

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7426
AWARD NO. 11, (Case No. 11)**

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

vs

UNION PACIFIC RAILROAD COMPANY (SPWL)

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: February 23, 2011

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

- 1. The Level 5 discipline (dismissal) imposed upon Mr. S. Wilson for alleged violation of Rule 45(h) (Absent Without Authority) in connection with allegedly being absent from his assignment without authority from July 14, 2009, to the present is unjust, unwarranted and based on unproven charges and in violation of the Agreement (Carrier's File 1527281).**
- 2. As a consequence of Part 1 above, we 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 Wilson shall also be compensated for net wage loss, both straight time and overtime, and benefit loss suffered by him since his wrongful and unwarranted removal from service and subsequent dismissal.'"**

FINDINGS:

Public Law Board No. 7426, 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.

Claimant entered the service of the Carrier on August 1, 2005. At the time of the incident under review, Claimant was assigned as a Track Laborer Monday - Friday with rest days of Saturday and Sunday. On July 28, 2009, the Manager of Track Maintenance sent him a letter which stated in pertinent part:

"This is to advise you that the Company's records indicate that you have been absent from your assignment without proper authority from 7:00 a.m., on July 14, 2009, to the present, you failed to report for duty and made no effort in trying to contact your manager or foreman.

Rule 45(h) of the agreement between the Brotherhood of Maintenance of Way Employees and the Union Pacific Railroad Company reads as follows:

'ABSENT WITHOUT AUTHORITY - To terminate the employment of an employee in writing to his last known address, by Registered or Certified Mail, return receipt requested, notifying him that his seniority and employment have been terminated due to his being absent without proper authority and that he may within 30 days, if he so desires, request that he be given an investigation under the provisions of this rule.'

Therefore in absenting your assignment without proper authority on the dates listed above, you are now considered as having voluntarily forfeited your employment with the Union Pacific Railroad Company."

On August 10, 2009, the General Chairman pursuant to Rule 45(h) requested a formal Investigation and on September 23, 2009, the Carrier advised Claimant to appear for a formal Investigation on October 7, 2009, concerning in pertinent part the following charge:

"Company records indicate you have been absent from your assignment without proper authority from 7:00 a.m., on July 14, 2009, to the present, you failed to report for duty and made no effort in trying to contact your manager or foreman."

The Investigation was held in "absentia". On October 20, 2009, Claimant was notified that he had been found guilty as charged and his dismissal remained intact.

It is the Organization's position that the Investigation should not have been held in absentia and it should have been postponed until the Claimant was available for the Hearing. It argued that because the Hearing was held in absentia the Claimant was denied a fair and impartial Investigation and the discipline should be rescinded and the Claim sustained as presented.

It is the position of the Carrier that the Claimant was not denied a fair and impartial Investigation and it did not err in holding the Hearing in absentia. It argued that the Claimant was given ample time (eight weeks) from the Organization's request for the Investigation to attend, but elected not to attend. It further argued that it was not refuted that the Claimant did not secure "proper authority to be absent" and because of that he forfeited his seniority. It closed by asking that the discipline not be disturbed and Claim remain denied.

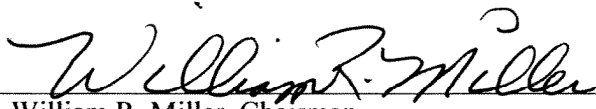
The Board thoroughly reviewed the transcript and the record of evidence and will first address the Organization's assertion that the Investigation was not fair and impartial because it was held in "absentia". The record indicates the Claimant chose not to appear at the Investigation and he offered no proof that he was ill or had some other substantive reason which did not allow him to attend the Hearing. The Carrier did not violate the Claimant's right to a fair and impartial Hearing, in this instance, when it was held in absentia. It is further noted there is no requirement that an accused must attend their formal Investigation, but when a charged employee chooses not to attend, he does so at his own potential peril because he offers no rebuttal or alternative theory or story. See Second Division Awards 11763, 13217, 13360, 13491, 13924 and 13957. The dispute will be resolved on its merits.

Turning to the merits the Board finds that beginning July 14, 2009, and continuing to his subsequent dismissal the Claimant absented himself from his assigned position without authority. Because the Claimant elected not to attend the Investigation the evidence that was presented by the Carrier, which was substantial, stands un-refuted. It is clear that the Carrier has met its burden of proof that Claimant was guilty as charged.

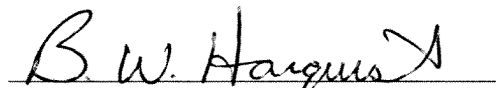
The only issue remaining is whether the discipline was appropriate. At the time of the dispute Claimant had less than four years of service when he committed a serious breach of Rules, therefore, the discipline assessed was in accordance with the Carrier's UPGRADE Discipline Policy. The Board finds and holds that the discipline will not be set aside because it was not arbitrary, excessive or capricious.

AWARD

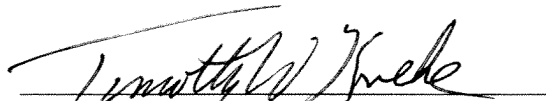
Claim denied.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: June 8, 2011