

NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25837
Docket Number MW-25467

THIRD DIVISION

Nicholas Duda, Jr., Referee

PARTIES TO DISPUTE: (*Brotherhood of Maintenance of Way Employes*
(*Union Pacific Railroad Company*

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

"(1) The Carrier violated the Agreement when it improperly closed the service record of Mr. R. G. Benavente (System File 6-23-11-14-55).

(2) Mr. R. G. Benavente shall be returned to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: *Claimant worked for several years intermittently for the Carrier until he established a seniority date on the Carrier's Utah Division as an Extra Gang Laborer on April 1, 1981. The month of September, 1982, he was working a Monday through Friday schedule.*

On September 28, 1982, the Carrier's Roadmaster sent Claimant a letter as follows:

This is to advise that the Company's records indicate you have been absent from the service without proper authority for the following five (5) consecutive work day period:

September 16 and 17, 23 and 24 and 27.

Rule 48(k) of the Agreement between the Carrier and the Organization, reads as follows:

'Emploees absenting themselves from their assignments for five (5) consecutive working days without proper authority shall be considered as voluntarily forfeiting their seniority rights and employment relationship, unless justifiable reason is shown as to why proper authority was not obtained'

You are, therefore, considered as having voluntarily forfeited your seniority rights and employment relationship.

On October 5, 1983, Assistant Chairman Larsen sent the Division Engineer a letter concerning the Roadmaster's letter advising that Claimant had voluntarily forfeited his seniority rights. Mr. Larsen protested that the days named in the letter were "not consecutive work days". He also contended that Claimant had been removed "without a fair and impartial hearing . . . in violation of . . . current Agreement, particularly, but not restricted to Agreement Rule 48". After asking that Claimant be reinstated, Mr. Larsen concluded:

If you elect not to reinstate him immediately, please consider this letter a request for a hearing in compliance with Agreement Rule (1). [Claimant] had authority to be absent and did not miss five (5) consecutive working days without authority.

In subsequent letters and conferences, the Carrier declined to reinstate Claimant and refused to have a formal hearing on the basis that Rule 48(k) acted to terminate Claimant's continuous service. The Organization grounds its Claim that Rule 48(k) is inappropriate for several reasons. Carrier, says the Organization, gave Claimant authorization to be absent on September 20-22, days on which the Brotherhood of Locomotive Engineers were on strike; those three days "intervened" or interrupted the period of his absence so he was not absent without proper authority for five consecutive working days. Furthermore says the Organization, Claimant had authorization to be absent on Friday, September 17. Finally, says the Organization, Claimant was entitled to a hearing pursuant to Rule 48(1) to substantiate his Claim that Rule 48(k) was totally inapplicable.

Rule 48 - Discipline and Grievances includes the following:

(a) Except as provided in Paragraphs (l) and (m) of this provision, an employe who has been in service more than sixty (60) calendar days, whose application has not been disapproved, shall not be dismissed or otherwise disciplined until after he has been accorded a fair and impartial hearing. Formal hearing, under this rule, shall be held within thirty (30) calendar days from date of the occurrence to be investigated or from the date the Company has knowledge of the occurrence to be investigated. An employe may, however, accept discipline and waive formal hearing pursuant to Paragraph (l) of this Rule 48.

(k) Employes absenting themselves from their assignments for five (5) consecutive working days without proper authority shall be considered as voluntarily forfeiting their seniority rights and employment relationship, unless justifiable reason is shown as to why proper authority was not obtained.

(l) Employes need not be granted a hearing prior to dismissal in instances where they refuse to work, voluntarily leave the work site without proper authority or involuntarily leave their job as a result of apprehension by civil authorities, willfully engage in violence or deliberately destroy Company property. Such employes may, however, make request for a hearing relative their dismissal, and request therefore must be made within fourteen (14) calendar days from date of removal from service.

(m) The Carrier will be under no obligation to give an employe a formal hearing where the employe's relationship is terminated under other provisions of this Agreement.

By the Roadmaster's letter of September 28, 1982, the Carrier clearly stated its opinion that Claimant had forfeited his seniority rights and employment. Whether that consequence occurred depends on application of the facts to the conditions in the Rule. The provisions of Rule 48(k), if they apply, are self-executing. It is clear and well established that if 48(k) applies, Rule 48(a) and (m) did not require Carrier to give Claimant a formal hearing before concluding that his employment relationship was terminated. (Award Nos. 24255 and 22662.)

On the other hand, Rule 48(k) is the only provision relied on by Carrier; if Rule 48(k) does not apply, then Claimant should not have been terminated. Claimant and the Organization deserved an opportunity to show Rule 48(k) did not apply to his situation because he did not absent himself for five consecutive days without proper authority and/or because he had justifiable reason why proper authority was not obtained. That opportunity was presented in the Claim before this Board. The only evidence submitted by or on behalf of Claimant is a copy of a letter which he wrote on November 2, 1982, to the Organization's General Chairman. That letter was subsequently submitted to the Carrier in the Organization's appeal dated November 22, 1982.

In responding to the Claim on appeal, the Carrier stated:

If Claimant . . . is prepared to furnish the justifiable cause as contemplated in Rule 48(k), and desires the opportunity to do so, he should contact Division Engineer Maxwell requesting a conference.

No request for a conference was made and no further evidence was made available to the Carrier when the dispute was discussed in conference on March 30, 1982. Thus, the only evidence to support Claimant's contentions is contained in his letter dated November 2, 1982. In that letter, Claimant said:

I missed work on September 13 and 14 due to domestic difficulties, On September 14 I called Steve Hunt, the foreman, at his home in Enterprise, Utah (I have enclosed a copy of my phone bill verifying this) and he told me that everything was all right, I should come to work the next day, and the only punishment, if any, would be a letter of demerits. . . . On September 15, Art Speers and myself started driving to Crestline and the timing chain in the car broke in Fillmore, Utah. After trying to make repairs, we took a Greyhound bus back to Salt Lake City late that night. (We have ticket stubs to verify this.) On September 16 we returned to Fillmore and towed the car back to Salt Lake City. On September 17 (Friday), I called the Salt Lake Union Pacific operator and had the call transferred to Caliente, Nevada. In Caliente I spoke to Keith Larsen, Roadmaster's Clerk, and told him the situation with the car why we hadn't made it to work. He told me that it was OK and he would write down that I had called.

According to his statement, Claimant missed work five days in the week of September 13 through 17, 1982. The Carrier was not persuaded that Claimant had proper authority for missing any days in that period and this Board, based on this record, finds no basis to find that the Carrier's conclusion was arbitrary or unreasonable. The statement attributed by Claimant to Foreman Hunt reflects that Hunt thought that Claimant had been improperly absent on the 13th and 14th. Certainly Claimant knew that the Roadmaster's Clerk was not a proper authority to excuse his absence on September 17th. Furthermore, the wording attributed to the Clerk was inadequate to show an excuse, even if the statement had been made by his Supervisor. The days missed because the car allegedly broke a timing chain were without proper authority. Furthermore, there was no showing why the call was not made until September 17 and then was made to a Clerk rather than to a Supervisor.

The only remaining contention of the Organization is that the Claimant was not absent from work for five consecutive working days without proper authority because he did not work September 20 through 22, days on which the Brotherhood of Locomotive Engineers was on strike. Were those days scheduled working days for Claimant? In Claimant's letter to his General Chairman, he contended that Carrier's Supervisor said that work during the strike "was optional and each Employee would have to decide for themselves whether to honor the strike of the brother union". According to Claimant, "this infers to me that the Company gave legal permission" for him to determine that September 20 through 22 were not working days and that is the choice he made, i.e., he took himself off the schedule. If that be true, September 20 through 22 became the same as rest days. Although the Board is not persuaded by Claimant's interpretation, we note that a consequence of that interpretation is that he was absent consecutive workdays in September on September 13-17, 23, 24, and 27, according to his own letter. (The Carrier claimed only September 16, 17, 23, 24 and 27).

Assume September 20 through 22 were work days on which Claimant absented himself. The Carrier denies that it gave him authority to be absent on September 20 through 22 and the Board does not have a reasonable basis in the record to criticize or disagree with that statement. Therefore, under the alternative assumption concerning these days, Claimant was absent an even greater number of working days in the period in question.

Carrier excluded from consideration the days of the Engineer's strike as "reasonable and proper". For reasons discussed above, the Board is not required, in this case, to evaluate Carrier's "exclusion" because the evidence shows that Claimant was absent for five consecutive working days without proper authority, whether September 20 through 22, are regarded as working days or not.

It may be that Carrier did not correctly identify the five consecutive working days Claimant was absent without proper authority. If that had been shown in action challenging dismissal after charges and formal investigation of misconduct, there might be a basis to overturn the dismissal. However, as discussed above, this is not that kind of proceeding.

Carrier's September 28, 1982, letter simply advised of a self-executing application under Rule 48(k). The letter identified the calendar period and dates of improper absence. Claimant had timely and full opportunity to show that the conditions for 48(k) had not occurred in the period ending September 27. He failed to do so; the letter he wrote shows that the conditions for 48(k) did occur in the subject period; therefore, there is no basis for challenging the Carrier's conclusion that Claimant voluntarily forfeited his seniority rights and employment relationship. Inasmuch as he has not shown justifiable reason as to why proper authority was not obtained, Claimant is not entitled to reinstatement.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois this 13th day of January 1986.