

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. 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 Carrier violated the Agreement when it improperly terminated B&B Carpenter T. Moreno's seniority without benefit of an investigation (System File 1525/871047).

(2) The Claimant shall be reinstated with seniority, benefits and all other rights unimpaired and he shall be compensated for all wage loss suffered."

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 employes involved in this dispute are respectively carrier and employes 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.

As of September 14, 1987, the Claimant was advised that he could not be released to take a vacation for the period from September 20 to October 10, 1987. The record is unclear whether this vacation period was requested by the Claimant as of September 14 or had actually been previously scheduled for the stated period.

In any event, the Claimant did not report for work Monday, September 21 and thereafter. On September 28, 1987, the Carrier sent the following letter to the Claimant:

"This is to advise that the Company's records indicate you have been absent from service since September 21, 1987, when you took vacation without proper authority.

Rule 48(k) of the agreement between the Brotherhood of Maintenance of Way employees and the Union Pacific Railroad Company reads as follows: 'Employees 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."

Although Rule 48(k) is considered by the Carrier to be self-effectuating, provision is made in Rule 48(n) for an employee to request a conference if he believes he has been "unjustly treated." Such conference was sought and held. As a result, the Carrier wrote to the Claimant on November 17, 1987, in part as follows:

"You are hereby returned to service on a leniency basis with all seniority and vacation rights unimpaired. There will be no claim for time lost."

The Claimant returned to service on November 24, 1987. However, the Organization maintained its right to pursue a Claim for time lost up to November 24, 1987.

Despite the controversy over the scheduling of vacation time, the record shows that the Claimant was seriously ill commencing September 19 and that notification of such illness was made to Carrier supervisors. This was conceded by the Carrier in its report of the November 4 conference, in which the Carrier representative stated that the Claimant "has proven . . . that he was sick and should have been off through 9/26/87."

Further, the Claimant contends that a Foreman, when informed of the Claimant's illness, arranged to place the Claimant on vacation (as previously requested) to avoid loss of pay for the Claimant. The Carrier argues that the Foreman did not have the authority to do so.

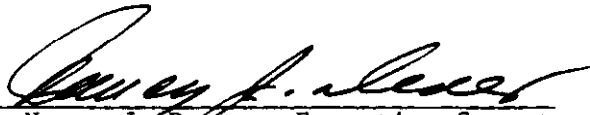
In any event, there was no legitimate basis for the Carrier's utilization of Rule 48(k), given the Carrier's contemporaneous knowledge of the Claimant's illness. As a result, the Claim must be sustained for the period from termination of employment until restored to duty.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of May 1990.