

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 214, (Case No. 223)**

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

vs

UNION PACIFIC RAILROAD COMPANY

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
P. Jeyaram, Carrier Member

Hearing Date: September 19, 2012

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

- 1. The dismissal of Consolidated System Gang #9065 employee R. Antonio for alleged violation of the September 21, 2009 Leniency Agreement in connection with being absent from work without proper authority on October 14, 2010 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File D-1057D/1548579).**
- 2. As a consequence of the violation referred to in Part 1 above, Mr. Antonio shall be restored to active service at the first available opportunity to do so, with all seniorities held restored intact and that he be compensated for all straight time and overtime wage loss suffered due to the improper dismissal commencing December 17, 2010 to continue until such time that he is properly restored to service with the Carrier."**

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.

The facts indicate that the Claimant was absent from work without proper authority on September 18, 2009. The Claimant was specifically charged with violation of Rule 1.15 (Duty-Reporting or Absence) as contained in the General Code of Operating Rules. That was Claimant's third violation of Rule 1.15 within a 36 month period. The proposed discipline would have been a Level 3, but since Claimant's discipline status was already at a Level 4 he was administered a Level 5 dismissal.

Subsequently, the Carrier offered the Claimant a Leniency Agreement dated September 21, 2009. The terms of the Leniency Agreement required Claimant to acknowledge responsibility for his action and accept dismissal from service after which he was returned to service with a discipline status of Level 3 and was subject to a 18 month probationary period during which time if he was in violation of Rule 1.15, any serious rule violation or safety rule he would revert back to the status of a dismissed employee without a Hearing under the Collective Bargaining Agreement.

On October 14, 2010, Claimant was employed as a System Laborer on System Tie Gang 9065 working in an area north of Caliente, Nevada. Claimant was absent from work that day. It was asserted by the Carrier that Claimant was absent without proper authority, therefore, according to the Carrier Claimant was in violation of his September 21, 2009 Leniency Agreement and because of that he was removed from service and reverted to the status of a dismissed employee without benefit of a Hearing per his Leniency Agreement. Claimant was notified by letter dated October 19, 2010, that he was dismissed from service.

The Organization requested a conference by letter dated October 29, 2010. The conference was held on December 17, 2010, and the Carrier determined Claimant did not receive permission to be off on October 14th.

It is the position of the Organization that the Claimant made a good-faith effort to contact his Supervisor to receive permission to be off of work for a bona fide medical reason on October 14, 2010, but was unable to contact him and had to leave a voice mail due to circumstances beyond his and the Carrier's control. It argued the Claimant was prevented from communicating with his Supervisor directly over the phone because the Carrier's Supervisor had no cell service which was no fault of the Claimant. Additionally, it argued that there is no dispute that the Claimant provided medical documentation that showed Claimant had a legitimate medical reason for his absence. It reasoned that there was no violation of Rule 1.15 and no violation of the Leniency Agreement. It concluded that the Carrier had erred in its dismissal of the Claimant and it requested that decision be overturned and the claim sustained as presented.

It is the Carrier's position that the record shows the Claimant only left a voice message that was received by his Supervisor the next day. It argued that voicemails do not constitute permission to be off. It further argued that even though the Claimant provided a doctor's note, it was seven days after Claimant's dismissal and was from New Mexico. It also asserted that since Claimant was assigned to work in the Caliente, Nevada, area one would assume Claimant would have had a doctor's note from that area. Submitting a doctor's note from his hometown seven days after being dismissed suggested that Claimant attempted to cobble together a defense. More importantly, this was not the first time Claimant was absent from work without permission, thus dismissal was appropriate. It closed by asking that the claim remain denied.

There is no dispute between the parties that the Claimant did not appear for work on October 14, 2010. The question at issue is whether or not there were extenuating circumstances and conditions that prevented the Claimant from advising the Carrier that he would not be able to report to work. As previously stated the Carrier contended that the Claimant was absent without authority whereas the Organization argued that the Claimant was prevented from communicating with his Supervisor directly over the phone because Supervisor Ridler had no cell service. Supervisor Ridler offered a written statement which reads in pertinent part:

"...as I was leaving Cedar City, UT, my cell phone alerted me of a message and after listening to that it was from Ray Antonio from the day before informing me that he would not be at work. The message was left on time the day of the absence. (Underlining Board's emphasis)

Supervisor Ridler closed his statement as follows:

"The distance between Cedar City, UT and Caliente, NM is approximately one hundred miles. I would not have phone service for approximately ninety eight of these miles and other than the quarter mile section north of Caliente I had no phone service at all if I would have Mr. Antonio would have contacted me instead of leaving a message that was not discovered until the following day and his dismissal would not have happened." (Underlining Board's emphasis)

The aforementioned statement by the Claimant's immediate Supervisor clearly indicates there were extenuating circumstances that prevented the Claimant from advising Mr. Ridler that he could not make it to work on October 14th. Claimant also provided a Doctor's excuse for his absence. The Carrier did not dispute the validity of the excuse, but suggested it was troublesome because it was provided seven days after his dismissal from the Claimant's personal physician rather than a doctor from the area where Claimant was working when he attempted to layoff. The Board will not question the medical expertise of the physician and finds it as an acceptable showing of a bona fide medical reason for being absent.

The Organization makes a very persuasive argument in behalf of the Claimant that he attempted to layoff for a legitimate medical reason, but was prevented from contacting his immediate Supervisor because the Supervisor did not have cell service. However, the Claimant offered a statement of October 25, 2010, which puts a different light on the situation as he wrote in pertinent part the following:

"I, Ray Antonio have called my supervisor Kevin Ridler the morning of October 14, 2010 and he had given me the ok/permission to take the day off. For the reason of my calling in that morning was some problems and pain with my

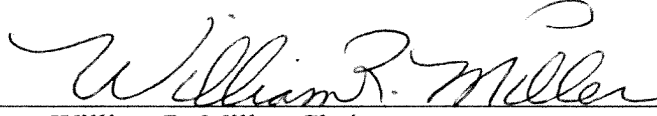
left leg. I did my behalf of calling into work that morning due to some medical issues...." (Underlining Board's emphasis)

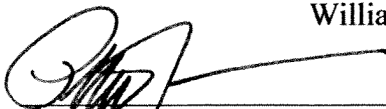
Claimant's statement conflicts with Mr. Ridlers's affidavit of January 7, 2011, wherein he stated that he only received a voicemail from the Claimant the following day and he did not actually speak with the Claimant, thus the record indicates that Mr. Ridler did not give Claimant permission to be absent and Claimant's written version of the incident is not accurate. The record further indicates there was an Unjust Treatment Hearing/Conference conducted on December 17, 2010, wherein Manager Haverstick, Supervisor Ridler, Claimant and a Organization representative participated. During that conference the Claimant's recollection of the incident differed from his written statement as he testified he tried to contact Supervisor Ridler, the Gang #9065 Safety Captain, and the #9065 Gang Time-keeper at least five times on the morning of October 14, 2010, in his efforts to secure proper permission to be absent that day. It was also shown that there was a Gang Office Trailer parked at Caliente, but it was unsubstantiated if there was anyone at the premises that the Claimant could have contacted. Additionally, it was developed that the company radio reception and communication was inconsistent.

The Board is persuaded there were extenuating reasons for the Claimant not being able to secure permission to be absent on October 14, 2010, and the Carrier failed to meet the requirements of the Leniency Agreement in returning the Claimant to a dismissed status. Therefore, the Board finds and holds that the return of the Claimant to a dismissed status was in error and Claimant shall be reinstated on a "Last Chance Basis" to his prior disciplinary status with seniority intact and benefits unimpaired. However, because the Claimant was less than forthright in his written statement and had a continuing absence without permission problem in the six prior years to his dismissal his return to service is without full back-pay. Claimant is to be compensated at the straight time rate of pay from October 19, 2011, until returned to service. The Board also forewarns the Claimant that after reinstatement he needs to be careful to adhere to all Carrier Rules and directives.

AWARD

Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.


William R. Miller, Chairman


P. Jeyaram, Carrier Member

Award Date: Dec 17, 2012


K. D. Evanski, Employee Member