

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36038
Docket No. MW-36338
02-3-00-3-569**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis 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 M. Ashley for allegedly being absent from his assignment without proper authority on January 25, 26, 27, 28, 29, February 1, 2, 3, and 4, 1999 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (Carrier’s File 1204193).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. M. Ashley shall now ‘ . . . be immediately reinstated to his former position with his seniority unimpaired and that he be compensated for his loss of wages commencing February 16, 1999 and continuing until he is reinstated to duty.’”**

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.

On June 1, 1979, the Carrier hired the Claimant as a Laborer in the System Track Department. The Claimant was injured in an off-duty car accident on March 6, 1998 and was granted a medical leave of absence.

The Claimant was notified on October 7, 1998 to submit to a medical evaluation of his fitness to return to duty. He complied. According to the Claimant's testimony, he was verbally informed that he was released for duty. A letter verifying that the Claimant had been medically cleared to return to work was sent by certified mail on November 19, 1998 to a post office box listed as the Claimant's address. The letter was returned unclaimed.

In mid-January 1999, the Claimant bid for a position on Gang 8553 and was awarded the job. He was assigned on January 21, 1999 to work under the supervision of J. Maldonado. Supervisor Maldonado testified that employees who put in a bid through the Gang Management System (GMS) are given the phone number, pager and name of the Supervisor of the gang for which they are bidding. Nevertheless, the Claimant did not show up for work, nor did he notify Maldonado of his absence. The Claimant was notified by letter dated February 11, 1999 that he had been absent from work without proper authority for the period January 25 to 29 and from February 1 to 4, 1999. In accordance with Rule 48(k) his seniority was considered to have been voluntarily forfeited. 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, unless justifiable reason is shown as to why proper authority was not obtained."

The Claimant thereafter requested and was granted a Hearing on the matter. Supervisor Maldonado testified that the Claimant showed up for work on Gang 8553 on February 21, 1999, well after his employment had been severed. He stated that the Claimant said nothing at that time about being on a medical leave of absence or not being released for work. Had he known that the Claimant was on medical leave of absence, the charges would not have been leveled against the Claimant, Supervisor Maldonado testified.

The Claimant testified that he knew he had been awarded the bid for the position on Gang 8553. He denied having been given any means by which to contact supervision

on the gang. He did state, however, that he made numerous attempts to contact the Carrier's medical office to request a release and finally received it by letter postmarked February 18, 1999. The Claimant testified:

"I was told you got to show that paper, but I've been calling Kay, but she won't send me the letter. So, if I report to work, maybe from there a supervisor might call her to send the paper. That's why I tried to get on the job."

The Claimant further testified that he attempted to report for work on February 16, 1999 but was told to go home because he was not released for work. The Claimant further stated that he later received a medical release from the Carrier postmarked February 18, 1999.

The Organization contends that the Claimant was off on medical leave of absence and, until he was cleared to return to work, he had a justifiable reason to be absent. It is further argued that the Carrier was aware that the Claimant did not receive a medical release until after February 18, 1999, yet never made Supervisor Maldonado aware of that fact. Thus, the circumstances in this case do not fall within the meaning of Rule 48(k) and the Carrier erred when it leveled the charge against the Claimant.

The Carrier argues that Rule 48(k) does not allow an employee to be AWOL and then defend his absence on medical grounds unless the medical grounds constitute a justifiable reason for not obtaining proper authority to be absent. In this case, the Carrier asserts that there was nothing to prevent the Claimant from notifying his supervisors or the GMS that he would not be protecting the position for which he voluntarily bid. In the absence of any such evidence, Rule 48(k) is clear, unambiguous and self-executing and requires denial of the claim.

After careful review of the record developed on the property, we find that the circumstances and evidence presented are similar to several cases cited by the Organization in which the Carrier's application of Rule 48(k) was viewed as an abuse of discretion. In Third Division Award 28877, for example, an employee sustained an injury while on duty and was off work. There was a dispute as to what the parties agreed to do from there. The employee and the Organization thought the parties had agreed that a medical statement would be obtained so that the employee could submit a request for a medical leave of absence. The Carrier believed that the parties agreed that the employee should get in contact with his gang while filling out the necessary

paperwork for a medical leave of absence. Concluding that the employee's termination under Rule 48(k) was improper, the Board in that case noted: "Claimant may well be guilty of poor judgment for not pushing harder for release of the medical documentation, but he did not just disappear without doing anything. He tried."

In Third Division Award 31535, we see the same reasoning. The Board in that case sustained a claim where the record indicated that the claimant's absence was due at least in part to the fact that he had been told by a Carrier manager that there was no need for him to report because he had been displaced when his gang was abolished. While acknowledging that the claimant had not been given authority to be absent for the first three days of absence, the Board concluded that there was "a degree of confusion in the communications between Claimant and the Manager Track Programs . . . concerning Claimant's future obligations to report," which accounted for the next several days of absence. The Board then went on to state:

"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 Award 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."

The rationale and logic of those prior cases applies with equal force to the matter at hand. Here, the Claimant should have attempted to contact the Supervisor of the gang to explain the circumstances surrounding his leave of absence. The onus was on the Claimant, and not on the Carrier, to supply that information to the Claimant's Supervisor. Nevertheless, the Claimant's assertion that he made numerous attempts to obtain a medical release went unrefuted by the Carrier. The Claimant's efforts may have been misdirected but they do not paint the picture of an employee who has abandoned his job.

While the Board is mindful of the fact that the parties negotiated Rule 48(k) so that they can reasonably and promptly assess whether employees have maintained an employment relationship with the Carrier, the record as a whole does not warrant a

finding that the Claimant forfeited his seniority in this particular instance. Accordingly, the Claimant will be restored to service with seniority unimpaired but without compensation for the time he has been out of service.

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 21st day of May, 2002.