

BEFORE PUBLIC LAW BOARD NO. 6915

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
CN – WISCONSIN CENTRAL RAILROAD**

Case No. 40

STATEMENT OF CLAIM:

1. The dismissal of Mr. Jacob Wingo for violation of Rule 31J of the Agreement in connection with being absent without permission for three (3) consecutive work days is based on unproven charges, unjust, unwarranted and in violation of the Agreement (Carrier's File WC-BMWED-2009-00017).
2. As a consequence of the violation referred to in Part 1 above, Mr. Wingo shall be returned to service immediately with seniority and all other rights unimpaired and compensated for eight (8) hours at the straight time rate for each work day beginning on October 10, 2008 and continuing.

FINDINGS:

Following his tour of duty on September 5, 2008, the Claimant was displaced from his trackman position on RS73 Rail Gang. The Claimant thereafter did not make a physical displacement within seven days. By letter dated September 22, 2008, the Carrier notified the Claimant that because he had been absent without authority for three consecutive workdays, he was considered as resigned from the Carrier's employment. The Organization thereafter filed a claim on the Claimant's behalf, contending that the Carrier had violated the parties' Agreement by improperly severing the Claimant's employment relationship and depriving the Claimant of work opportunity beginning on October 10, 2008. The Carrier denied the claim.

The Organization initially contends that Rule 11 of the Agreement gives a displaced employee the right to displace a junior employee, but it does not require the

employee to do so. The Organization asserts that employees who do not exercise this right are governed by Rule 11F, which provides that such employees will be furloughed, subject to recall in accordance with Rule 12. The Organization argues that in the instant case, the Claimant simply elected not to exercise seniority pursuant to Rule 11A, and he entered furlough status under Rule 11F. The Organization emphasizes that the Claimant was not absent without authority for three consecutive workdays, and the Carrier's decision to dismiss him is in violation of the Agreement.

Addressing the Carrier's position, the Organization submits that failing to exercise seniority within seven days places an employee in furlough status, but it does not terminate the employee's employment relationship. The Organization further points out that the fact that the employee is "within his probationary period" when he elects not to exercise seniority to another position does not grant the Carrier any right to sever an employment relationship.

Pointing to a number of Board Awards, the Organization insists that agreements must be applied as written. The Organization suggests that the only conclusion that may be reached is that the Claimant was furloughed and not absent without permission. The Organization therefore maintains that the Carrier's decision to dismiss the Claimant for alleged violation of Rule 31J is based on unproven charges and cannot stand.

The Organization goes on to emphasize that the Carrier's actions deprived the Claimant of any opportunity to exercise his seniority through bulletin and assignment. The Organization submits that the remedy requested on the Claimant's behalf is that provided for by Rule 31I of the Agreement. The Organization suggests that the Carrier

has ignored the fact that its decision to dismiss the Claimant has deprived him of work opportunity beginning on October 10, 2008, and continuing.

The Organization emphasizes that it has not requested any compensation for the Claimant while he was in furlough status, and the requested compensation is for the loss of work opportunity caused by the Claimant's improper dismissal, which prevented him from returning to active duty on October 10, 2008, and continuing. Pointing to a number of prior Board Awards, the Organization submits that the requested remedy properly would make the Claimant whole for the lost work opportunity and unwarranted dismissal. The Organization asserts that there should be no doubt that the Claimant is entitled to made whole for his entire loss due to the Agreement violation that occurred when the Carrier invoked Rule 31J as a means to improperly dismiss the Claimant for being absent without permission for three consecutive work days.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the issue in this matter is not disciplinary in nature, so the Organization bears the burden of proving that the Agreement was violated. The Carrier asserts that the Organization has failed to prove that any violation has occurred. The Organization has failed to provide any evidence to substantiate its accusations or justify its requested remedy.

The Carrier argues that the Organization has not provided any proof that the Carrier improperly applied Rule 31J of the Agreement. The Carrier submits that the Organization has attempted to improperly suggest that the Claimant was "dismissed,"

resulting from some unexplained disciplinary function. The Carrier insists that the explicit language of Rule 31J is a self-executing provision under which the Claimant severed his service with the Carrier as a result of his own actions/inactions and of his own volition.

The Carrier emphasizes that the Claimant allowed himself to be absent without authority for more than seventeen days after he was displaced. During this period of time, the Claimant made no attempt to contact the Carrier to advise that he had opted for furlough status, or to inquire about what other positions he could hold. The Carrier points out that it is obvious that the Claimant had no intention of trying to secure another position and that he had no desire to inform the Carrier of his intentions. The Carrier contends that when employees are displaced or their positions are abolished, employees are sent a form to be completed that informs the work force coordinator of their intentions. The Carrier asserts that the Claimant did not respond with the form to apprise anyone of his intentions. The Carrier also argues that at the time he was displaced, there were positions to which the Claimant could have exercised seniority.

The Carrier goes on to maintain that even if the Organization had been able to refute the fact that the Claimant's own actions/inactions severed his employment relationship, the Carrier has the unequivocal right under Rule 31A to terminate the employment relationship of any employee, with or without just cause, at any time within ninety days from the date an employee first is employed. If the Board is persuaded that the Claimant did not sever his own employment, the Carrier was well within its rights to sever that employment under Rule 31A, especially in light of the Claimant's obvious

failure to keep the Carrier informed as to whether he was going to work or opt for furlough.

The Carrier submits that the Organization has not advance any proof whatsoever that the Carrier violated Rule 31J of the Agreement. The Carrier reiterates that this provision is self-executing, and it argues that numerous Awards have recognized and confirmed the intended operation of such rules. The Carrier insists that the instant claim must be denied because there has been no showing of any rule violation.

The Carrier maintains that by operation of Rule 31J, the Claimant has resigned from employment, and no remedy is prescribed by the Agreement. The Carrier argues that the remedy sought by the Organization therefore is excessive and without Agreement support. The Carrier further points out that any compensation awarded the Claimant must be offset by all compensation that he has earned in other employment. Moreover, if the Claimant “opted” for furlough status, as the Organization has asserted, then the Claimant would have had no earnings while in furlough status. The Carrier argues that a plea for furlough status made in tandem with a claim for lost earnings is absurd.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the record in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of violating 31J of the Agreement, which is a self-executing provision which states the following:

Employees who are absent from work without authority for three (3) consecutive work days will be considered as having resigned from the service and forfeit all seniority without right of investigation.

In this case, there is no question that the Claimant provided no information as to his whereabouts or his intentions between September 5, 2008, and September 22, 2008.

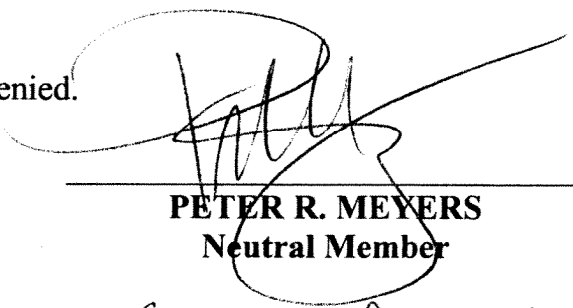
Therefore, the Carrier had every right to remove the Claimant as an employee.

In addition, the record reveals that the Claimant was a probationary employee. Given that status, the Carrier can sever that employment relationship at any time for whatever reason. In this case, the Carrier had no knowledge of the Claimant's whereabouts or what he planned to do over a lengthy period of time. The Claimant, being a probationary employee, could be removed by the Carrier at any time for whatever reason.

For both of the above reasons, this claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: Sept 17, 2010



CARRIER MEMBER

DATED: Sept 17, 2010