

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7426
AWARD NO. 22, (Case No. 22)**

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

vs

UNION PACIFIC RAILROAD COMPANY (SPWL)

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
J. T. Wayne, Carrier Member

Hearing Date: June 5, 2013

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

- 1. The discipline (dismissal) imposed on Mr. X. Ybarra by letter dated August 19, 2011 in connection with allegations that he was absent without authority from March 31, 2011 up to his dismissal was without just and sufficient cause, unwarranted and in violation of the Agreement (System File RC-1145S/1558595D).**
- 2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Ybarra's record with seniority and other benefits unimpaired and compensate him for all wage loss suffered as a result of the Carrier's unjust and improper discipline."**

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.

The facts indicate that at the time of the incident Claimant was on a Medical Leave of Absence (MLOA). The MLOA was scheduled to expire on March 31, 2011, and after the Claimant did not return to work on March 31st, the Carrier sent two certified letters to the Claimant requesting that he provide additional information regarding his medical condition. The documentation was requested for the Carrier's Health Service Department to substantiate the Claimant's continued absence after his MLOA had expired. The two aforementioned certified letters were mailed on April 8, 2011 and May 2, 2011, to the Claimant. There was no response to the first letter and in the second letter the Carrier included a reminder that stated:

"Important Reminder:

We encourage you take this matter seriously and act promptly. Failure to provide this information will be communicated to your supervisor and may result in discipline or termination pursuant to your collective bargaining agreement, including any applicable self-executing termination provisions."

Carrier's letter also included a warning that stated: **"This letter serves as a final reminder."**

The Carrier received no responses from the Claimant. On June 10, 2011, the Carrier chose to terminate the Claimant in accordance with Rule 45 of the Agreement. Subsequently, the Claimant requested a conference in a letter dated June 23, 2011.

On July 8, 2011, Carrier notified Claimant to appear for a formal Investigation on August 10, 2011, concerning in pertinent part the following charge:

"...indicating that you have been absent from your assignment without proper authority from March 31, 2011, to the present, you failed to report for duty and made no effort in trying to contact your manager or foreman."

On August 19, 2011, Claimant was sent a letter regarding the formal Investigation that had been held which stated in pertinent part:

"It has been determined you failed to provide just cause for your continued absence from assignment without authority. Therefore, you will be considered as having resigned and your name removed from the roster per Rule 45 (h) of the Agreement..."

It is the position of the Organization that the Carrier did not meet its burden of proof. It argued that when the Claimant received the Carrier's "show cause" letters for a continuance of his MLOA he took those notices to his physician. He thought his doctor would forward the necessary information to the Carrier confirming his need to extend the MLOA. Unfortunately Claimant's physician did not respond to those letters, however, the Organization argued that the requested medical documentation was sent by fax to the HMS on April 14, 2011, therefore, the Claimant complied with the Carrier's instructions. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the Claimant received two letters from the Health Services Department reminding him that his return to service date was approaching and the Carrier needed critical information regarding his physical status and his intent to return to service, along with medical information to substantiate the Claimant's fitness for duty or additional leave out of medical necessity. According to the Carrier it properly applied Rule 45(h) when the Claimant failed to respond with the proper documentation, and failed to return to work on March 31, 2011, at which time he was placed in AWOL status. It closed by stating that its determination that the Claimant had resigned was proper and it asked that the claim remain denied.

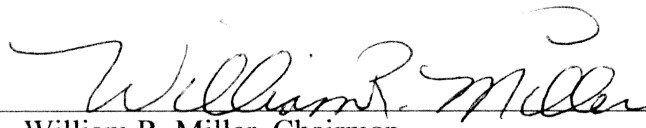
The Board has thoroughly reviewed the transcript and record of evidence and it is determined that the Investigation and appeal process met the guidelines of the Agreement and Claimant was afforded all of his "due process" Agreement rights.

Review of the record fails to show that the Claimant contacted medical services after being sent two "show cause" letters for a continuance of his MLOA. The Organization asserted that the Claimant provided the "show cause" letters to his physician and the physician failed to forward the requested information in a timely manner. Assuming the Claimant forwarded those letters to his physician, that did not relieve the Claimant of his responsibility to ensure that the required information was sent to the Carrier, especially considering that the Claimant was sent a second "show cause" letter when the requested information was not provided the Carrier's Health Service Department. Substantial evidence was adduced at the Investigation that the Carrier did not receive the requested information from the Claimant in a timely manner and that Claimant should have been more responsible in making sure that his doctor had sent the required information to the Health Services Department.

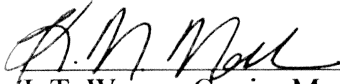
The only issue remaining is whether the termination in accordance with Rule 45(h) of the Agreement should remain intact. At the time of the incident Claimant had 16 plus years of service with a good work record. The Board does not excuse the Claimant's failure to be diligent in making sure that his physician forwarded the requested information for the continuation of his MLOA, however, after review of the record the Board has determined that the discipline was excessive. Therefore, the Board finds and holds that dismissal will be reduced to a lengthy suspension. Claimant is to be reinstated to service with seniority intact and all other rights unimpaired, with no back-pay after he passes all required medical fitness examinations as the record is unclear as to when or if he was fit for service.

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 by the parties.



William R. Miller, Chairman



J. T. Wayne, Carrier Member



K. D. Evanski, Employee Member

Award Date: 8.5.13