

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 6402
AWARD NO. 131, (Case No. 152)**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

VS

UNION PACIFIC RAILROAD COMPANY

**William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member**

Hearing Date: September 23, 2009

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's decision to impose a Level 5 discipline and dismiss Claimant Jamie Rowley from service of the Carrier for the alleged violation of Union Pacific Rule 1.6(3) (Conduct (Insubordination)), is harsh, unjust, unwarranted and in direct violation of the Agreement (System File MW-08-101/1507681D MPR).
2. As a consequence of the violation outlined in Part (1) above, we request that the Claimant be reinstated to service of the Carrier and be made whole as outlined in Rule 21 (f) of the Agreement."

FINDINGS:

Public Law Board No. 6402, 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 June 27, 2008, Carrier notified Claimant to appear for a formal Investigation on July 7, 2008, concerning the following charge:

"Please report to the La Quinta Inn & Suites, at 24868 I-45 North Spring, Texas, on Monday, July 7, 2008 at 1300 hours, for investigation and hearing on

charges to develop the facts and place responsibility, if any, that while employed as a Trackman, on Gang No. 9169, at Mexia, Texas, at approximately 1:00 p.m., on June 23, 2008, you allegedly willfully left your place of assignment without authority.

These allegations, if substantiated, would constitute a violation of Rule 1.6(3) (Conduct (Insubordinate)), as contained in the General Code of Operating Rules, effective April 3, 2005. Please be advised that if you are found to be in violation of this alleged charge, that the discipline assessment may be a Level 5 and may result in your dismissal."

On July 22, 2008, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the Organization's position that the Carrier erred in its dismissal of the Claimant. It argued that at the time of the incident Claimant was regularly assigned as a Trackman on System Gang No. 9169, temporarily headquartered at Mexia, Texas, which is approximately three hours from his residence in Alto, Texas. The Claimant and his twin brother Jessie, traveled to and from work together because they both worked on the same system gang, shared a hotel room while working on the road and shared the same residence. According to it, a few days prior to June 23, 2008, the Claimant had been feeling ill and despite taking some non-prescription drugs, he continued to feel poorly. On June 23rd while on the job Claimant experienced escalated discomfort/illness and he informed his brother that he needed to leave work and visit his personal physician. Both brothers were on a work bus at the time preparing to go to a new work site, when the Claimant's brother asked the bus driver to let them out at their truck. The brothers exited the bus and Claimant's brother then proceeded to take him to see his personal physician.

The Organization further argued that the Claimant's brother attempted to contact their immediate Supervisor, but because neither brother had Assistant Foreman R. Richard's contact information, they instead contacted Foreman J. Scott (who was on vacation) and advised him of the situation which they assumed he would handle in the appropriate manner. It further explained that Claimant was not able to see his doctor on that date because the doctor's office was closed, so he went home and rested and saw the doctor the following day when he was given a shot and a prescription of antibiotics. It further argued that the Carrier failed to provide the Claimant with a fair and impartial Hearing as it alleged that all of the witnesses met in the hearing room prior to the Hearing to coordinate their stories and that Claimant was required to stand at the Investigation account of severe pain because he could not sit for long periods of time. It concluded that based upon the unfairness of the Hearing and the Carrier's inability to meet its burden of proof the discipline should be set aside and the Claim be sustained as presented.

It is the position of the Carrier that Claimant was afforded a fair and impartial Investigation and contrary to the Organization's arguments there were no procedural violations which impinged upon the fairness of the Hearing. It further argued that discipline assessed was appropriate and that it offered to

reduce the dismissal to a suspension which it believed was lenient, but that offer was rejected by the Claimant at his own peril. Therefore, it concluded that the discipline was proper and asked that it not be disturbed.

The Board has thoroughly reviewed the record and first notes that the instant case is a companion case to P.L.B. No. 6402, Case No. 151, involving the Claimant's brother which is addressed by this Board in Award No. 130.

The Board will next discuss the Organization's argument that the Claimant was denied a fair and impartial Hearing. The Organization alleged that Carrier witnesses met prior to the Hearing to discuss their respective testimonies. Review of the transcript reveals that during the Hearing the Organization questioned each of those witnesses as to whether they had been coached or had gotten together to coordinate their testimony. All of the witnesses unequivocally stated NO and a careful comparison of their testimonies shows no effort upon their part to "tell the same story". The Organization also alleged that the Claimant had to stand during the Investigation account of severe pain because he was not able to sit for a lengthy period of time. There is nothing in the transcript to verify the allegation that Claimant was in any pain or that he was forced to stand during the proceedings. The Hearing lasted less than one and one half hours, not counting at least one recess. Contrary to the Organization's suggestion there is no proof that Claimant was hurting or that he was required to "sit for a long period of time" which forced him to stand. All of the Organization's procedural arguments are rejected as it is clear that the Claimant was afforded a fair and impartial Investigation.

Turning to the merits, the testimony developed at the Hearing proves that on June 23, 2008, the Claimant left his work site accompanied by his brother without advising anyone of his departure or seeking permission to leave. The Claimant's reason for not obtaining permission or advising anyone was because he was ill and he did not have either his Supervisor's or Manager's phone numbers. Supervisor Johnson testified (and it was not refuted) that the bus which Claimant was on had a radio and his immediate Supervisor had a hand held radio. Additionally, he stated that the phone numbers for his Assistant Foreman, Foreman and Manager were readily available as part of the Emergency Response Plan packet that was in the bus. Claimant had the option of using any of the aforementioned means for communication with his superiors and at the very least he could have told the bus driver of his plans to leave work or that he was ill. Bus Driver L. Carter testified that neither the Claimant nor his brother ever mentioned that Claimant was ill. The only thing they told him is they wanted to get off the bus so that they could get something out of their truck. He further testified that Supervisor Johnson was in the area and available by radio if either the Claimant or his brother wanted to contact him. On page 40 of the transcript Claimant was questioned as to whether he could have called his immediate Supervisor by radio and he testified as follows:

"Q Okay, were you around any of those radios where you could have said hey, call my supervisor so that he can-

A Yes I was.

Q -get hold of him?

A Yes I was.

With that testimony Claimant acknowledged that he had the means to advise his immediate Supervisor of his intention to leave work. On page 46 of the transcript Claimant chose to make a closing statement wherein he stated in pertinent part the following:

"Yes sir, I'd like to just extend an apology out to Dee Johnson and all the Chairmen and everybody who's gonna be reviewing this. You know I- I know I've done wrong..."

There is no doubt that the Claimant understood that the Carrier had proven that he had abandoned his assignment without proper authority and he was guilty as charged.

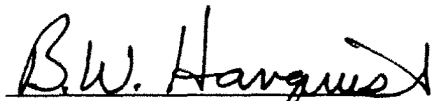
The only issue remaining is whether the dismissal was appropriate. At the time of the incident Claimant was a relatively short term employee with a little over three years of service. On November 14 and again on December 17, 2008, Claimant was offered the opportunity to return to service on a last chance leniency basis. Claimant purportedly rejected both offers account of its stipulations, unfortunately for him that choice was not wise. The proof of job abandonment was of a serious nature and the Board finds no reason for mitigation and holds that the dismissal was not arbitrary, excessive or capricious. The discipline will not be set aside.

AWARD

Claim denied.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: 12/9/09