

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 improperly terminated System Gang Employee L. F. Pino's seniority for allegedly being absent from service without proper authority for the following five (5) consecutive work-day period: November 17, 18, 21, 22 and 23, 1988 (System File D-128/890237).

(2) As a consequence of the violation in Part (1) above, the Claimant shall be reinstated to service 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 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.

This is another case involving the provisions of self-executing Rule 48(k) which provides for the forfeiture of seniority by employees who are absent from their assignments for five (5) consecutive working days without proper authority. The rule as written contains an exception which states:

"... unless justifiable reason is shown as to why proper authority was not obtained."

Rule 48(k), and similar rules, have been interpreted numerous times by Arbitration panels created under the provisions of Section 3, First and Second of the Railway Labor Act, as amended. It is firmly established that Rule 48(k) is self-executing and that termination of seniority under the Rule does not require a Hearing or any other handling under other rules of the

Agreement. However, in each case it is necessary that the particular facts and circumstances be examined to insure that there was no justifiable reason shown as to why proper authority for the absence was not obtained.

In this case, there are contentions and counter-contentions made which lead the Board to the conclusion that the general blanket of prior Awards which have been cited by both parties do not fall 4-square on the fact situation which exists here. The record contains several first-time arguments by Carrier relative to an alleged "verbal fifteen(15) day leave of absence - -"; to a contention that Claimant merely "left a message on a recorder" when he contacted the Omaha office and to the undated statement of a Track Supervisor. Each of these arguments is, at best, self-serving and unpersuasive as well as being untimely.

We are of the opinion, from the relative convincing force of testimony and evidence in this particular case, that the Claimant should not have his 11 years of seniority wiped out on the basis of the unconvincing evidence which exists here.


To be sure, the Claimant must bear some of the responsibility for the situation in which he is found. He could have, and should have, done more to protect himself. However, permanent termination is not warranted by these facts and this evidence.

Therefore, the Claimant shall be reinstated to the seniority roster with seniority unimpaired but without any payment for the time he has been out of service.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1991.