

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31535
Docket No. MW-31884
96-3-94-3-184**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(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 the seniority of Mr. C. N. Terry on December 9, 1992 for allegedly being absent for five (5) consecutive days without proper authority (System File D-188/930408).
2. The Claimant shall be reinstated to the Carrier's service with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all of 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.

Claimant did not report for work on November 23, 24, 25, 30, and December 1, 1992. Consequently, Carrier terminated Claimant's seniority pursuant to Rule 48(k). Rule 48(k) provides:

"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."

Claimant contested his termination and a conference was held on January 25, 1993. Following the conference, Carrier reaffirmed Claimant's termination.

The Organization contends that Carrier violated the Agreement for several reasons. The Organization argues that Claimant's absences on November 23 and 24 were justified because his car was stolen. Furthermore, the Organization observes, Claimant attempted to telephone the Manager Track Programs to obtain authority for his absences. On November 23 he reached an answering machine and left a message. On November 24 he received no answer. The Organization maintains that unavoidable car trouble is a justifiable excuse for being absent. It further argues that Carrier was obliged to have the Manager Track Programs available to receive calls from employees requesting authority to be absent.

According to the Organization, on November 25 Claimant succeeded in calling the Manager Track Programs and advised him of the car theft and of an off-duty injury he had sustained. According to the Organization, the Manager Track Programs told Claimant that he had been displaced, that his gang had been abolished and that there was no need to report. In the Organization's view, Carrier furnished Claimant with inaccurate information which resulted in his loss of seniority.

Carrier contends that Rule 48(k) is self-executing and that Claimant automatically forfeited his seniority when he was absent five consecutive days without authority. Carrier argues that, because of past absenteeism, Claimant was required to contact the Manager Track Programs personally and obtain authority for any absence. Carrier observes that Claimant admitted that he did not have authority for his absences. Carrier further observes that Claimant was given an opportunity to document his off-duty injury and request a medical leave of absence. The documentation that Claimant

furnished, however, did not relate to the five days in question, but rather, showed the Claimant disabled beginning December 5, 1992. Claimant also furnished no documentation of the alleged theft of his car. In Carrier's view, Claimant was solely responsible for his five consecutive days of absence without authority, was given opportunities to document justified excuses and failed to do so and, consequently, was properly terminated under Rule 48(k).

The Board has reviewed carefully the record developed on the property. There was no transcript of the conference; consequently, we are forced to rely on the representations made by the parties during handling on the property as to what was said at the conference.

Carrier represented that during the conference Claimant admitted that he was required to obtain authority for his absences personally from the Manager Track Programs and admitted that he did not receive authority when he reached the Manager Track Programs on November 25. These representations were not denied.

In light of these representations, we find that the Organization's contentions regarding Claimant's allegedly stolen car and off-duty injury lack merit. Claimant was aware that he was to obtain authority personally from the Manager Track Programs. On November 23 and 24 he failed to contact the Manager. Leaving a message on the answering machine on November 23 and trying once without success on November 24 is no substitute. There was no explanation as to why Claimant did not call additional times on either day. Claimant cannot expect the Manager Track Programs to be waiting by his telephone constantly in the event an employee attempts to call for absence authority.

Furthermore, when Claimant did reach the Manager Track Programs on November 25, he did not receive authority for his absences. Moreover, Claimant never documented the alleged car theft by, for example, producing a police report; nor did he document his alleged physical disability during the period in question. His documentation showed his disability beginning on December 5.

During handling on the property, however, the Organization represented that, at the conference, Claimant stated that the Manager Track Programs told him on November 25 that he had been displaced and need not report. The Organization further represented that the Manager Track Programs replied that he had not stated that the Claimant had been displaced, but merely indicated that he believed the Claimant had probably been displaced. These representations were not denied.

In light of these representations, it appears that in his November 25 conversation with the Manager Track Programs, Claimant was not given authority for his first three days of absence, but was also advised either that he had been displaced or that he probably had been displaced. Such displacement would have relieved Claimant of the obligation to report on November 30 and December 1. Thus, there appears to have been a degree of confusion in the communications between Claimant and the Manager Track Programs on November 25 concerning Claimant's future obligations to report.

We recognize that Rule 48(k) is self-executing. In the past, however, when faced with a claimant who had not followed through to the extent that he should have but who also had not completely abandoned his job, this Board has recognized that confusion in communications contributing to the claimant's predicament can mitigate against the harshness resulting from a literal application of self-executing rules calling for forfeiture of seniority. See, e.g., Third Division Awards 28877, and 29483. In those cases, the Board restored the claimant to service with seniority unimpaired, but without compensation for time lost. We find that a similar result is appropriate in the instant case.

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 25th day of July 1996.