

Public Law Board No. 7633

PARTIES) **Brotherhood of Maintenance of Way Employees Division**
) **– IBT Rail Conference**
TO)
) **and**
DISPUTE)
)
) **Union Pacific Railroad Company (former Missouri Pacific**
) **Railroad Company)**

Members of Board:

Jeanne M. Vonhof, Chairman and Neutral Member
Chris Bogenreif, Carrier Member
John Schlismann, Employee Member

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

1. The Carrier’s discipline (second violation of Union Pacific Railroad’s Attendance Policy) imposed upon Mr. M. Hogan, by letter dated June 1, 2021, in connection with allegations that he failed to protect his employment on a full time basis through frequent or pattern layoffs and/or failure to report for service between March 18, 2021 and March 18, 2021 was excessive, arbitrary, disparate; without the Carrier having met its burden of proof; and in violation of the Agreement (System File UP509KL21/1759021 MPR).
2. As a consequence of the violation referred to in Part 1 above, Claimant M. Hogan shall now have the:

‘... unexcused absence be expunged from his personal record. Mr. Hogan be reinstated from his medical suspension as he was in the process of filling (sic) for his FMLA and compensated for all lost wages, strait (sic) time, and overtime, beginning with the day he was removed from service and ending with his reinstatement to service excluding all outside wages. Mr. Hogan be compensated for

all losses related to the loss of fringe benefits that can result from dismissal from service, i.e., Health benefits for himself and his dependents, Vacation benefits., Personal Leave benefits and all other benefits not specifically enumerated herein that are collectively bargained for his (sic) as an employee of the Union Pacific Railroad and a member of the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters, Mr. Hogan to be reimbursed for all losses related to personal property that he has now which may be taken from him and his family because his income has been take from him. Such losses can be his home, his vehicles, his land and/or properties, and any other personal items that mat (sic) be garnished from him for lack of income related to his dismissal from service.

In short, we herein make the demand that Mr. Hogan be made. (sic) “whole” for all losses related to his suspension from service.

As a remedy for this violation, the suspension should be set aside, and the claimant shall be made whole for all financial and benefit losses because of the violation. Any benefit lost including vacation and health insurance benefits shall be restored. Restitution for financial losses because of the violation include all strait (sic) time, overtime, and loss of holiday pay for time Mr. Hogan EID (0441636) was held out of service and that Mr. Hogan be returned from medical suspension immediately.’ (Employes’ Exhibit ‘A-2).”

Findings of the Board

The Board upon consideration of the entire record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended and that the Board has jurisdiction over this dispute.

The Claimant, Marcus Hogan, has ten and a half years of service with the Carrier. He was provided with notice that he was being investigated to determine his responsibility for failing to protect his employment on a full-time basis through frequent or pattern layoffs and/or an alleged unexcused absence from work on March 18, 2021. The investigation was held on May 17, 2021, and, on June 1, 2021, the Claimant was assessed a “Second Offense Attendance Violation” per the Carrier’s Attendance Policy.

The Claimant had attendance problems which led to him being given an attendance alert (warning) on February 9, 2021, and a First Offense Attendance Violation on March 8, 2021, for which he accepted a waiver. He failed to come to work on time on March 18, 2021, sending a text message to his Supervisor Richard Whitaker at 0713, thirteen minutes after his shift began, stating, "Hey I had a spell last night what you want me to do." The Supervisor responded that he was on a conference call and that the Claimant should "just come tomorrow." The Claimant responded, "OK sorry the meds have been helping just didn't stop it last night." The Supervisor testified that employees are supposed to notify the Company at least an hour before their shift if they cannot come in. In support of this standard, he cited the section of the Carrier's Attendance Policy which states that employees bear the responsibility to notify their Managers in advance of an absence or retain documentation related to their absence.

Whitaker said that he had spoken to the Claimant in March about the Carrier's expectations that he be at work and asked whether he needed help through EAP. He said that he also had a discussion with the Claimant about his hands. He could not recall when that conversation occurred but said that it was "later on ... when all the events started going on." He stated that in April, after the absence at issue here, he discussed both the EAP and FMLA with the Claimant. The Supervisor stated that the Claimant provided no medical documentation to back up his illness on March 18, but had provided medical documentation for one of his earlier absences.

The Claimant testified that he had been having problems with his hands for a few years but it had recently become dramatically worse. He did not see doctors for his condition until around the time of the attendance violations imposed here. The Claimant testified that he provided a medical letter to Whitaker on March 11, which is not included in the record, and testified that Whitaker told him that the doctor should have placed him on some kind of restriction. Claimant had a nerve study performed on his hands on March 19. He applied for FMLA leave on April 7. He said that he did not understand the purpose of FMLA before this date, believing that it covered only the illnesses of family members or long-term disability.

The Claimant acknowledged that when he signed the waiver in early March, he had a discussion with Management and his Organization representative regarding his medical issues and the availability of FMLA. He said that a doctor provided him with nerve pills at the time. According to the Claimant, they worked for only about a week, and then the pain woke him up during the night of March 18. He said that eventually he fell back asleep but did not awaken naturally to call into work on time. He testified that he had vacation available on March 18, but could not recall whether he requested the day as vacation. He filed for FMLA about two and a half weeks after the absence in issue here.

The Union introduced evidence that the Claimant had made a complaint about Whitaker through the Company's Value Line in November 2020. The claim was resolved in February 2021, according to the Claimant, with Whitaker being admonished to watch how he talks to employees. The Claimant testified that he believed Whitaker's approach to his attendance issues changed at that time because Whitaker began charging him with attendance violations soon after the Company addressed his complaint. Whitaker testified that he did not know about a hotline call and did not retaliate against the Claimant. He said that he took action on the Claimant's absenteeism after other employees asked him why he was allowing the Claimant so many absences.

The Organization argues that serious procedural errors were made in this case. According to the Organization, the Carrier postponed the hearing unilaterally and kept objecting to every date suggested by the Organization. In addition, the Organization argues that Supervisor Whitaker retaliated against the Claimant because the Claimant had filed a complaint about his conduct on the Company hotline. The Organization argues further that the Supervisor knew about the Claimant's disability and therefore, should have excused his absence, under the language of the Employer's own attendance rule.

The Board concludes that there are no procedural issues which call for the claim to be sustained on that basis. There is not sufficient evidence that the problems in scheduling were intentional attempts by the Carrier to postpone the hearing improperly. In addition, there is not sufficient evidence that Supervisor Whitaker retaliated against the Claimant by subjecting him to discipline. There is no question that the Claimant was having attendance problems, and he accepted responsibility and took a waiver for the First Attendance Violation.

There is substantial evidence in the record that the Claimant did not come to work on March 18, 2021. There is no medical documentation in the record showing that the Claimant was disabled on March 18, or that he had ever submitted medical documentation regarding the condition of his hands before March 18, 2021. The Organization argues that he must have been disabled on March 18 because the Carrier placed him on leave from service pending further medical review as soon as he submitted his FMLA form on April 7. However, he did not seek FMLA leave after his warning and his First Attendance Violation, but rather waited until he violated the attendance policy again before filling out the FMLA application. He is trained on FMLA and he was specifically told in early March about FMLA availability for his hand issues.

In addition, the Claimant admitted that he did not call in to say that he would be absent on March 18 until after the shift had already begun. He acknowledged that he allowed himself to wake up naturally, instead of taking other precautions to ensure that he woke up in time to either go to work or call off in a timely manner. Claimant had a responsibility to call in before the shift to report that he would be off that day, even if he were suffering from a disability. When employees are absent without calling in before the shift begins it creates special problems for the Employer because the Employer does not know if the employee is planning to come in and is simply late, or is planning to stay away all day, or was planning to come in and had an accident on the way. The uncertainty of the situation makes it difficult for the Carrier to know how to schedule the work that was planned for the Employee on that day.

Therefore, the Board concludes that on this record there is substantial evidence that the Claimant violated the attendance standards. The Claimant did not show sufficient care over his attendance problems, and seeking out FMLA leave, if he needed it, in a timely fashion. Under these circumstances, the penalty of a Second Attendance violation is in accordance with the Carrier's attendance and is not excessive or arbitrary.

Award

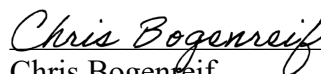
Claim denied.



Jeanne M. Vonhof
Neutral Board Member



John Schlismann
Employee Member



Chris Bogenreif
Carrier Member

Dated: July 11, 2024