a consequence of Part 1 above, we respectfully request that Claimant be immediately reinstated to the service of the Carrier, to his former position with seniority and all other rights restored unimpaired and that the letter of dismissal also be expunged from his personal record. In addition, Claimant Rodgers shall also be compensated for net wage loss, both straight time and overtime and benefit loss suffered by him since Claimant's wrongful and unwarranted removal from service and subsequent dismissal.

Claimant was notified by letter dated May 18, 2007 that he should report for an investigation and hearing in connection with an allegation that he was absent without authority on May 11, 2007. After a postponement and hearing location change, an Investigation and Hearing was conducted on June 21, 2007. Claimant was notified by letter dated July 11, 2007 that the charges that he violated GCOR Rule 1.15 had been sustained and that he was being

assessed a Level 5 discipline and dismissed from service as this was his third unauthorized absence in a thirty-six (36) month period. A claim was initially filed on Claimant's behalf on September 4, 2007 with a corrected copy sent to Carrier on September 5, 2007. The claim was denied by letters dated October 24 and October 25, 2007. An Appeal was presented on December 5, 2007 and denied on February 5, 2008. The claim was discussed in conference on March 5, 2008.

It is undisputed that prior to the most recent incidence of absenteeism, Claimant's disciplinary history record contained two prior entries: both unauthorized absence infractions; one on November 17, 2006 and the other on September 19, 2005. It is further undisputed that in each of the prior instances, Claimant waived his contractual right pursuant to Rule 48 ¶¶ (a) and (I) to grieve the imposition of the disciplines assigned and accepted them for what they were, unauthorized absences.

The record reflects that on the evening of May 10, 2007 at around 7:30 p. m. Claimant had a conversation with his immediate supervisor. The Track Supervisor testified that Claimant requested the following day off to go to the courthouse to file some papers. The Track Supervisor related that at the time he was short-handed and for safety reasons, couldn't afford to be without Claimant on the following day. For the foregoing reasons, the Track Supervisor recalled, he informed Claimant that he could not have the following day off. Claimant, during the investigation, implied that the Track Supervisor refused to allow the absence due to his knowledge that Claimant intended to file EEO charges against him, but the Track Supervisor steadfastly denied that he was aware of that fact and testified that Claimant only told him that he wanted to go to the courthouse and file some paperwork.

On the following morning as he was eating breakfast, the Track Supervisor related, Claimant called and informed the Track Supervisor that he would not be at work that day. The Track Supervisor testified that he informed Claimant that if he did not come to work, that his absence would be unauthorized. The record reflects that Claimant nevertheless did not come to work on May 11, 2007.

Under Union Pacific Railroad Policy and Procedure for Ensuring Rules Compliance in the Progressive Discipline Table there exists a policy, commonly referred to as the three strikes policy that states "If an Employee commits three repetitions of the same rule infraction during a thirty-six month period (excluding missed calls and tardiness) the discipline will be assessed a Level 5 - Permanent Dismissal. Hence, Claimant by voluntarily laying off work for a regularly scheduled workday without authorization in violation of GCOR 1.15 subjected himself to permanent dismissal under the three strikes rule.

The Organization avers that Carrier failed to prove either that this was Claimant's third strike or that he failed to continue to protect his employment. The Organization argues that Claimant's prior two "strikes" were not unauthorized absences at all, but were instead instances of tardiness that are explicitly excluded from the three strike rule. In both instances, the Organization asserts, Claimant was on his way to work and through no fault of his own was not able to report on time. In both instances, the Organization maintains, Claimant was not allowed,

by the Carrier, to work. The Organization asserts that Claimant can not be charged with unauthorized absences in these two instances when it was the Carrier who refused to let him work. A reasonable mind, the Organization contends, cannot refuse to let an employee work because he arrives late and then count that as an unauthorized absence or count the late arrivals as a failure to protect one's employment when the employee did attempt to report to work and was not allowed by the Carrier to work.

Carrier concedes that it had the burden to present substantial evidence to support the conclusion that Claimant was in violation of Rule 1.15. Moreover, the Carrier asserts that Claimant was afforded all due process and that the assessment of discipline, although severe, was neither arbitrary, capricious nor an abuse of Carrier's discretion.

Carrier points to Claimant's own testimony on the record as an admission of his guilt and argues that an admission, in and of itself, amounts to substantial evidence. *See Third Division Award 28484* holding: "Where, as here, there is an admission of guilt, there is no need for further proof." Thus, the Carrier opines, there is nothing in the record to justify this Board reversing the decision of the Carrier in finding the Claimant culpable of violating Rule 1.15.

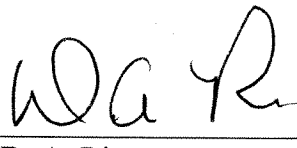
Of critical importance in this case is not so much Claimant's unauthorized absence on May 11, 2007; it is undisputed that Claimant did not report to work on his scheduled workday, and Claimant testified that he did not obtain authority to be absent. But the Organization contends that Claimant's prior two assessments of discipline should not count against him under the 'three strikes and your out rule.'

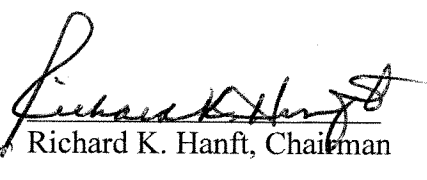
The record shows and Claimant acknowledged through testimony at the investigation that he was assessed discipline for two prior violations of Rule 1.15. Claimant had the right to grieve the impositions of those disciplines, but chose to waive his right to grieve and accepted the discipline imposed. It is well established that where an employee is given notice of an adverse entry to his disciplinary record and does not file a grievance where able to do so, an arbitrator may subsequently accept the entries on their face without considering their merit. Such is the case here.

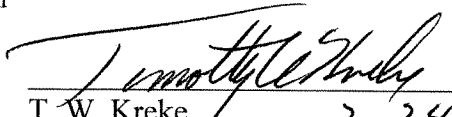
The Board finds that the Carrier has met its burden of proof in this case. Claimant testified to missing work on May 11, 2007 and further admitted that he had not obtained authority to miss. Claimant had previously been put on notice by signing a waiver for his first and second offenses of the same rule. Awards of several Boards have consistently upheld the application of the 'three strikes and your out' policy to attendance violations. *See Public Law Board 6402, Case No. 56, Award No. 36 and Awards cited therein.* Therefore, the Board sees no reason to disturb the Carrier's action in this case.

AWARD

Claim denied.


D. A. Ring
Carrier Member


Richard K. Hanft, Chairman


T. W. Kreke
Employee Member

2-24-09

2/24/09

Dated at Chicago, Illinois, January 23, 2009