

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35926
Docket No. MW-35967
02-3-00-3-54**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman 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 dismissal of System Gang employe P. A. Mihalik, Jr., for allegedly being absent from his assignment without proper authority on March 9, 10, 11, 12, 13, 16 and 17, 1998, was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement. (Carrier's File 1155677).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. P. A. Mihalik shall now be ‘ . . . reinstated to his former assigned position, with seniority and all other rights restored unimpaired, compensated for net wage and benefit losses suffered by him, and that the alleged charge(s) be expunged from his personal record.”

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.

By letter of March 17, 1998, the Claimant was informed that under Rule 48 he had forfeited his employment. Rule 48(k) states:

“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.”

The Carrier released the Claimant from service due to the Claimant’s failure to report on March 9, 10, 11, 12, 13, 16 and 17, 1998. The Carrier points out that these absences were unauthorized. Following an informal conference held on the property, the Carrier points to the fact that one sided messages from the Claimant do not substitute for permission to be absent. The Claimant did not receive proper authority to be absent from work. The Carrier makes note of the fact that the Claimant may have tried to contact Supervisors; may have discussed his being off work with a Claims Agent; and may have contacted Supervisor G. Nelson’s cell phone; but considers all of the above as irrelevant, because proper authority was never granted for the Claimant to be absent.

The Board fully reviewed this record. The facts are that the Claimant was injured on the job on February 19, 1998. Supervisor Nelson accompanied the Claimant to the emergency room. Discussions of the injury were held with the Claims Agent and direct Supervisor L. Martinez. There is no doubt from the testimony and record that requested vacation time to deal with recovery was made through Supervisor Nelson’s referral to Supervisor Martinez, and granted. The record indicates that in the intervening days, the Claimant worked “light duty” and then, after physician consultation on March 5 and 6, 1998, set an appointment for further medical evaluation on the first date herein considered, March 9, 1998.

The Claimant alleges the following actions. On March 6 and 7, 1998, he called and left messages for both Supervisors Nelson and Martinez, as well as the Claims Agent. When on March 9, 1998, his personal physician ordered him not to work, he notified the Carrier. He alleges he called Martinez and then, when he could not get his

cellular phone, paged him. He also states that on that same day, March 9, 1998, he paged the Claims Agent and finally reached Supervisor Nelson.

The Board notes that Supervisor Nelson testified that he had “no record of a call coming in on March 9.” After the Claimant produced a telephone bill documenting that the call to the number was made, Supervisor Nelson suggested that someone else may have gotten the call. The record also indicates that the following day, March 10, 1998, the Claimant again called his Supervisors with no return response, but did discuss his status with the Claims Agent. The Claimant also asserts that he tried to page several other Supervisors, who denied any such pages. The Carrier states that “even if pages or messages were left, this does not grant authority to remove oneself from service.”

In full consideration of all the facts, we do not find this instance to constitute a case of abandonment of one’s job. The informal conference produced sufficient proof to conclude, as the Conference Officer states, that the Claimant had no authority to be absent on the dates in question. It is also correctly stated at the informal conference by the Conference Officer that throughout all the inconsistencies, it is apparent that the Claimant failed to make “a strong enough effort” so as to be found innocent of the charges.

However, while we understand that Rule 48(k) is self-executing, there are numerous Awards that hold, as we do here, that the instant circumstances do not support an action by the Claimant of abandonment of his job. In the full case at bar, the Supervisor took the Claimant to the hospital and had complete knowledge of his medical problems. The Claimant’s direct Supervisor Bracken was off and although the Claimant allegedly attempted to contact his pager, there is sufficient proof to conclude that several attempts were made thereafter to keep the Carrier informed and to obtain proper authority.

This case has sufficient evidence to conclude that the Carrier knew of the reasons for the Claimant’s absence and that the Claimant’s pager messages and cell phone calls, while not sufficient to obtain authority, do not rise to the level to constitute abandonment of his job. Under similar circumstances, the Board has concluded that employees should be restored to service with seniority unimpaired, but without compensation for lost time (Third Division Awards 31535, 28877, 28406; Public Law Board No. 6089, Award 17). That is also the conclusion of the Board after full consideration of these instant facts.

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 22nd day of January, 2002.