

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37458
Docket No. MW-36937
05-3-01-3-582

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and 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. B. Tussler because he allegedly accepted a leave of absence other than as prescribed in the schedule rules (System File UJH-02-99/8-00386 CMP).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. B. Tussler shall be reinstated to service and shall be compensated “. . . for all lost wages; including but not limited to all straight time, overtime, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare and dental insurance, and any and all other benefits to which entitled, but lost now or during the pendency of this dispute, as a result of Carrier’s decision dated July 16, 1999 that claimant was not unjustly treated when Carrier deliberately, arbitrarily, and capriciously terminated claimant under the ruse that he voluntarily forfeited his seniority rights.”

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.

This case is before the Board as a result of the Carrier's issuance of a letter dated June 11, 1999 advising the Claimant that he had voluntarily forfeited his seniority by being absent from his position on June 4, 7 - 11, 1999 and a claim following an Unjust Treatment Hearing which did not result in the Claimant's reinstatement.

The Claimant has been employed by the Carrier since August 12, 1991. From what we can tell, prior to the incident involved in this matter, the Claimant's record was clear.

In May 1999, the Claimant, who resided in Fort Atkinson, Iowa, was in furlough status. At that time, the Claimant received a call from Senior Staffing Assistant G. Hugo to fill a temporary position (less than 30 days) at Sturtevant, Wisconsin. The Claimant testified that he initially declined the position due to the distance of the assignment in Wisconsin from his home in Iowa. . However, according to the Claimant, he called Hugo back and agreed to take the assignment until he could get an assignment on a steel gang.

Commencing on or about May 26, 1999, the Claimant worked one day at Sturtevant on the Sturtevant Section Gang and, after speaking with Track Maintenance Supervisor P. L. Poeschel, the Claimant was then assigned to Glendale, Wisconsin, as a Laborer on the Glendale Section Gang. The Claimant testified that because he was not receiving expenses for the assignment, he had to sleep in his car while working at those locations.

The Claimant testified that during his conversation with Poeschel on May 26, 1999, Poeschel "... told me he needed somebody in Glendale . . . and he told me as soon as he could find someone to replace me he would let me go."

Glendale Section Foreman D. Hendricks corroborates the Claimant's testimony that Poeschel told the Claimant that he would be let go as soon as a replacement was found. According to Hendricks:

- [Q] Had he [the Claimant] ever made a request with you present . . . to Mr. Poeschel about a replacement so that he could be released from the section crew?
- [A] Yes. Yes he did.
- [Q] Did you hear the conversation?
- [A] Yes I did.
- [Q] Could you tell me what was said?
- [A] I know he asked about being released, he wanted to go to the Steel Gang and Pat said he could release him as soon as he could and that's all I really remember."

Poeschel testified that "[i]t's not uncommon for people to ask me to be released . . . they ask me all the time."

On June 1, 1999, J. Bottoni filled a vacancy on the Glendale Section Gang. According to Poeschel, Bottoni was sent to fill a position that was going to be vacated by E. Everett who was going to bid on the Foreman's job on a pro-switch crew. According to Poeschel, Bottoni was not a replacement for the Claimant.

The Claimant testified that after he saw Bottoni on the job, he assumed that Bottoni was his replacement. According to the Claimant:

- [A] I just figured the position was full and I left.
- [Q] Why did you leave?
- [A] Because I was sleeping in my car and I was 240 miles from home.
- [Q] Did your conversation with Mr. Poeschel have any bearing on . . . as to why you left?
- [A] Yes.
- [Q] And that conversation was?
- [A] That when he found a replacement, I could go.
- [Q] And you felt at the time that that employee that showed up on June 3rd was your replacement?

[A] That's correct.

* * *

[Q] So you felt when the employee showed up on June 3rd that you were being released by him?

[A] That's correct."

Prior to leaving his position on June 3, 1999, the Claimant did not advise Maintenance Supervisor Poeschel that he was leaving. The Claimant did not work his assignment on June 4, 7-11, 1999. According to the Claimant:

"[Q] Did you in any way think that you were forfeiting your seniority by leaving the Glendale Section Crew?

[A] No I didn't.

[Q] Why?

[A] Because he told me as soon as he found a replacement that I could go and that's what I figured that man replaced me was for.

* * *

Sorry for all the trouble, but I thought I was released that's all I have to say."

Rule 17 provides for various forms of leave of absence (those granted by permission, promotion to non-covered official positions, etc.). Rule 17(e) provides that "[a]n employee accepting a leave of absence other than as specified in preceding sections . . . will forfeit all seniority rights."

As the Carrier asserts, the facts can be read to show that the Claimant left his position - i.e., took a leave of absence - without permission and did not thereafter report for duty, thereby abandoning his job. But such a narrow construction of the facts misses what really happened.

The evidence from the Hearing shows through the testimony of the Claimant and Section Foreman Hendricks that the Claimant asked Maintenance Supervisor Poeschel to be released from the Section Gang job in Wisconsin, and, according to

Hendricks, Poeschel told the Claimant that "he could release him as soon as he could." Maintenance Supervisor Poeschel does not really dispute the assertion that the Claimant asked to be released as shown by his testimony that "[i]t's not uncommon for people to ask me to be released . . . they ask me all the time." When a replacement employee showed up, the Claimant assumed - without asking - that his replacement had been secured and he therefore had permission to leave. The Claimant's assumption was wrong because the replacement employee was for another employee, not the Claimant. But the point here is that upon seeing the replacement employee the Claimant - in his mind - had a basis (albeit a threadbare one) to rely upon Poeschel's earlier representation that the Claimant would be released to go home as the Claimant requested.

That request to be released by the Claimant and Maintenance Supervisor Poeschel's response that he would do so "as soon as he could," coupled with the arrival of the new employee (which caused the Claimant to believe that he had been replaced) distinguishes this case from the usual scenarios cited to us by the Carrier on the property between the parties where employees simply disappear without permission. See e.g., Third Division Awards 34980 ("[t]here is nothing in the record to establish that the Claimant made any attempt or effort to notify a supervisor as to why he was absent"); 34971 (where the employee was specifically told "that if he did not report to work, he would be considered on unauthorized leave").

We are not satisfied that the record sufficiently shows that the Claimant abandoned his job. If anything was abandoned, it was the Claimant's use of good judgment and simple common sense to make an inquiry whether the new face on the job site was, in fact, his replacement which would then allow him to go home to Iowa. We therefore find that the claim has merit as an arbitrary determination made by the Carrier.

In the claim, the Organization seeks make whole relief. That type of relief cannot be granted. The Claimant brought all of this upon himself by failing to make a simple inquiry about the identity of the new employee on the job site and wrongfully assuming that person was his replacement and he could therefore go home. The Carrier should not be penalized in any monetary sense because the Claimant acted as he did in this case. In any event, at the Hearing, the Organization made it clear that it was not seeking monetary relief, i.e., "we ask for no money only that he be reinstated to a position that he may be able to fill." We see no reason to increase the remedy beyond what the Organization originally sought at the Hearing.

The Claimant shall therefore be entitled to reinstatement without loss of seniority, but without backpay or other monetary benefits sought in the claim.

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 19th day of April 2005.