

PUBLIC LAW BOARD NO. 7660
AWARD NO. 204

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE

PARTIES
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The removal of Mr. G. Garcia from medical leave of absence status and the termination of his seniority without just cause was unjust, unwarranted and in violation of the Agreement (System File MK-2048U-602/174279 UPS).
2. The Carrier’s refusal to convene a Rule 48(n) unjust treatment hearing regarding Claimant G. Garcia’s removal from medical leave status was arbitrary, unwarranted and in violation of the Agreement.
3. As a consequence of the violations referred to in Parts 1 and/or 2 above, the Carrier shall provide Claimant G. Garcia ‘... compensation for all medical cost that has been acquired since the Carrier’s arbitrary elimination of his medical benefits that he is entitled to by virtue of the current agreement. We also request that the Carrier reinstate Claimant back to a Medical Leave of Absence status from his current terminated status which will activate Claimant’s health benefits. Payment should be calculated by observing all rules under the current agreement. Payment shall be no less than the hours identified herein. This is compensation that Claimant would have received absent the violation of our Collective Bargaining Agreement.’ (Employees’ Exhibit A-1).”

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant has been employed by the Carrier for 24 years and was working as a Machine Operator when he voluntarily enrolled in EAP in June, 2019, and was placed on MLOA on June 12, 2019. According to the correspondence on the property, Claimant failed to engage with EAP or provide requested documentation, and was notified that his MLOA would expire on August 12, 2019. Claimant did not respond or return to work so the EAP, through the HMS team, sent him a Show Cause letter on September 12, 2019, giving him a deadline of October 3, 2019 to provide relevant information on his condition to EAP. When they heard nothing from Claimant, a second Show Cause letter was sent on December 12, 2019 setting a deadline of January 2, 2020 to provide the requested information. Both letters informed Claimant that his failure to return to service or provide the requested documentation would result in the forfeiture of his seniority under Rule 25(b).

Two additional Show Cause letters were sent to Claimant by the Engineering Department on February 4 and 27, 2020, and when he failed to respond, Carrier issued him a certified letter dated April 7, 2020 informing him that he had forfeited his seniority under Rule 25(b) since he had not returned from his LOA or provided documentation extending his leave. The letter was received on April 17. The record contains a series of emails between the Organization and a Carrier representative beginning on April 21 and going through early August concerning Claimant's situation. By email dated August 11,

2020 the Organization requested a unjust treatment conference under Rule 48(n). Carrier denied the request as untimely.

The Organization filed a claim on September 15, 2020 alleging that Claimant was unjustly removed from his MLOA and denied the requested conference, and that Carrier failed to grant him an opportunity to provide documents to justify his absence. Carrier's November 13, 2020 denial indicates that the Organization's August 11 request for an unjust treatment hearing was not made within 20 calendar days of his April 7 forfeiture of seniority, and that he was giving multiple opportunities over an 8 or 9 month period to respond to 4 Show Cause letters and provide requested documentation and failed to do so.

On November 14, 2020 the Organization filed its appeal, indicating that it requested the unjust treatment hearing within 20 days of Carrier's final email indicating that it intended to uphold the dismissal, after months of good faith dealings to attempt to resolve the situation. The appeal made reference to two doctor's notes (February 11, 2020 and August 29, 2019) that were sent to Carrier on February 19, 2020, and a copy of Claimant's statement sent to Carrier on June 28, 2020 indicating that during the time of his absence he was undergoing medical treatment, as confirmed by his doctor's notes starting on August 20, 2019, and that since he complied with the request to submit documents in February, he did not think he needed to further respond to other letters. Attached to the appeal is a doctor's note dated April 27, 2020, indicating that Claimant has a debilitating ankle injury, with limited ability to stand or walk, that he is wearing a brace and undergoing treatment, and that he is not released to return to work, as he may need surgery. Another note from Claimant's family doctor dated November 25, 2019 was also included with the appeal.

Carrier's January 13, 2021 denial reasserts its prior position and the fact that no documents were received in response to its letters. The Organization's February 18, 2021 appeal, after conference, includes Claimant's June 25, 2020 letter to Carrier and medical information supporting his absence and MLOA. Carrier's August 24, 2021 response repeats that Claimant failed to timely act, and indicates that nothing included in the Organization's appeal proves that Claimant actually sent in the letters forwarded by it. This denial includes a statement from Carrier official Derek Hinds indicating that he reviewed the file, but that the documents sent in the Organization's June 28, 2021 email do not cover the time period in question. He lists the only documents received by Carrier, which did not include the medical notes sent by the Organization.

The Organization argues that Claimant's seniority was improperly terminated and that this action was unjustified, especially considering the fact that Claimant had over 20 years of service. It relies upon the fact that Claimant faxed a letter from his doctor on February 11, 2020 following receipt of the January 30 notice, and did not get any other notices sent by Carrier. The Organization contends that while it was engaging in good faith discussions with Carrier attempting to resolve the issue there was no need to request an unjust treatment hearing, and that once those discussions came to an end without resolution, the time clock under Rule 48(n) commenced, it met the required 20 calendar day period for its request, and Carrier's refusal to hold the hearing violates the Agreement. The Organization requests that Claimant be placed back on MLOA and be compensated for all medical bills that were not covered as a result of his loss of seniority.

Carrier contends that Claimant failed to respond to either his EAP treatment obligations, or any of 4 Show Cause letters spanning over 7 months, which provided him an extended opportunity to comply with providing documentation to extend his LOA, if necessary. It asserts that the Organization failed to sustain its burden of proving that the application of Rule 25 (b) in these circumstances was inappropriate or in violation of the

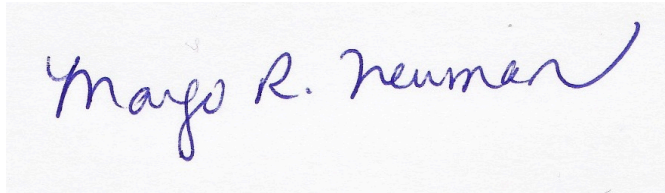
Agreement. Carrier argues that the Organization's August 11, 2020 request for an unjust treatment hearing was untimely as Rule 48(n) requires a request within 20 calendar days from the event complained of, which is agreed to be the April 7, 2020 removal of Claimant's seniority. It asserts that the remedy requested was improper, and that, while it is unfortunate, Claimant is the one responsible for the forfeiture of his seniority.

A careful review of the record convinces the Board that, while the Organization has failed to meet its burden of proving that it timely requested an unjust treatment hearing under Rule 48(n), the reason for the delay was its apparent effort to resolve the matter with Carrier directly. The record is conflicting about whether, and when, Claimant actually submitted medical documentation that was received by Carrier in support of an extension of his MLOA, but it is clear that Claimant was under medical care throughout this period, and, from reading his doctor's April 27, 2020 note, unable to return to work due to a debilitating ankle injury. Claimant himself communicated directly with Carrier at the end of June, explaining his situation and claiming to have sent in medical records earlier in the year.

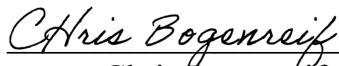
Based upon the particular facts of this case, and in light of Claimant's 24 years of service with Carrier, the Board is of the opinion that the forfeiture of his seniority and removal from MLOA, while primarily the fault of Claimant's inaction, should be rescinded, and he should be returned to the status of an employee on an approved MLOA. Claimant shall be returned to such status with full seniority and medical benefits. His out of pocket medical expenses shall be submitted to determine if the insurance company can make any reimbursement. In the event Claimant seeks to return to active service, he must submit the required documentation to undergo a FFD evaluation. Otherwise, he shall continue to provide Carrier medical documentation supporting the extension of his MLOA.

AWARD:

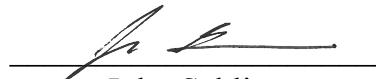
The claim is sustained in accordance with the Findings. The Carrier is ordered to make the Award effective on or before 30 days following the date of the Award.



Margo R. Newman
Neutral Chairperson



Chris Bogenreif
Carrier Member



John Schlismann
Employee Member

Dated: February 7, 2023

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