

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 terminated the seniority of Track Machine Operator J. Jurado for alleged absence without proper authority for five (5) consecutive workdays, October 31 through November 8, 1988 (System File S-127/890217).

(2) As a consequence of the violation referenced in Part (1) above, the Claimant's seniority and employment relationship shall be restored to allow him to return to work for Carrier as soon as his disabling condition ceases to exist."

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.

The Claimant in this case entered Carrier's service on July 1, 1979. His seniority with Carrier was terminated by letter dated November 8, 1988. Carrier contends that Claimant was absent from his track machine operator position without proper authority for five (5) consecutive workdays and therefore he voluntarily forfeited his seniority rights and relationship under the self-executing provisions of Rule 48(k) of the Agreement. The Organization argues that, because of the particular circumstances in this case, Rule 48(k) has no application, but rather, the provisions of Rule 25 control and that the language of Rule 25 precludes Carrier's termination of Claimant's seniority in this instance.

Rule 48(k) reads as follows:

"Employees absenting themselves from their assignment 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."

Rule 25, in pertinent part, reads as follows:

"Requests for medical leave of absence account sickness or injury in excess of fifteen (15) calendar days must be made in writing and properly documented and supported by a statement from the employee's physician, which includes the specific reason therefor and the expected duration.

* * *

In the event a dispute arises as to whether a request for a medical leave of absence is properly documented, such dispute shall be resolved by the Carrier's Medical Director and the employee's physician, however, the seniority of the employee involved shall not be terminated as a result of such issue during the pendency of such dispute."

It is important that we review the chronology of events which occurred in this case. The situation began on October 13, 1988, when Claimant allegedly sustained an injury while on duty. He received medical attention for the injury and did not thereafter perform any subsequent service for the Carrier.

On October 24, 1988, Claimant, along with his Representative, contacted the Carrier relative to his employment status. The Representative's version of the essence of the conversation with Carrier's Manager of GMS Support is that "It was agreed by all that Mr. Jurado would get a proper medical statement verifying his need to be absent so he could immediately submit request for a medical leave of absence pursuant to Rule 25." Carrier's version of the conversation as given by the Manager Program Services is that ". . . it is apparent that your memory has failed you. I have been informed that during the three-way conversation on October 24, 1988, Mr. Jurado was told by you personally that he must fill out the necessary paper work and get in contact with his gang. Mr. Jurado simply failed to follow through."

The next event in this chronology occurred on November 2, 1988, when Claimant was examined by a Keith M. Sadler, M.D. who ordered further examinations and testing with the concluding information that ". . . we will proceed from there."

By letter dated November 8, 1988, Claimant was informed by Carrier that he was considered as having voluntarily forfeited his seniority under the provisions of Rule 48(k) because he was allegedly absent without proper authority from October 31 to November 8, 1988.

Appeals were initiated on Claimant's behalf and progressed through the usual manner of handling disputes on the property. Failing to reach a satisfactory resolution of the dispute on the property, it has come to this Board for final adjudication.

The Organization's argument concerns itself with the fact that the October 24, 1988, conversation implied that Claimant should obtain proper documentation of his medical condition and present it to Carrier to justify his request for a medical leave of absence in accordance with the provisions of Rule 25. The Organization avers that the development of this "proper documentation" required more than the normal amount of time because the physician hesitated to release the required information until he had been prompted by Claimant's attorney. All of this medical documentation was subsequently presented to the Carrier during the on-property handling of the dispute.

Carrier's argument is straightforward. Claimant did nothing to attempt to secure authorization for absence from his assignment. As Carrier's Representative succinctly put it in his denial of the initial appeal "Mr. Jurado simply failed to follow through." Carrier continues by contending that Rule 48(k) is clear, unambiguous and self-executing. Carrier cites with favor Third Division Award 28483 which dealt with the same Rule on the same property concerning a situation involving an alleged on-duty injury.

We have examined all of the circumstances and evidence presented in this case and have considered all of the arguments which have been presented. This case does not have the clean-cut fact situation which existed in Award 28483. Here there was an apparent on-duty injury on October 13, 1988, after which no subsequent service was performed by Claimant. Here there was an attempt made by Claimant on October 24, 1988, to preserve his seniority standing during the period of his disability. To be sure, there is reason to wonder why he did not attempt to contact his gang following the October 24, 1988, conversation. But equally, to be sure, there is reason to wonder why Carrier waited until October 31, 1988, to begin to count the five (5) consecutive work days required by Rule 48(k). This is not a case in which Claimant did nothing.

Rule 25 requires documentation and support to justify a medical leave of absence. Rule 25 also has its own built in provisions for resolution of disputed medical opinions. In this case, the wheels of juridical processes and medical determinations turned slowly, but they did turn. The medical opinions were eventually obtained. Claimant may well be guilty of poor judgment for not contacting his gang after the October 24, 1988 conversation or for not pushing harder for release of the medical documentation, but he did not just disappear without doing anything. He tried.

Rule 48(k) is clearly self-executing. However, in this case, based on our study of the fact situation which exists here, and without doing any harm to the clear line of precedent which has been established relative to the proper application of Rule 48(k), it is our opinion and conclusion that Carrier acted hastily in this instance.


Claimant should, therefore, be returned to the seniority roster with seniority unimpaired subject to possible return to duty following a determination by Carrier's Medical Department of his physical ability to resume such 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. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 30th day of July 1991.