

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24413  
Docket Number MW-24605

Paul C. Carter, Referee

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 improperly terminated its employment of Sectionman R. B. Godoy on January 6, 1981 (System File 5-19-11-14-55/013-210-G).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Claimant had been in Carrier's service about fifteen years as a sectionman. He was on authorized vacation between December 8 and December 26, 1980. The Carrier contends that on or about December 10 the claimant called the Roadmaster's clerk and requested a two weeks leave of absence beyond December 26 and was advised that his request could not be granted. On December 28, 1980, claimant sent a telegram to the Division Engineer:

"Forgive my absence to Job, Due Sickness, be back soon."

The record does not show that a response was made to claimant's telegram of December 28, 1980. On January 6, 1981, claimant was advised by the Division Engineer:

"This is to advise that you are hereby removed from service effective this date account your failure to report for work on Monday, December 29, 1980, after completion of your two-week vacation. This is in violation of Rule 48(k) of the Agreement between the Brotherhood of Maintenance of Way employees and the Union Pacific Railroad effective January 1, 1973."

Rule 48(k), a part of the discipline and grievance rule of the applicable agreement reads:

"(k) 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."

On January 12, 1981, the Local Chairman of the Organization requested a formal hearing under the Discipline and Grievance Rule in behalf of claimant. On January 15, 1981, the Division Engineer responded in part:

"Please refer to Rule 48(k) and Rule 48(m), which read as follows:

RULE 48(k) - 'Employee absenting themselves from their assignments for five (5) consecutive working days without proper authority shall be considered voluntarily forfeiting their seniority rights and employment relationship, unless justifiable reason is shown as to why proper authority was not obtained.'

RULE 48(m) - 'The Carrier will be under no obligation to give an employee a formal hearing where the employee's relationship is terminated under other provisions of this Agreement.'

"Under these terms, the Carrier is not under any obligation to grant a hearing to Mr. Godoy and, therefore, your request on his behalf is respectfully declined."

The Carrier contends that Paragraphs (k) and (m) of Rule 48 are exempt from the formal hearing requirements. The Board agrees with this interpretation. Rule 48(k) is self-executing. This interpretation is strictly in accord with the first sentence of Rule 48(a) of the Discipline and Grievance Rule, which reads:

"(a) Except as provided in Paragraphs (k), (l), and (m) of this provision, an employee who has been in service more than sixty (60) calendar days, whose application has not been disapproved, shall not be dismissed or otherwise disciplined until after he has been accorded a fair and impartial hearing."

We do not consider Rule 48(l) as applicable. Its application is confined to the specific conditions outlined therein.

In the on-property handling, and in their respective submissions to this Board, the Carrier has steadfastly maintained that the claim does not involve the realm of discipline, whereas the Organization has been equally as steadfast in its argument that Carrier's application of Rule 48(k) was tantamount to the disciplinary process. The Carrier points out that the appeal process on the property for disciplinary and non-disciplinary cases is different, disciplinary cases being progressed to the Chief Engineer and non-disciplinary cases progressed to the Director of Labor Relations, and the Carrier goes on to contend that the appeal of the dispute to the Chief Engineer was improper. The question is, to say the least, close. However, Rule 48(k)

being a part of the Disciplinary and Grievance Rule, and being specifically excepted from the requirements of Rule 48(a), the Board concludes that the dispute must necessarily be considered a disciplinary case.

On January 30, 1981, Assistant Chairman J. V. Larsen, in filing the initial claim in behalf of claimant furnished a letter from Dr. Jesus R. Olivas B., written in Spanish, describing claimant's condition. It would seem that if the Assistant Chairman was attempting to furnish a reason for claimant's absence, he would have furnished a translated copy of the letter from the doctor. On the other hand, it would appear that if the Carrier were seriously interested in determining whether or not claimant was actually ill, and the seriousness of the illness, it would not have been an insurmountable task for it to have had the letter translated.

In the appeal on the property, the General Chairman also pointed out to the Chief Engineer, that claimant, in an effort to explain his absence completely, contacted a clerk in Los Angeles by telephone.

In his appeal to the Chief Engineer, the General Chairman also stated in part:

"In a letter dated February 20, 1981, Mr. Wengert declined such reinstatement and payment of this claim. We cannot accept Mr. Wengert's decision of denial on the basis as contained in his letter dated February 20, 1981 and by copy of this letter to Mr. Wengert, he is advised that his decision of denial is, hereby, being rejected."

In response the Chief Engineer took the position that the dispute involved a non-disciplinary matter and was improperly appealed to his office, which issue we have previously disposed of. The Chief Engineer also took the position:

"Moreover, a review of my file indicates that Assistant Chairman Larsen failed to furnish Division Engineer Wengert written notification of the rejection of his decision. Failing to furnish such written notification within the time period set forth in Rule 49 likewise renders the claim invalid."

Subsequently the Carrier submitted a number of letters supporting its position as to practice and the General Chairman submitted copies supporting his position so far as rejection of the lower officer's decision was concerned. This issue has previously been decided between the same parties. See recent Award No. 24358, the awards cited therein, and Decision No. 14 of the National Disputes Committee, dated Chicago, Illinois, March 17, 1965. The record indicates that on June 19, 1981, the parties entered into a letter Agreement specifying just how claims arising on and after that date would be handled.

In a letter dated November 27, 1981, following a conference with the General Chairman the Chief Engineer explained that claimant called the Division Engineer's office on January 5, 1981, eight days after his telegram dated December 28, 1980, and talked to a clerk in that office who then indicated that, to the best of her knowledge, claimant's reasons for his continued absence was because of (1) car trouble or (2) his mother's illness, and that no mention was made of claimant's ill health or that he had otherwise been very sick. Also, an employe at Los Angeles interpreted Dr. Olivas' note of December 28, 1980, which explained claimant's illness as akin to a sore throat. In that conference, the Carrier offered, in consideration of claimant's length of service in complete disposition of the claim, to restore claimant's seniority rights in Groups 8, 17 and 18 as follows:

Group	"CLASS		
	(a)	(b)	(c)
8	-	8-14-72	8-14-72
17	1-13-69	-	-
18	11-4-65	-	- "

On December 23, 1981, the General Chairman advised that claimant had rejected the proposed settlement. He also presented at that time a translated statement of Dr. Olivas. This translation of Dr. Olivas' statement reads:

"TO WHOM IT MAY CONCERN:

This is to certify that Mr. Raul Godoy Bapera (?) have been under (?) medical care by the undersigned and initially treated for a cold which started on December 27, 1980. This illness became afterward into a bronchitis of which he felt after much better and relief on January 4, 1981. He was treated with antibiotics, pulmonary widers and spectorants.

At the request of the interested party this certificate is issued in the city of Culincan, Sin. on January 4, 1981."

The Carrier's offer of reinstatement of claimant was reiterated on December 30, 1981, and again rejected.

There is nothing in Dr. Olivas' statement of January 4, 1981, that claimant was too ill to travel, or contact his superior officers at the expiration of his vacation period. On the other hand, we consider the Division Engineer's actions of January 6, 1981 as hasty, considering claimant's telegram of December 28, 1980, his telephone call of January 5, 1981, and the statement of Dr. Olivas dated December 28, 1980, which the Carrier did not see fit to have interpreted. Depriving a long-term employe of his source of livelihood is a serious matter.

Based upon the entire record, the Board concludes that the proper resolution of the dispute is to award that claimant be restored to the service of the Carrier with seniority and other rights unimpaired, but without compensation for time lost while out of the service.

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

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the claimant's termination was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: Acting Executive Secretary  
National Railroad Adjustment Board

By Rosemarie Brasch  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 15th day of June 1983.