

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38366
Docket No. SG-39011
08-3-NRAB-00003-040417
(04-3-417)

The Third Division consisted of the regular members and in addition Referee Danielle L. Hargrove when award was rendered.

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of S. M. Duff, for his return to his regular assignment and be compensated for all time lost, and his personal record be cleared of all reference to this matter, account Carrier violated the current Signalman's Agreement, particularly, Rules 68 and 80, when it improperly withheld the Claimant from service and then dismissed the Claimant without benefit of a fair and impartial investigation required under the provision of Rule 68; Carrier compounded its violation when it violated the time limits of the rule. Carrier's File No. 1377049. General Chairman's File No. N disp 381. BRS File Case No. 12925-UP."

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 facts on the record reveal the following: The Claimant, a Signal Maintainer at Laramie, Wyoming, at the time of his dismissal, was scheduled to work on July 11 and the week of July 14, 2003. The Claimant did not report on July 11, nor did he report to work on July 14, 2003. On July 14, the Claimant's mother contacted the Claimant's Foreman and advised that the Claimant had been incarcerated and that he would not be in to work. The record also reflects that the Foreman did not know when the Claimant would be able to return to work. The Claimant ultimately did not return to work until July 21, 2003, the effective date of his dismissal. The Carrier asserts that it dismissed the Claimant from its employ because he did not report to work as scheduled during the period of July 11 through July 21, 2003 in violation of Rule 62D of the Agreement.

Rule 62D provides that:

"Employees absenting themselves from their assignments for five (5) consecutive working days without proper authority will be considered as voluntarily forfeiting their seniority rights and employment relationship."

Therefore, the issues for the Board to consider and resolve are whether the Claimant was absent with "proper authority" and, if not, did the Claimant have a justifiable reason for not obtaining proper authority to be off work. Upon careful review of the record, we find no credible evidence to support the claim that the Claimant was properly on vacation during the period in question. Further, we find that there was sufficient evidence produced at the requested show cause Hearing to warrant the Carrier's determination that there was no justifiable reason for not obtaining proper authority to be off work.

The Organization contends that the Claimant requested and received permission from his Foreman to take leave during that time.¹ The Organization claims that the Carrier has an established practice of allowing employees to seek and gain approval for vacation from Foremen when supervisors are unavailable. This may be true, however, the Claimant failed to demonstrate that he actually had such approval from the Foreman. The Claimant also failed to put forth any evidence of a practice that permits leave to be approved after the fact.

The Organization makes procedural arguments that Rule 62D is irrelevant in this case and that Rule 68 applies. We disagree. It is long-standing precedent that Rule 62D is a self-invoking Rule and not disciplinary in nature. It administratively addresses situations such as this, setting the clear standard on acceptable and unacceptable absenteeism. The redeeming quality of Rule 62D for the employee is that it provides for the opportunity to request a Hearing with the Carrier to furnish a justifiable reason for why proper authority was not obtained. Neither Rule 68 nor Rule 80 has any bearing in this instance.

The Organization further claims the Claimant's absence was justifiable because he was under the care of health care professionals; however, there was no such evidence produced in the Hearing record. There was, however, uncontroverted evidence that the Claimant did not report to work on July 14, 2003 because he was incarcerated. The Carrier contends that the Claimant absented himself for more than five consecutive working days without proper authority in violation of Rule 62D. The Carrier maintains that the Claimant's violation automatically terminates his seniority rights and his employment with the Carrier. It is the Claimant's burden, upon his request, to demonstrate that his absence was, in fact, with proper authority. Other than his representative's unsubstantiated argument, the Claimant offered no testimony, witnesses or evidence to controvert that he had been incarcerated or that he

¹ After the Claimant had his mother call in for him, he arranged for his fellow employee to annotate the time records to reflect that the Claimant took July 11 as an approved safety day and July 14 and 15, 2003 as approved vacation days. However, none of those absences were scheduled or approved in advance. The record also does not reflect any evidence that anyone in a position of proper authority ever actually approved the Claimant's absences. It is clear that the Foreman was aware of the Claimant's predicament; however, the record does not clearly demonstrate that he "approved" the time being taken as proposed, tacitly or otherwise.

could have come to work had he known the Carrier would not approve his request to take leave. Strenuous advocacy by his representative alone is insufficient.

Several Awards have found that incarceration does not constitute an excusable or justifiable reason for absence from work. The Board understands and is cognizant of the desire to propound the quick fix and fiction suggested by the Organization. The fiction being that the Claimant was simply out on vacation when, in reality, he unexpectedly could not come to work. Unplanned, unscheduled, and inexcusable absences are the types of absences meant to be covered by Rule 62D. Therefore, it cannot be said that the Claimant is being unfairly forced into Rule 62D's venue. Although the Claimant had leave readily available for its proper use, the Board cannot and will not require the Carrier to allow the Claimant to circumvent the intent and purpose of Rule 62D by using "good" leave for an improper purpose.

We find no reason to disturb the Carrier's actions in this matter.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 20th day of November 2007.