

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro 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 Laborer D. L. Zipperien's seniority on July 28, 1989 for allegedly being '... absent from your assignment without proper authority for the following five (5) consecutive workdays 24, 25, 26, 27, 28 in July of 1989.' (System File D-137/890657).

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be returned to service with benefits and all other rights unimpaired, he shall have his personal record cleared of the charge leveled against him and he shall be compensated for all time lost."

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 waived right of appearance at hearing thereon.

On October 11, 1983, the Carrier hired the Claimant as an Extra Gang Laborer. During July 1989, the Claimant worked as an Extra Gang Laborer on Gang 9012.

The Claimant was absent from work during the week of July 24, 1989, allegedly due to a colon infection. The Claimant attempted to contact his Supervisor to obtain permission to absent himself from work. When he was unable to reach the Supervisor, the Claimant telephoned the NPS Specialist at the toll-free number provided by the Carrier. The Claimant asked the NPS Specialist to convey the message concerning his illness to the gang. The NPS Specialist conveyed the message.

On July 28, 1989, the Supervisor wrote the Claimant a letter advising him that he was considered as voluntarily forfeiting his seniority rights and employment relationship pursuant to Rule 48(k) of the Agreement because he had been absent without authority from his assignment July 24, 25, 26, 27, 28, 1989. Rule 48(k) provides:

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

Rule 48(k) is characterized as a self-executing provision.

In response to the Supervisor's letter, the Claimant provided two medical statements on August 11, 1989, allegedly verifying his need to be absent from work from July 25, 1989, until July 27, 1989. The Claimant provided additional medical documentation on August 30, 1989.

The first issue before the Board is whether the Claimant obtained proper authority for absenting himself from his assignment for five consecutive days.

The Organization maintains if the NPS Specialist lacked proper authority to grant permission to be absent from work, she was obligated to inform the Claimant of that fact. In support of this argument, the Organization relies on the theory of agency. The general principle of agency states that when the agent is working on behalf of the master's business, the master is responsible for his acts. (Third Division Award 12309). Because the Carrier's business can only be performed by its agents and servants and as they were performing work in furtherance of their master's business, the master is liable. (Third Division Award 1220).

The Carrier maintains its application of Rule 48(k) was proper. The Carrier asserts that forfeiture of seniority was sanctioned by the application of a self-invoking Agreement Rule; therefore, the Claimant's forfeiture of seniority was his own doing when he failed to request and receive proper authorization for his absences. The Carrier cited Board precedent which held "that rules, such as Rule 48(k) herein, are self-invoking and discipline was not involved in this dispute." Third Division Award 24218.

The Carrier argued because the NPS Specialist was not the Claimant's Supervisor, she lacked authority to grant permission for the Claimant to absent himself from work. The Assistant Foreman testified he personally instructed the Claimant on the proper procedure to follow when reporting an absence. The Assistant Foreman provided the Claimant with a hierarchical list of individuals to notify in the event of an absence, and he specifically stated the GMS telephone number would NOT constitute an excused absence. Further the Supervisor testified although he was on vacation from work, he remained at home during the week of July 24, 1989. The Supervisor testified he never received a telephone call from the Claimant.

With respect to the issue whether the Claimant obtained proper authority for absenting himself from his assignment for five consecutive days, the Board finds the Claimant failed to obtain proper permission. The Board distinguishes the agency cases cited by the Organization, because these cases describe the obligations of the master to third parties not to the agent. Because Rule 48(k) is self-invoking, the forfeiture occurred when the Claimant absented himself from work without proper authority.

The Carrier noted having forfeited his seniority rights under the self-invoking Rule 48(k), the Claimant's only recourse was to furnish justifiable cause for failing to secure proper authority for his absence.

The Organization argues the Claimant complied with the provisions of Rule 48(k) because the Claimant demonstrated good and justifiable cause for his absence because he was ill, suffering from a colon infection. The Organization cites Board precedent which held illness is a valid and justifiable cause for an employee's absence from his assignment. The Board characterized illness as a good and sufficient reason (Second Division Award 7754), and further, the Board has held "If the person accused can show that he was not responsible for the absences because of reasons beyond his control, such as illness...he should not be subject to discipline. (Third Division Award 20148).

The Carrier contends the three medical statements neither present justifiable reasons why the Claimant did not secure proper authority to be absent nor do they provide the required documentation necessary to justify the absences. Although the Claimant's last absence was on July 28, 1989, he failed to provide medical statements until August 11, 1989.

The medical statements were provided by a specialist in obstetrics and gynecology. Despite this specialty, the physician works as a general practitioner due to the small size of the community. The first medical statement merely indicated the Claimant had been under the physician's care from July 25, 1989, to July 27, 1989, and he was able to return to work. The Carrier objected to the validity of this statement because it failed to list a return to work date or a reason for the medical treatment.

The Carrier received a medical statement, dated July 25, 1989, written on a Wheatland Medical Clinic pad. The medical statement read: "Due to pain in abdomen he cannot work today." The Carrier noted this statement only addressed one day, and the reason given conflicted with the Claimant's statement to the NPS Specialist that he suffered from a colon infection.

Due to the inadequacy of the first two statements, the Carrier requested a third medical statement which the Claimant provided on August 30, 1989. This statement was written on a "Return to Work or School Certificate." The statement indicated the Claimant was under the physician's care from July 24, 1989, until July 27, 1989, and he was unable to work during this time. The Carrier pointed to the discrepancy of dates and signatures between the first and the third medical statements. Further the medical statements offered no reason for treatment.

The Board is mindful of the fact that in order for a Carrier to function efficiently and effectively, it must have employees who are "dependable [about] informing the Carrier of their whereabouts in the event of sickness...so the Carrier can reasonably carry out its management functions by means of substitutes. Rule 28 has been negotiated by the parties to precisely handle this...type of eventuality, and it contains qualifications to cover conditions of extreme duress". (Second Division Award 9406). Further, all employees should be aware that if they do not report for work on a punctual and regular basis, they will be subject to discipline. (Second Division Award 8796).

The Carrier argues Third Division Award 24681 controls this case, and the Organization argues Award 24681 can be distinguished because the Claimant in this case provided substantial evidence to support his absences. The Board adopts the Carrier's interpretation of this precedent because the Board finds the medical statements provided by the Claimant to be factually insufficient to provide a justifiable reason for his absences. Specifically, the medical statements lacked a specific diagnosis of the Claimant's condition and the impact such a diagnosis would have on the Claimant's ability to perform his usual work.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1992.