

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29880
Docket No. MW-30005
93-3-91-3-399

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 Carrier violated the Agreement when it terminated the seniority and closed the service record of Maintenance of Way employe L. J. Newell within a letter dated May 3, 1990 (System File D-145/900449).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated with seniority 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 employe 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.

This case involves an application of self-executing Rule 48(k) which reads, in pertinent part, as follows:

"Rule 48. DISCIPLINE AND GRIEVANCES

- (k) 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."

The fact situation in this case reveals that Claimant was a furloughed Section Laborer. At some unspecified time prior to April 2, 1990, Claimant was contacted by the Carrier's assignment clerk to fill a position on Section Gang #4784 head-quartered at Salina, Kansas. It is contended that this section gang was programmed to perform service for only a two-week period of time. There is no evidence in the record to indicate whether or not the positions on this section gang were advertised for bid. Neither is there anything in the case file to indicate whether Claimant was recalled from furlough in the order of his seniority standing or if he had made his availability known to work interim vacancies in accordance with the provisions of the side-bar agreement dated June 12, 1985, which provides, in pertinent part, as follows:

"(2) It is recognized furloughed employees holding seniority in the group and class in which the vacancy occurs, should, after making their availability known, be afforded the opportunity to work interim vacancies,..."

In any event, Claimant accepted this assignment on Section Gang #4784, he reported for work on April 2, 1990, and he completed the tour of duty as assigned on April 2, 1990. On the same date, April 2, 1990, Claimant received a call at his home from the KYLE Railroad for a work assignment on that property. After completing his assigned duties on Carrier's property, Claimant returned to his home and learned of the call from the KYLE Railroad. Claimant subsequently returned to Section Gang #4784 at Salina on April 3, 1990, and talked to the Manager Track Maintenance relative to his situation. Claimant also talked to the Carrier's assignment clerk located at Omaha, Nebraska, concerning the matter. As is to be expected, there is disagreement between the parties relative to the exact colloquy which took place. Claimant asserts that he was informed by the assignment clerk that he could leave the section gang assignment. The Manager Track Maintenance states that he gave no permission to Claimant to absent himself from the section gang assignment. The fact is that Claimant left his section gang assignment on April 3, 1990 and accepted the offer of employment with the KYLE Railroad.

Thereafter, by letter dated May 3, 1990, Claimant was notified by Carrier that because of his unauthorized absence from the

section gang assignment on April 3, 4, 5, 6 & 9, 1990, he had forfeited his seniority under the provisions of Rule 48(k).

The Organization contends that because Claimant was not filling a "regular" assignment, but rather was working a temporary assignment as contemplated by the June 12, 1985, Letter of Agreement, he never had an "assignment" from which to absent himself. Therefore, it argues, Rule 48(k) has no application in this case. The Organization further argues, for the first time before this Board, that "Claimant was offered an opportunity to fill a temporary vacancy pending the arrival of a senior recalled employee." (Underscore in original - not ours). The Organization continues with the argument that "- - - it should be clear, even to the uninitiated, that there is an easily discernable distinction between the use of a furloughed employee to fill a position owned by another and the ownership of a position by assignment." It cites several Awards in support of its argument. The Organization concludes its presentation by contending that Claimant had tacit permission from the Carrier to vacate the temporary assignment and accept the employment with the other carrier.

Carrier, of course, disagrees with all of the above. Carrier says that Claimant did not have permission from anyone in authority to absent himself from the section gang assignment; that the June 12, 1985 Letter of Agreement does not allow an employee to vacate an assignment as suggested by the Organization; that there is nothing in the Agreement or elsewhere which permits an employee to leave an assignment on this Carrier to accept employment in the same class of service on another railroad; that the assignment clerk here referenced did not have authority to interpret the Agreement or to grant permission to Claimant to vacate his assignment with the section gang; and, therefore, Carrier's application of the provisions of Rule 48(k) were mandatory and proper.

The Board has considered all the arguments and has reviewed all the citations of authority from the parties. When all of the vitriolic vituperation is stripped away, we are left with two or three basic, straightforward issues which are dispositive of this dispute. The Organization's reliance on Awards of this Board dealing with qualification for payment of holiday pay to attempt to make a distinction between position and assignment is misplaced. Qualifications for holiday pay are not the same type of situation or required consideration as is present here. In this case, Rule 48(k) does not refer to "regularly assigned", it talks only about being absent from an "assignment." As was alluded to under different circumstances in Third Division Award 10136, Section Gang #4784 had a regular assembly point and starting time. In fact, the language of Third Division Award 14325 tends to support the

Carrier's position in its application of Rule 48(k) when it says, "That the position was newly created to increase the force for an indefinite period does not detract from Claimant's ownership of the position." Here Claimant was assigned to and identified with a position on the temporary section gang for the duration of the section gang assignment. That assignment, made on the basis of his seniority standing, placed him under the influence of Rule 48(k) and therefore subject to the penalties which accompany Rule 48(k).

The Organization's attempt to shift responsibility in this case to the assignment clerk and/or the Manager Track Maintenance is also misplaced. Claimant has the paramount responsibility under the application of the provisions of Rule 48(k). This is not a case which involves the principle of agency. Rather, it is a matter of proper interpretation of a negotiated Rule by the properly designated authority. The assignment clerk was not the properly designated authority to interpret Rules on this property. As to the argument relative to why the Manager Track Maintenance would advise Claimant to call the assignment clerk, we would note only that our Board does not deal with conjecture or speculation. Our responsibility goes only to the interpretation of Rules.

We have read with interest the statement from a former General Chairman presented by the Carrier in support of its argument that "the intent of the Claimant all along" was to work for the KYLE Railroad. This statement, while being a proper and timely piece of evidence, lends nothing to a determination of the situation which existed on April 3, 1990.

It is evident from this record that Claimant was recalled from furlough to perform service for the Carrier on a section gang assignment. He accepted that recall. He was thereafter subject to all of the provisions of the Agreement including Rule 48(k). There has been no evidence presented in this case to support the contention that rule 48(k) has no application to short-term or temporary assignments. Neither, in our opinion, does the language of the June 12, 1985 Letter of Agreement contain any exception to an application of the provisions of Rule 48(k). The language of Rule 48(k) is clear and unambiguous. Claimant, by his act of absenting himself from the assignment to which he had accepted recall from furlough, placed himself in violation of the language of rule 48(k). His forfeiture of seniority was the result of his own actions.

The claim on his behalf has no support in the Agreement and is, therefore, denied.

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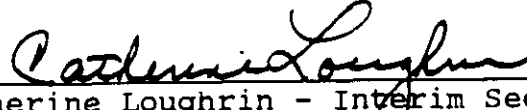
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A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: _____


Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 26th day of October 1993.