

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 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 the seniority of Machine Operator L. D. Begay Sr. for alleged absence without proper authority for five (5) workdays, September 23, 24, 25, 26 and 29, 1988 (System Files D-130/890310 and D-134/890498).

(2) The Claimant will be reinstated with seniority and all other rights unimpaired and shall be compensated for all wage loss suffered from March 16, 1989 and continuing until he is returned to service."

FINDINGS:

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

The carrier or carriers and the employee 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.

Claimant was assigned as a machine operator on a Production crew in the vicinity of Umatilla, Oregon, when, on September 22, 1988, he was arrested and placed in the Umatilla County jail pending civil investigation of certain charges which are not specified in this case file. By letter dated September 29, 1988, Claimant was informed by the Carrier that his seniority was terminated under the provisions of Rule 48(k) of the Agreement because of his absence from his assignment without proper authority for five (5) consecutive work days, namely, September 23 to September 29, 1988.

After having been held in jail from September 22, 1988, until January 4, 1989, Claimant was released on a motion of the District Attorney to the Circuit Court to dismiss the case "without prejudice in the above matter on and for the reason that the victim could not be served."

Subsequently, by letter dated January 30, 1989, a grievance was filed on behalf of Claimant requesting restoration of "Mr. Begay's seniority and employment relationship and allow him to exercise his seniority accordingly." By letter dated March 16, 1989, this request was denied by Carrier on merits grounds alone. Subsequent appeal of this grievance was handled in the usual manner on the property and continued to be denied by Carrier on merits grounds alone.

Under date of May 2, 1989, the Organization initiated another Claim on Claimant's behalf demanding ". . . in addition to restoring Mr. Begay's seniority and employment relationship as previously requested in the referred to and still pending Claim, we are also claiming that Mr. Begay must be compensated for all wages lost March 16, 1989, and subsequent days thereto until Carrier restores Mr. Begay's seniority and allows him to return to work as his seniority will allow." This new, or amended, Claim was denied at all levels of handling as being untimely presented and in violation of the provisions of Rule 49 - Time Limit on Claims. The Claim which is the subject of the dispute before this Board is the amended Claim which was initiated on May 2, 1989.

The Agreement Rules which are applicable in this dispute are:

"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.

and,

Rule 49(a)(1)

All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. * * *

The Organization contends that Rule 48(k) contains an exception which is applicable in this case, i.e., "unless justifiable reason is shown as to why proper authority was not obtained." It argues that Carrier knew that Claimant had been incarcerated, that the Supervisor, in fact, gave Claimant permission to be off on the day of his arrest and that the charges against Claimant were eventually dismissed thereby relieving Claimant of all responsibility in the matter. The Organization further argues that all time limits had been complied with because ". . . Rule 48(k) is without time limits to show why justifiable reason was not obtained to be absent from work. * * * The Claimant had no grounds to file such a grievance until he was released from custody and the charges dismissed." The Organization acknowledges that, under other circumstances not found here, incarceration in jail is not a justifiable reason for absence from an assignment, but, in this case, there were no proper circumstances to warrant Claimant's incarceration.

Carrier argues that both the initial Claim and the amended Claim are in violation of the time limit requirements of Rule 49; that Rule 48(k) is an unambiguous self-executing rule which does not require a Hearing; and that being incarcerated in jail is not a justifiable reason for absence.

Rule 48(k), by its terms and conditions, applies to those employees who absent themselves from their assignments without first obtaining proper authority to be absent. The language of the Rule is clear and unambiguous. It has been the subject of numerous Awards of this Board which have consistently held that such a rule is a self-executing Rule which does not require a Hearing or any other handling under other Rules of the Agreement.

The question for us to decide in this case is whether or not Claimant had proper authority to be absent on the dates in question, namely, September 23 to 29, 1988, or in the alternative, whether or not Claimant's incarceration and subsequent release constituted justifiable reason for not obtaining proper authority for the absence. The respective parties have each presented Awards of this Board which, they say, support their respective positions. We have read and examined each of the Awards presented and do not find any of them to be directly on point with the fact situation which we have in this case.

Here we have a situation in which there is no indication that Claimant ever attempted to secure authorization for his absence beyond the one (1) day (September 22, 1988) on which he stated that his Supervisor told him "... I had the day off to take care of the matter." Neither does the subsequent dismissal of the charges in the manner as exists here, i.e., "without prejudice . . . for the reason that the victim could not be served" automatically create a situation of "justifiable reason" for not obtaining proper authority for the absence on the dates which formed the basis of the initial action, namely, September 23 to 29, 1988. This Claimant, based upon the evidence in this case file, made no attempt to obtain proper authorization for his absence on the dates in question.

On the time limits contentions of the respective parties, we will say merely that Carrier, by not advancing their contention relative to the untimeliness of the initial Claim during their handling of that Claim on the property, may not properly raise that issue before this Board. On the issue of the amended Claim as submitted on May 2, 1989, there can be no question but that it is well beyond the 60-day limit "from the date of the occurrence on which the claim or grievance is based," i.e., Claimant's removal from the seniority roster on September 29, 1988. The Organization's argument relative to the absence of the time limits in Rule 48(k) is novel but not convincing. Rule 49 clearly sets forth the time limits for presentation of "All claims or grievances" which includes claims or grievances emanating from action taken under self-executing Rule 48(k).


The facts of record in this case lead to the conclusion that Claimant was absent from his assignment without proper authority for five (5) consecutive working days and there has been no justifiable reason shown as to why proper authority was not requested or obtained. The Claim is denied.

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 30th day of July 1991.