

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 168
AWARD NO. 159

-----+
PARTIES TO DISPUTE |

CARRIER |

Union Pacific Railroad |

AND |

ORGANIZATION |

Brotherhood of Maintenance of Way Employees |
Division of International Brotherhood of Teamsters |

Carrier's File
1503143

System File
C-0848U-153

-----+
STATEMENT OF CLAIM

1. The Carrier violated Rules 1, 14, 25, 26, 35, 48, 48(a) and Appendix "V" of the Agreement when, by letter dated March 31, 2008, Director of Track Maintenance, Patrick Halsted, notified Claimant Ned Yazzie he was considered to have voluntarily forfeited his employment relationship thereby, without benefit of a hearing arbitrarily and without cause removing Claimant from service and concomitantly taking away his established seniority and employment relationship with Carrier.
2. As a consequence of the violation as set forth in point 1 above, the Organization requests that the Claimant be immediately reinstated to service with the Carrier with all seniority, vacation, and Agreement rights unimpaired and that he be compensated for all time lost from the date of his removal from service until the violation of the Agreement ceases.

STATEMENT OF BACKGROUND

According to Carrier, sometime in July of 2007, but according to the Organization, sometime in the latter part of December, 2007, Carrier disqualified Claimant from his regularly assigned position as a roadway equipment operator (backhoe) on Gang #8573. Shortly thereafter, Claimant requested a Medical Leave of Absence (MLA) which was subsequently granted by Carrier. According to the Organization, Claimant remained on a MLA from January 2, 2008 until January 10, 2008. On January 10, 2008, Claimant's physician, Dr. Wiseman cleared Claimant to return to work as of January 14, 2008 without any restrictions. On January 11, 2008, Carrier's Manager of

Employee Assistance, Tarsyia Waddell telephoned Claimant and apprised him he had been released to return to service and made clear to Claimant he was no longer going to be covered by his MLA. According to the Organization, since prior to Claimant's going on an approved Medical Leave of Absence he had been disqualified from his position of roadway equipment operator (backhoe), Claimant could not return to work in that position. As a result, Claimant elected not to remain in service of the Carrier through the exercise of displacement rights, that is, by the exercise of his seniority rights but instead elected to remain in service of the Carrier by entering into a furlough status pursuant to the provisions set forth in Rule 21(f) which states in pertinent part as follows:

Employees who do not elect to remain in service through the exercise of displacement rights or who are unable to do so will be furloughed. In order to be eligible for recall and in order to avoid any forfeiture of seniority under recall provisions, employees must have on file at all times a current address with the Director of Non-Op Personnel Services in Omaha, Nebraska. * * * .

Notwithstanding Claimant's presumed furloughed status, after Claimant had not returned to service for a period of approximately two and half (2 ½) months following his medical release to return to work without any restrictions, Carrier, by letter dated March 31, 2008 informed Claimant that since he had failed to return to service in accordance with Rule 25, specifically, Rule 25(d), he was considered as having forfeited his seniority and employment relationship. This letter also stated the following: "Just recently you advised the Medical Services that you had a medical condition which would have precluded you from returning to service. However, while there is no substantiation of this, this would not have conflicted with your return to service as of January 12, 2008." Rule 25(d) reads in whole as follows:

An employee returning from leave of absence and an employee who is released from an official, supervisory, or excepted position may return to former position or may exercise seniority rights over any junior employee who is holding a position that has been bulletined during the returning employee's absence, except that if the employee's former position has been abolished or is being held by a senior employee through the exercise of displacement rights, the returning employee may exercise seniority rights over junior employees as provided in Rule 21.

Subsequent to receipt of the March 31, 2008 letter by Claimant, the Organization filed the subject claim dated April 7, 2008. Carrier denied the claim citing among other support, Rule 25(b) which states in whole as follows:

Employees granted leave of absence in writing by proper authority

of the Company will retain their seniority. Employees failing to return before the expiration of their leave of absence will lose their seniority rights unless an extension has been obtained. When leave of absence or extension has been requested and is denied, the employee will be so advised and required to return to service within five (5) calendar days after receipt of such notice or forfeit all seniority rights.

Carrier asserts that in not complying with the requirement to return to service within a timely manner as provided for in Rule 25(b), Claimant failed to protect his employment relationship. Carrier further asserts there is nothing in the record of any attempt by Claimant in the over eleven (11) weeks after he was advised of the expiration of his MLA and requirement to return to service to call Carrier and make inquiry as to where he could exercise his seniority rights/choice. Carrier submits it was more than lenient with Claimant in giving him more than eleven (11) weeks to comply with the requirement to return to service but instead, of his own volition, he elected to not return to service, thereby self-invoking Rule 25 triggering the termination of his employment which, under the circumstances cannot be deemed a disciplinary action. As Claimant's termination of employment was not as a result of any disciplinary action, he was not entitled to a hearing to contest the end of his employment relationship. Additionally Carrier argues, contrary to the Organization's position Rule 25(d) does not allow employees to "elect" to be furloughed and further, even though Rule 25(d) does reference Rule 21, it does so in regard to exercising seniority over junior employees.

The Organization submits that Carrier never granted Claimant an approved MLA in writing and therefore, it asserts, it is reasonable to conclude that Carrier was aware Claimant's MLA was to be less than fifteen (15) days in duration. That in fact was the case as Claimant was absent on medical leave for a total of twelve (12) days. Since Claimant's MLA was less than fifteen (15) days, the Organization argues that the provisions set forth in Rule 25(b) do not pertain to the circumstances surrounding Claimant's situation and is therefore inapplicable. Contrary to the Carrier's position, the Organization submits that since Rule 25(d) states that upon a return from a leave of absence the employee **may** exercise seniority rights in accordance with Rule 21, it references Rule 21(f) which provides that, in the event an employee does not elect to remain in service through the exercise of seniority, the employee will be furloughed.

FINDINGS

Public Law Board No. 6302, 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.

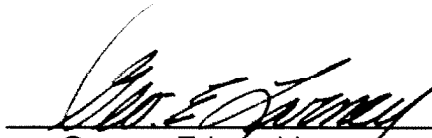
It is clear to the Board under all the given circumstances surrounding this case that Carrier having terminated Claimant's employment was not in the nature of a disciplinary action.

It is further clear to the Board that contrary to Carrier's assertion that its verbal communication to Claimant notifying him his MLA had expired and he was therefore required to return to service was clearly communicated and understood by Claimant, the fact that Carrier ignored the time limit of five (5) days for Claimant to return to service after notification his MLA had expired and permitting him to be absent unofficially for another eleven (11) weeks before informing him his absence had triggered his termination of employment is sufficient in persuading the Board that something is amiss here that undercuts Carrier's position in this matter. On the other hand, Claimant must also bear an equal responsibility in not clearly communicating to Carrier the basis for his not returning to service as it is unclear that he was granted furloughed status.

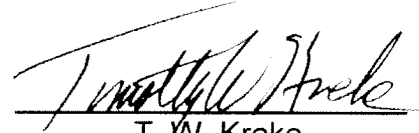
Accordingly, based on the foregoing Findings, the Board orders Carrier to reinstate Claimant with seniority unimpaired but without back pay and without compensation for benefits as so requested by the Organization.

AWARD

Claim Sustained as per Findings


George Edward Larney
Neutral Member & Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois

Date: March 3, 2010