

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36002
Docket No. MW-36123
02-3-00-3-298**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Southern Pacific
(Transportation Company (Western Lines))

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Assistant Foreman Edson A. Thomas for his alleged absence without authority from December 3 through December 10, 1998 was without just and sufficient cause, based on an unproven charge and in violation of the Agreement (Carrier's File 1195249 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Assistant Foreman Edson A. Thomas shall now be reinstated to service with seniority and all other rights unimpaired, compensated for all wage loss suffered and this incident shall be removed from his record."**

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 employee 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 were given due notice of hearing thereon.

By letter dated December 10, 1998, the Claimant was dismissed from service for being absent from duty without authority from December 3 to December 10, 1998. In accordance with Appendix R of the controlling Agreement, the Claimant requested and was granted a Hearing on January 18, 1999. On February 12, 1999, the Carrier sustained its earlier dismissal decision.

The record of the Hearing established that, prior to the dates in dispute, the Claimant had been displaced from his position on the Western Division. He bid on and was awarded the position of Assistant Foreman on Gang 7198 at Roseville, California, on the Sacramento Division.

On December 3, 1998, he reported for duty to his awarded position. From 6:30 A.M. to 7:00 A.M., he attended the morning Foreman job briefing and from 7:00 A.M. to 7:30 A.M., he attended the gang job briefing.

Afterward, he approached Track Supervisor H. M. Stowell and requested rain gear due to the inclement weather. A discussion ensued about the availability of rain gear. The Claimant told Stowell that he could not work in the rain without proper rain gear. Stowell testified: "Then I just told him, wait a minute; I'll see what I can do for you, because it was raining hard that day." Stowell then went into the office building. The Claimant testified that he did not hear Stowell's offer to get the rain gear, and, after waiting several minutes for Stowell to return, the Claimant went home.

According to Stowell, he never saw or heard from the Claimant again. Stowell testified that he did not receive any messages from the Claimant on his voice mail nor did the Claimant at any point seek permission to be off work in accordance with the Carrier's call-in policy. Stowell subsequently informed Manager Special Projects V. Keane that the Claimant left the job on December 3 and then failed to return to duty after five consecutive days, whereupon the Claimant was dismissed. Keane testified that he did not speak to the Claimant prior to his dismissal.

The Claimant testified that he called on two occasions to request permission to be off. He stated that he telephoned Stowell's office phone number just prior to 6:00 A.M. on December 4 and left a message stating that he needed time off due to some personal problems. The Claimant further testified that he telephoned again on December 7 and the Timekeeper relayed his message to Keane, who returned the call

shortly thereafter and informed the Claimant that he had not reported for duty and was absent without permission.

The Claimant presented a telephone bill documenting the two calls referenced in his testimony. He also presented a letter from a therapist, dated December 22, 1998, which stated that the Claimant had been in counseling for some personal problems.

As the Carrier correctly points out, Appendix R is a self-executing Rule. An employee who is absent without authority in violation of the Rule is subject to automatic forfeiture of his seniority. Essentially, the Carrier may sever seniority because an employee who is absent from work without notification and approval is presumed to have abandoned his position. Unlike the typical discipline case, the burden is on the Organization to establish that the employee has an explanation for his absence, which is either approved by the Carrier or deserving of approval. Third Division Award 28481.

Based on the record evidence, the Board finds that the Organization met that evidentiary burden. This case does not present the picture of an employee who abandoned his job, for several reasons. First, there is documented evidence on this record to support the Organization's contention that the Claimant attempted to notify the Carrier of his absence and to obtain proper authorization to be off. Second, Stowell testified that there are times when messages are not received by Supervisors. Third, Stowell acknowledged that he would have given approval for the Claimant's absence had he received the message. Finally, the record shows that the Claimant, who was new on the job, had not been informed of the call-in procedures at this facility. It was not entirely unreasonable for the Claimant to assume that leaving a message on the answering machine was sufficient notice of his absence.

In light of the evidence showing attempted notification and a reasonable explanation for the period of absence which would have been deserving of approval, the Board finds that the Claimant's employment should not have been terminated. The Claimant will be restored to service with seniority unimpaired but without compensation for lost time, in accordance with prior Board Awards. Third Division Awards 35926; 31535.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 16th day of April, 2002.