

PUBLIC LAW BOARD NO. 7660  
CASE NO. 51

BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES DIVISION - IBT RAIL CONFERENCE

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY  
[Former Southern Pacific Transportation Company (Western Lines)]

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The termination of Mr. R. Watkins’ seniority for alleged violation of Rule 45(h) by letter dated March 10, 2015 in connection with allegedly being absent from his assignment without authority starting March 17, 2014 was unjust, unwarranted and based on unproven charges and in violation of the Agreement (System File RC-1545S-702/1624956 SPW).
2. As a consequence of the violation referred to in Part 1 above, we request that ‘...Claimant Watkins be immediately reinstated to service of the carrier to his former position with seniority and all other rights restored, unimpaired and that the letter of dismissal be expunged from his personal record. In addition, Claimant Watkins shall be made whole and compensated for net wages lost, both straight time and overtime, and benefit loss suffered by him since his wrongful and unwarranted removal from service and subsequent dismissal.’”

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, a 7 year employee, was displaced from his Laborer position on Gang 8895 on March 19, 2014. Having lost his right to displace, he was in furlough status and reviewed iTrack for new positions he could bid on. On May 23, 2014 he was awarded a position as a Backhoe Operator on Gang 8894, but was informed by his Manager that he needed to get an eye test and medical qualifications. Claimant did so through LHI, the company handling testing and documentation, by June 3, 2014. As developed in the record of investigation, Claimant was under the impression that he had to wait until he was called back to work by his Manager after receiving the testing paperwork, and his Manager believed that he should have reported to work after the testing was completed. They apparently played telephone tag, but had no direct communication concerning the completion of testing or reporting back to work. Since Claimant was not called back, he assumed he was still on furlough, and continued to make his insurance monthly payments to keep his benefits. He reviewed iTrack to see if he could bid on other jobs, but was unable to do so until October, when he bid on a Grinder position to commence October 24, but did not get the job.

Manager Brennan testified that he did not know why Claimant did not show up for work after June 3, and did not call him to find out why he had an extended absence. He stated that he assumed that Claimant was on FMLA leave, but did not check into that until October, when he discovered that Claimant was not in that status. He issued a letter on October 27, 2014 terminating Claimant under Rule 45(h) for his absence without authorization since March 17, 2014. That Rule provides, in pertinent part:

## RULE 45 - HEARINGS

(h) ABSENT WITHOUT AUTHORITY - To terminate the employment of an employee who is absent from duty without authority, the company will address such employee in writing at his last known address, by Registered or Certified Mail, return receipt requested, notifying him that his seniority and employment have been terminated due to his being absent without proper authority and that he may within 30 days, if he so desires, request that he be given an investigation under the provisions of this rule.

The Organization requested a formal investigation on November 24, 2014. It sent various emails to Labor Relations concerning the status of scheduling such investigation, and a Notice of Investigation was sent out on February 20, 2015, with the Investigation being held on February 27, 2015. Claimant was sent a Notification of Discipline Assessed on March 10, 2015, also indicating that Claimant had been absent without authority since March 17, 2015 and upholding the termination of his seniority under Rule 45(h).

The Organization contends that Carrier unreasonably delayed the holding of the Investigation until 4 months after terminating Claimant without explanation, denying Claimant due process. It asserts that there was a miscommunication between Claimant and his Manager about reporting to work after completing his testing, and no effort was made to clarify why Claimant continued to remain off the job, assuming he was still on furlough and acting consistently with that belief. The Organization argues that Claimant's actions in bidding on positions and continuing his insurance payments show that he did not intend to abandon his job, which is what Rule 45(h) was meant to address.

Carrier argues that Claimant was properly terminated under self-executing Rule 45(h) for absence without authorization since June 4, 2014. It points out that Claimant never reported to his assigned position after he finished his required testing, as directed by his Manager, and made no effort to clarify the instructions or protect his assignment, unreasonably remaining at home for months. Carrier asserts that it complied with Rule 45 by holding the hearing within 20 days of the Notice of Investigation.

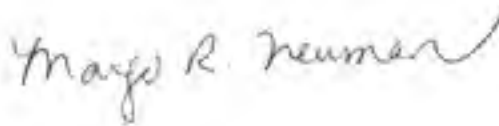
On the basis of the entire record, the Board concludes that, while the Agreement does not require Carrier to hold the investigation within any specific time period of the action giving rise to it, in this case Carrier waited over 3 months to initiate the investigation after it was requested by the Organization, without any explanation for the delay. This is not a case where the Organization sat on its hands, as it repeatedly made contact with Labor Relations attempting to schedule a hearing. While Carrier has latitude under the Agreement, the Board finds that this case represents excessive delay in initiating the investigation without any asserted reason.

Additionally, the evidence establishes that this is not a case where Claimant walked away from his job or intentionally abandoned his position. He was bumped and held on his position until March 19, 2014, ran out of time to exercise his bumping rights, and was in furlough status until successfully bidding on the Backhoe Operator position on May 23, 2014. He completed the required testing as instructed by his Manager. It is clear that, between the miscommunication of the instructions as to whether to report to work after the testing or to wait to be called after receipt of the paperwork, the telephone tag between Claimant and his Manager, the failure of the Manager to inquire why Claimant had not returned to work for a lengthy period of time based upon an inaccurate assumption he must have been on FMLA leave, and Claimant's continued payment of his insurance premiums as if he was still on furlough, this is not a case where the employee intended to abandon his job and understood that he was absent without authorization.

Since Claimant assumed he remained on furlough and made minimal efforts to reach management for clarification, the Board is of the opinion that the misunderstanding was perpetuated by the inaction of both parties. Therefore, we conclude that the letter of termination, sent after Claimant had bid on another position, was improperly issued, and Claimant should be returned to work. However, we deem no back pay is appropriate under the circumstances of this case.

AWARD:

The claim is sustained in accordance with the Findings.



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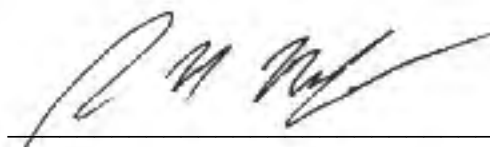
Margo R. Newman  
Neutral Chairperson

Dated: 2/12/2018



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K. N. Novak  
Carrier Member



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Andrew Mulford  
Employee Member