Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28483
THIRD DIVISION Docket No. MW-28970
90-3-89-3-387

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

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 Agreement was violated when the Carrier improperly terminated Extra Gang Laborer K. T. Smith's seniority for allegedly being '... absent from service without proper authority for the following five (5) consecutive workday period: May 31, June 1, June 2, June 6 and June 7, 1988....' (System File D-120/880683).

(2) The claim, as presented by Vice General Chairman Larson on June 20, 1988, to Superintendent M. C. Frey, shall be allowed as presented because Superintendent M. C. Frey 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 reinstated with benefits and all other rights unimpaired, his record cleared of the charges 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.

The Claimant had some six and one-half years of seniority with the Carrier. He was assigned to a Gang which had a workweek consisting of four (4) ten (10) hour work days, Monday, Tuesday, Wednesday and Thursday. This assignment had three (3) consecutive rest days, Friday, Saturday and Sunday.

On Tuesday, May 24, 1988, Claimant sustained an on-duty injury to his left foot. After receiving medical attention for the injury, Claimant returned to his work gang. He remained with the work gang for the duration of that work-week. On his rest day, Friday, May 27, 1988, Claimant returned to his home. He was next scheduled to report for work with the gang on Tuesday, May 31, 1988 (Monday, May 30, 1988 was a non-working holiday). Claimant did not report for work on May 31. Neither did he report for work on Wednesday, June 1, or Thursday, June 2. There were then three (3) intervening rest days on June 3, June 4 and June 5. Claimant did not report for work as scheduled on Monday, June 6, or Tuesday, June 7. Thereafter, by letter dated June 7, 1988, Claimant was advised that since he had been absent from service without proper authority for five (5) consecutive workdays, he had voluntarily forfeited his seniority under the provisions of Rule 48(k) which reads as follows:

> "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."

Subsequently, on June 20, 1988, a Claim for reinstatement with pay was initiated by the Organization on behalf of Claimant. When no response was received from the Carrier, the Organization on September 12, 1988, again requested reinstatement of Claimant with pay. Finally, by letter dated September 20, 1988, the Carrier denied the Claim. Subsequent appeal of this Claim was handled in the usual manner on the property and, failing to reach a satisfactory conclusion, has come to this Board for final adjudication.

There are three (3) issues which must be addressed in this case. First is the contention by the Organization that Claimant was entitled to a hearing in connection with this action. Second is the situation concerning Carrier's untimely rejection of the Organization's initial Claim. Third is the propriety, or lack thereof, of Carrier's action of termination of Claimant.

The Organization's argument relative to the need for, or entitlement to a hearing in connection with an action taken under the provisions of Rule 48(k) is not well founded. Rule 48(k) is a self-executing Rule which does not require a hearing prior to the administration thereof. The application of the provisions of Rule 48(k) is not a disciplinary proceeding. This principle has been established and recognized by the Board. See Third Division Awards 22662, 24255 and 24413.

As for the timeliness of Carrier's rejection of the initial Claim, this issue too plows no new ground in this case. Decision No. 16 of the Disputes Committee established to interpret the provisions of Article V-Time Limits of the August 21, 1954 National Agreement has been with us for many years. The Board has had numerous opportunities to review and apply the provisions of Decision No. 16 to situations such as we have in this case. The Board has consistently held that "-- a late denial is effective to toll Carrier's liability for procedural violation as of that date. From the date of late denial, disputes are considered on their merits if the merits are properly before the Board." (Third Division Award 24298) In this case, the remedy for the procedural violation is payment of wage loss sustained by Claimant from June 7, 1988 to and including September 20, 1988, the date on which the Organization's Claim was denied.

On the merits of this case, we are concerned and a little troubled. The Claimant was injured while on duty. He was treated for his injury and returned to his work assignment. Everyone, both the individual and the Carrier knew about the injury. Whether or not Claimant performed full service on May 25 and 26, 1988, is immaterial. The fact is that Claimant was on duty and under pay with his assigned gang on these dates. Claimant returned to his home on his rest day and remained there for his three relief days plus the holiday. When he found that he could not return to duty on Tuesday, May 31, the responsibility was his to seek and obtain proper authority to be absent. He did not do that. It is alleged by the Organization, and denied by Carrier, that Claimant attempted to obtain proper authority to be absent on Wednesday, June 1. However, the record does not contain any probative evidence of this alleged attempt, and the medical reports which were submitted on June 13 indicate that Claimant's first visit to his personal physician was on June 2. After receiving this medical attention on June 2, Claimant apparently did nothing further to attempt to obtain proper permission for absence. He could have made other attempts on either June 2 or any of the other workdays up to and including Tuesday, June 7. He did not do so.

While Carrier certainly knew of the May 24 on-duty injury, Carrier had no way of knowing why Claimant had not returned to service on any of the intervening workdays. It was Claimant's responsibility to obtain proper authority from the Carrier for his absence. This Board can only wonder why a 6 1/2 year employee would assume such a cavalier position when he knew - or should have known - that unauthorized absence on five (5) consecutive work days without proper authority could be fatal to his employment relationship. The record in this case supports the action as taken by the Carrier. On the merits, the Claim for reinstatement is denied.

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 7th day of August 1990.