

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7426
AWARD NO. 4, (Case No. 4)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES 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: September 22, 2010

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

1. The dismissal of Claimant Damario Turner for the alleged violation of Rule 45(h) in connection with being continuously absent without authority since September 16, 2008, is excessive, capricious, improper, unwarranted and in violation of the Agreement (Carrier's File 1515347).
2. As a consequence of the unjust dismissal described in Part 1 above, Mr. Turner shall be made whole and restored to the service of the Carrier with pay for all lost time, seniority and vacation unimpaired."

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.

On September 30, 2008, Carrier sent Claimant a letter which stated in pertinent part the following:

"Our records indicate that you have been continuously absent without authority since September 16, 2008. In accordance with Rule 45(h) of the Agreement between the Brotherhood of Maintenance of Way Employees and Union Pacific Railroad (Western Lines) this is to notify you that your seniority and employment relationship with the Company has been voluntarily terminated..."

After receipt of the Carrier's letter the Claimant requested a formal Investigation pursuant to Agreement Rule 45 and on November 7, 2008, Carrier notified Claimant to appear for a formal Investigation on November 13, 2008, concerning in pertinent part the following charge:

"...to develop the facts and determine your responsibility, if any, concerning the following alleged incident. While you were employed as Track Laborer, you have been continuously absent without authority since September 16, 2008.

These alleged actions indicate a possible violation of Rule 45(h) in the Agreement between the Brotherhood of Maintenance of Way Employees and Union Pacific Railroad (Western Lines) and the General Code of Operating Rules, effective April 3, 2005.

The hearing will be conducted in conformity with the provisions of Rule 45 and you are entitled to all of your due process rights provided for in that rule. If it is determined that you have self-executed the provisions of Rule 45(h) then your seniority and employment will remain denied."

On December 2, 2008, Claimant was notified that he had been found guilty as charged and his dismissal remained intact.

There is no dispute that Claimant (Seniority Date 7-16-07) was continuously absent from August 23 - September 14, 2008. He worked September 15th and was then off from September 16, 2008, on a continuous basis until his dismissal.

It is the Organization's position that the reason why Claimant was not at work was because with just over one year of employment with the Carrier he was confused by the bidding and assignment process. It argued there was a miscommunication between the Claimant and Bid and Bulletin Clerks who advised him that he had not been assigned to Gang 8857 and he should continue to bid on positions until he was assigned to a job. It also argued that his inexperience in the bidding process is reflected by the fact that he thought the Organization assigned the employees to the positions. It further argued that the Claimant was a good employee who had never been in trouble and did not violate Rule 45(h) in this instance as there was no intention to be absent without authority. According to it, this was simply a case wherein the employee acted in good faith and misunderstood the Rules. It concluded by requesting that the discipline be set aside and the Claim be sustained as presented.

It is the position of the Carrier that Rule 45(h) is a self-executing Rule stating that if an employee is absent without proper authority the employee will be considered to have voluntarily forfeited his seniority rights and employment. It argued that the Organization requested a formal Investigation which was held and nothing was developed to indicate that the Claimant should not

have been dismissed. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the transcript and the record of evidence and has determined that the formal Investigation was held in accordance with the Agreement and it is clear that the Hearing was conducted in a fair and impartial manner.

The facts reveal that prior to August 23, 2008, Claimant had been assigned as a System Track Laborer on System Gang 9063. Claimant chose to release his seniority as a System Track Laborer and return to a District position. On August 23, 2008, Claimant was released from System Gang 9063 and instructed to report to District Gang 8857.

On September 15, 2008, the Claimant reported to District Gang 8857, headquartered in Martinez, California. According to the Claimant he worked the entire morning and during his lunch break, he placed a call to the Carrier's "bid line" to inquire about a bid for another position that he had previously submitted on August 15, 2008. He alleged that during the call, he was advised that he was not awarded a position and was not assigned any position on any gang at that time. Claimant alleged that because of that information he went home and continued to bid on positions with the hope that he would eventually be assigned a job, therefore, he was not absent without authority because he thought he had no job.

Claimant's argument lacks credibility for a variety of reasons. Claimant's Foreman J. M. Colombo testified on page 41 of the Transcript that the Claimant was awarded a position on his Gang 8857. He further testified on page 43 when asked by the Claimant if he remembered the Claimant telling him there was some doubt about whether he was assigned to Gang 8857 he specifically stated:

"...And you asked me if ... if you were on a gang, and I said, Yeah, you were showing on the gang."

Colombo went on to say that he told the Claimant that if there was any doubt about his assignment to Gang 8857 he should contact the Manager of Track Maintenance, S. R. Haines, immediately. Later on the same day, September 15th, Claimant told Foreman Colombo that he would not be in the next day account of a dental appointment. On page 42 of the Transcript, Colombo testified that he advised the Claimant he needed to secure permission from Manager Haines to be off on September 16th. The record is clear that the Claimant made no effort to contact Manager Haines to request time off nor did he call him to ask him to verify his assignment to Gang 8857. Manager Haines also testified on page 19 of the Transcript that the Claimant called him regarding his absence as follows:

"A "...On the 29th, I did receive a call from Mr. Turner, on the cell phone. He told me he did not have my number, and that's why he hadn't called. I informed him that he was aware of my work location. That he could've come in any day to talk to me personally. And he says, "Yeah, he was aware where I was at." And I informed him that he hadn't been at work and it wasn't authorized, and he told me that he had spoken to the Union and they told him that he did not have a position in Martinez.

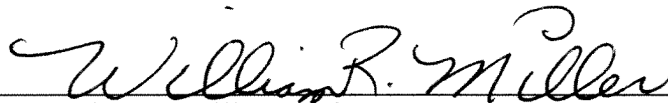
And I informed him that he was on my time rolls and that he was afforded the job, he bid it, and received a job and was on the time roll...."

Manager Haines and Foreman Colombo's testimony was not rebutted. Claimant should have followed his Foreman's advice and directives rather than waiting 14 days to call Manager Haines. It is clear that when the Claimant chose to take off work beginning on September 16th without securing permission he did so at his own peril. Carrier met its burden of proof that he was absent without authority.

The only issue remaining is whether the discipline was appropriate. At the time of the dispute Claimant was a short term employee who chose not to follow his immediate superior's advice and instructions. 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: Nov 23, 2010