

The Third Division consisted of the regular members and in addition Referee Jack Warshaw when award was rendered.

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

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

(1) The Agreement was violated when the Carrier terminated Sectionman K. Martinez' seniority for allegedly being '...absent from the service without proper authority for the following five (5) consecutive workday period: July 29, 30, & 31, August 1, & 2, 1985.' [System File D-45/013-210-48(k)].

(2) The claim as presented by Assistant Chairman on August 16, 1985 to District Engineer J. M. Sundberg, shall be allowed as presented because District Engineer J. M. Sundberg failed to disallow said claim as contractually stipulated within Rule 49(a).

(3) As a consequence of either or both (1) and/or (2) above, the claimant shall be compensated for all time lost during the period August 5, 1985 through December 11, 1985."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimant was absent from duty, without authority, according to the Carrier, on July 29, 30 and 31, August 1 and 2, 1985. On August 5, 1985, the Carrier notified him that he was considered as having voluntarily forfeited his seniority rights and employment in accordance with Agreement Rule 48(k) which provides:

"(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."

The Organization states that the Claimant notified his Foreman it was necessary that he be absent on July 30, 1985, and that the Foreman granted the Claimant permission to be absent. It also states that during the handling of the claim on the property, the Carrier failed to disallow the claim of August 16, 1985, within the time limits for doing so under Agreement Rule 49 which provides, in pertinent part:

".....Should any such claim or grievance be disallowed, the Carrier shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance."

The Carrier states that the Claimant did not have proper authority to be absent on any of the five days involved. The Carrier acknowledges that the Claimant stopped by the depot to speak to his Foreman on Tuesday morning July 30, 1985, indicating that he would be late for work on account of personal business and would report about 10:00 a.m. The Foreman then told the Claimant that he would have to contact the Roadmaster for approval if he was going to miss more work. The Claimant then acknowledged the Foreman's instruction but failed to report for work at 10:00 a.m. or for the remainder of that day or the next three days. Moreover, except for the brief discussion between the Claimant and the Foreman, the Claimant never contacted the Roadmaster or any other Carrier official regarding his absence.

Although the Carrier disallowed the claim, the parties subsequently entered into a formal agreement which reinstated the Claimant to service with all rights restored and without prejudice to either party's position with respect to the issue of wages lost between August 5, 1985, through December 11, 1985.

The Board has repeatedly held that Rule 48(k) of the Agreement is self-executing and does not require invocation of the Disciplinary Investigation Rule. (See Third Division Awards 24255, 24413, 24681, 15837). The Rule provides that the forfeiture provision will not apply if the employee can show he was not at work with proper authority.

The Organization states that the Claimant sought and received authorization from the Foreman to be absent on Tuesday morning, July 30, 1985. It further contends that whether or not the Claimant obtained authority to be absent under Rule 48(k) is immaterial in view of the Claimant's contact with the Foreman to notify the latter of the Claimant's whereabouts and intent and desire to return to work within the five day period. It argues that such

action by the Claimant indicates his interest in protecting his employment and successfully rebuts any inference that his absence should be considered a voluntary forfeiture of his employment relationship and seniority rights.

The record before the Board is conflicting as to what the Claimant and the Foreman actually said and ultimately understood in disposition of the Claimant's request. Even assuming the facts most favorable to the Claimant's position, there is nothing in the record to explain his failure to return to work at 10:00 a.m., Tuesday, July 30, 1985, as he had apparently requested permission to do or of his failure to report for work or to contact Carrier officials thereafter for the remainder of the workweek. Indeed the Claimant's failure to do so is inconsistent with his apparent purpose in seeking permission to report for duty later on July 30, 1985.

But even assuming, arguendo, the facts as presented by the Claimant, his request for permission to be late for duty on July 30, 1985 is not tantamount to receipt of approval from proper authority within the meaning of Rule 48(k). That Rule is not satisfied merely by an indication of the employee's intention or desire to retain his seniority rights and employment relationship without more. The Rule requires that to avoid forfeiture of seniority rights and employment relationship, the employee must have approval to be absent from proper authority or show justifiable reason why such authority was not obtained.

As the Claimant has not demonstrated to the Board's satisfaction that he had the requisite authority to be absent, the Board will not disturb the Carrier's action.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of July 1988.