

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32047
Docket No. MW-32063
97-3-94-3-442**

The Third Division consisted of the regular members and in addition Referee Charles J. Chamberlain when award was rendered.

**(Brotherhood of Maintenance of Way Employes
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. M. R. Patterson on January 18, 1993 for allegedly being absent on five (5) consecutive days, January 4, 5, 6, 7 and 8, 1993, without proper authority (System File D-196/930618).**
- (2) The claim* as presented by Vice Chairman J. V. Larsen on March 26, 1993 to Superintendent J. L. Riney shall be allowed as presented because said claim was not disallowed by Superintendent J. L. Riney in accordance with Rule 49(a).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, 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 beginning January 18, 1993 and continuing until he is returned to service.**

***The initial letter of claim will be reproduced within our initial submission."**

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.

The Claimant in this dispute, Mr. M. R. Patterson held seniority as a Truck Driver on the Oregon Division Track Subdepartment Roster. The Claimant was assigned as Truck Driver on Gang 6619 under the direct supervision of Foreman D. Johnson. The Claimant was first employed by the Carrier on November 3, 1975.

The issue that gave rise to this dispute was the alleged absence of the Claimant from duty without proper authority for five consecutive working days between January 4 and 8, 1993, and his subsequent dismissal by the Carrier by letter dated January 18, 1993, which read as follows:

"Dear Mr. Patterson

This is to advise you that the company's records indicate you have been absent from your work assignment without proper authority for the following five (5) consecutive workdays the 4th, 5th, 6th, 7th, and 8th in January of 1993.

Rule 48-K of the Agreement between the Brotherhood of Maintenance of Way employes and the Union Pacific Railroad Company, reads as follows:

'Employes 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.'

Therefore in absenting your assignment without proper authority on the dates listed above, you are now considered as having voluntarily forfeited your employment with the Union Pacific Railroad Company.

You should quickly arrange to return all company property now in your possession. Failure to do so will delay the processing of any wages due you.

S. J. White Date: 1/18/93
Track Supervisor"

Subsequently on February 2, 1993, the Organization Representative Mr. Joseph V. Larsen wrote Superintendent J. L. Riney and requested a conference to discuss the dismissal and attached an account of the Claimant's activities on the dates involved.

The request for a conference was declined by Superintendent Riney by letter dated March 13, 1993.

On March 26, 1993, the Organization submitted a claim to Superintendent Riney in behalf of the Claimant. The letter read as follows:

"Dear Sir:

We submit to you herewith a claim in behalf of Oregon Division Track Subdepartment Truck Driver M. R. Patterson SSN. 544-74-0355 because the Carrier violated the Agreement specifically, but not restricted to Agreement Rules 48, 48(a), 48(k) Section 4(a) and (b) from Appendix 'A' (Nonoperating (MofW) National Vacation Agreements), the 12/17/41 Agreement and past practice when on January 18, 1993, it removed Claimant Patterson from service without cause and without a hearing.

By administrative message No. 007 from LATA H#21172, dated 01/18/93, Claimant Patterson was notified by Track Supervisor S. J. White that he was removed from service according to the provisions of Agreement Rule 48(k), for allegedly failing to gain authority to be absent on 'FIVE (5) CONSECUTIVE WORKDAYS THE 4TH, 5TH, 6TH, 7TH AND 8TH IN JANUARY OF 1993.' (quote from Supervisor White's 01/18/93 message)

Telephone calls were made in order to resolve the matter, then a request for a conference was made by letter dated February 2, 1993. The request for conference was denied by your letter dated March 13, 1993, file B-464. Because Mr. Patterson was and is unjustly withheld from service and is now being denied due process this claim is made for all wages lost beginning on January 18, 1993.

Enclosed is a copy of Mr. Patterson's account of the dates involved and how he was left with the understanding that he had gained authority to be absent on the dates in question. Please notice Mr. Patterson's account of his conversations with Track Supervisor White and Manager Track Maintenance Ray Oneida on January 4, 1993, it was clear to Mr. Patterson that he was granted a personal leave day on January 4, 1993, and would be allowed additional vacation days in order to get snow tires and chains. As he had authority to take a personal leave day on January 4, 1993, and additional vacation days he was not absent without authority, therefore Mr. White's administrative message No. 007 from LATA H#21172, dated 01/18/93, must be rescinded.

We take the position that Mr. Patterson did have proper authority to take his vacation based on Section 4(a) and (b) from Appendix 'A' (Nonoperating (MofW) National Vacation Agreements), the 12/17/41 Agreement which states in part;

12/17/41 AGREEMENT

'5. Each employee who is entitled to vacation shall take same at the time assigned, and, while it is intended that the vacation date designated will be adhered to so far as practicable, the management shall have the right to defer

same provided the employes so affected is given as much advance notice as possible; not less than ten (10) days' notice shall be given except when emergency conditions prevent.'

So according to Section 4(a) and (b) from Appendix 'A' (Nonoperating (MofW) National Vacation Agreements), the 12/17/41 Agreement would allow Mr. Patterson to take his vacation on January 5, 6, 7, and 8, 1993, which was the time assigned and Mr. White's position that he was absent without proper authority is without support.

Mr. Patterson was denied a hearing, a conference and because he was not allowed to face his accusers, question witnesses, participate in, nor allowed present a defense he should be returned to service and paid for all time unjustly withheld this is supported by the following are quotes from Due Process in Disciplinary Hearings, by Joseph Lazar.

'The Sixth Amendment of the United States Constitution provides, in part, that 'the accused shall enjoy the right ... to be confronted with witnesses against him.' The fundamental rights of confrontation and cross-examination are essential to the integrity of disciplinary procedures and provide basic safeguards for all parties to the employment relationship. In the larger context of industrial liberty, these rights provide a secure foundation for other due process rights. In disciplinary procedures, fairness and due process exclude faceless accusations, whether the result of faulty memory of malevolent intent.

The argument for the constitutional rights of confrontation and cross-examination has been underlined by the Board: 'Some of these reasons were in the minds of our ancestors when they founded this country, and the right to personally confront the witnesses against them was one of the things they fought for. It may be said that this is not a criminal trial, but it currently partakes of that character and even in civil trials no deposition can be admitted in any court without the opposing party having been given the right either in

person or by council to confront the witness and cross examine him.'

The Board insists that an accused employee must enjoy the fundamental rights of confrontation and cross-examination of hostile witnesses. Award No. 14987-1 states: 'Claimant and his representative were not permitted to "hear" the testimony of, and interrogate, the one principal witness against him. This proceeding did not vaguely approach that "fair and impartial hearing" contemplated. . . However good the motive of carrier and however great the provocation presented, fundamentals of a rule so important to the claimant and his security as an employee cannot be so lightly by-passed, whatever the occasion otherwise demands. . . It is much better that a case of the most clearly desirable discipline fail for want of proof that it rest upon such a hearing as was here attempted.' If the claimant and his representative had an opportunity to face and interrogate his accuser, the witness 'might have told a different story. Upon that, we do not need to speculate. We are not required to. Claimant had the right to rest upon the protection his contract gave him for a fair and impartial hearing, and this he did not get.' Award No. 13577-1 similarly declares:

'The right to confront opposition witnesses and be afforded the privilege of cross-examination is a prerequisite to the fair and impartial hearing.'

The Board has expressed the conviction that while disciplinary procedures are 'not bound by the strict rules of judicial procedure it is, never-the less, essential to observe the fundamental requirements of due process. These include. . . an opportunity to confront the witnesses . . . (T)he Agreement, expressing, as it does, the spirit of the law of the land, requires, that one charged with misconduct shall be afforded a reasonable opportunity to meet his accusers face to face.' (end of quotes)

Notwithstanding the above, the Carrier is in violation of the terms and provisions of Agreement Rule 48 by withholding Mr. Patterson from service before he was given a fair and impartial hearing. Agreement Rule 48(a) states in part;'

AGREEMENT RULE 48(a)

(a) Except as provided in Paragraphs (k), (l) and (m) of this provision, an employe 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 being accorded a fair and impartial hearing.'

It is Mr. Patterson's right according to Agreement rule 48(a) to be accorded a fair and impartial hearing to determine whether or not there is cause to assess discipline. By removing Mr. Patterson from service denied him the right to a fair and impartial hearing before discipline was assessed and showed the Carrier's prejudgment.

In view of these facts and circumstances the Organization has no alternative but to submit a claim in behalf of Mr. Patterson claiming he must be paid for all time withheld from service beginning on January 18, 1993, continuing until he is returned to service, benefits are claimed as if he had worked and it is requested the unjust removal from service be expunged from his personal record.

Please advise when this claim will be allowed as presented. As always your cooperation is greatly appreciated.

Sincerely yours,

Joseph V. Larsen"

On June 25, 1993, the Organization wrote Superintendent Riney a letter which read as follows:

"Dear Sir:

This refers to the claim dated March 26, 1993, which was filed in behalf of Oregon Division Track Subdepartment Truck Driver M. R. Patterson SSN. 544-74-0355 because the Carrier violated the Agreement specifically, but not restricted to Agreement Rules 48, 48(a), 48(k) Section 4(a) and (b) from Appendix 'A' (Nonoperating (MofW) National Vacation Agreements), the 12/17/41 Agreement and past practice when on January 18, 1993, it removed Claimant Patterson from service without cause and without a hearing.

The March 26, 1993, claim has not been denied within the time limits, therefore this grievance and claim should be allowed as presented. Agreement Rule 49 (a) 1. states in part:

Agreement Rule 49(a)1.

'If not so notified, the claim or grievance shall be allowed as presented but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.'

Please advise as to the date Claimant Patterson can expect payment of this claim and when he will be reinstated.

Sincerely yours,

Joseph V. Larsen"

Superintendent Riney responded to the Organization by letter dated August 6, 1993, which read as follows:

"Dear Mr. Larsen:

Referring to your letter of June 25, 1993, file 2279-48K, in connection with Truck Driver M. R. Patterson:

As you know, Mr. Patterson removed from service for failure to protect his assignment, under the provisions of Rule 48(k). There is no requirement to hold a conference within any 'time limits'; and as I stated in my letter of March 13, 1993, I am not agreeable to holding such a conference. Mr. Patterson has a long history of absenteeism problems, and I see no advantage to discussing the matter any further.

Accordingly, your claim is denied in its entirety account lack of merit and agreement support."

The dispute was subsequently handled on the property up to and including the highest officer of the Carrier without resolution and is now before this Board by submission of the parties respective Ex Parte Submissions.

A review of the record submitted by the parties to this dispute reveals the following: The Carrier relied upon Rule 48(k) as basis for the dismissal of the Claimant. Rule 48(k) reads as follows: "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."

In this dispute, the record shows that there was substantial unrefuted evidence that the Claimant did make an effort on more than one occasion to notify his superiors of the problems that he was encountering.

The Carrier officials ignored the Claimant's attempts to apprise them of his situation and dismissed him without giving him an opportunity to be heard.

Rule 48(k) cannot be relied upon by the Carrier as they failed to give the Claimant an opportunity to explain his position.

In addition, the record clearly shows that the Organization was denied a conference which they requested in attempting to represent the Claimant's interests. The record further shows that the Carrier totally disregarded the claim filed by the Organization in behalf of the Claimant.

The error on the part of the Carrier in not affording the Claimant an opportunity to explain his circumstances surrounding the incident, the subsequent dismissal of the Claimant and total disregard for following prescribed Agreement procedures for handling and processing disputes which included clear time limit violations can only lead to one conclusion that the Carrier's dismissal of the Claimant was unwarranted, prejudicial and a clear abuse of discretion.

Accordingly, it is the decision of this Board that the claim of the Organization filed in behalf of the Claimant must be sustained as presented in its entirety.

AWARD

Claim sustained.

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 10th day of June 1997.

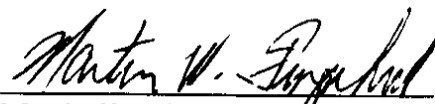
Carrier Members' Dissent
to Award 32047 (Docket MW-32063)
Referee Charles J. Chamberlain

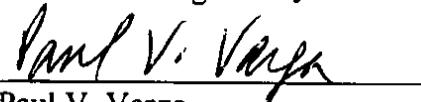
The Majority in Award 32047 erroneously found that "Rule 48(k) cannot be relied upon by the Carrier as they failed to give the Claimant an opportunity to explain his position." The Majority takes this rationale a step further to find that the Carriers's denial to conference regarding this matter is in violation of Rule 48, regardless of the specific, unambiguous language in Rule 48(k).

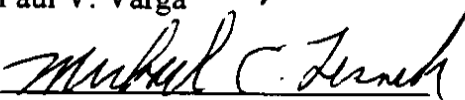
The Board has exceeded its authority under the Railway Labor Act when it mandates that Rule 48(k) language be given the meaning by the Majority that affected employees under this self-executing provision are entitled to a conference. Since the inception of this rule, employees voluntarily forfeiting their seniority rights under this provision may explain their circumstances in any manner of ways, including by letter, as was done in this case. For the Board to hold that 48(k) includes the requirement to hold a conference is to allow the Board to rewrite the plain, agreed-upon language of 48(k). The Board is not entitled to author or amend in this manner.

The reason for a self-executing termination clause, such as 48(k), is to allow better time management by the Organization and Carrier alike, by not creating unnecessary procedural hoops for either party to jump through in cases, such as five consecutive days absent without authority, that are clearly flagrant violations of policy and work rules.

We dissent.


Martin W. Fingerhut


Paul V. Varga


Michael C. Lesnik