

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38996
Docket No. SG-38930
08-3-NRAB-00003-050353
(05-3-353)

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(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 R. E. Hazlitt, for reinstatement to his former position with his seniority rights and benefits restored and payment for all time lost beginning on April 13, 2004, account Carrier violated the current Signalmen’s Agreement, particularly Rules 62 and 68, when it improperly dismissed the Claimant under the provisions of Rule 62 and then compounded this violation by failing to adhere to the time limit provisions of Rule 68 following an unjust treatment hearing held on April 13, 2004. Carrier’s File No. 1401911. General Chairman’s File No. N 68 453. BRS File Case No. 13176-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 Claimant was hired by the Carrier April 17, 2002. He last performed service for the Carrier on January 12, 2004, and took paid vacation on January 13, 14, and 15. On or about January 23, the Claimant contacted Director Signal Maintenance M. E. Hauser, his uncle by marriage, and verbally requested a leave of absence under the Family Medical Leave Act (FMLA) due to his father's alleged medical condition. On January 29, 2004, Hauser sent the Claimant the forms that he was required to fill out and return for FMLA certification. Although the forms were sent to the Claimant's address of record via certified mail, and the U.S. Postal Service attempted to deliver the mail on February 2 and 10, 2004, the mail was not claimed and was returned to Hauser unopened on February 17.

Having received no documentation to substantiate the Claimant's January 24, 2004 request for FMLA leave, the Carrier issued a letter to the Claimant on March 5 informing him that he had forfeited his seniority rights and employment relationship with the Carrier pursuant to Rule 62D of the parties' Agreement. Rule 62D states:

"D. 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. Such employees may make request for a hearing relative to their forfeiture of seniority to show justifiable reason as to why proper authority was not obtained. Said request for hearing must be made within ten (10) calendar days from the date of removal from service."

The Claimant and his Representative made a timely request for a Hearing to show justifiable reason as to why proper authority was not obtained. Based on the evidence presented at the April 13, 2004 Hearing, the Carrier determined that there was more than a substantial degree of evidence which warranted sustaining the Claimant's forfeiture of seniority rights and employment relationship under Rule 62D.

In its appeal the Organization asserted that the Carrier had violated Rules 68 and 80, as well as Rule 62. The Organization further contended that the Claimant had been off for six weeks out of his 12 week FMLA allotment, that Hauser was aware of the Claimant's activities, and that the FMLA forms were never received by the Claimant, so that Rule 62 was inappropriately applied. The Carrier rejected the appeal of the claim.

The Organization contends that the Carrier violated Rule 68 by failing to execute formal charges and to render a decision within the time limits of that Rule, and incorrectly applied Rule 62D by finding that the Claimant was absent without proper authority when he was actually on leave under the FMLA. It is the Carrier's position that Rule 62D is self-executing, that Rule 68 was inapplicable to the Claimant, and that the Claimant was given the Hearing to which he was entitled under Rule 62D. Because it is undisputed that the Claimant failed to provide any documentation to support his claim for FMLA leave, and failed to receive the FMLA forms through his own fault, the Carrier asserts that the claim must be denied.

The Carrier did not commit a procedural violation. Numerous Third Division Awards demonstrate that, as the Carrier contends, Rule 62D is self-executing, and automatically terminates an employee's seniority and employment relationship after five days of absence without proper authority, subject only to the employee's right to a hearing to provide justifiable reasons for the absence. Rule 68 refers only to discipline-related hearings, so its procedures and time limits do not apply to a "voluntary forfeit of seniority" under Rule 62D. See Third Division Awards 25837, 28637, and 27225. The Carrier was not required to comply with the time limits of Rule 68 in dealing with the Claimant.

Under Rule 62D, once it has been established that the employee has been absent for five consecutive working days without proper authority, the burden is on the employee to show justifiable reason as to why proper authority was not obtained, and the Board's role on appeal is merely to determine whether there is substantial evidence to support the Carrier's determination. Here the record evidence is clear that the Claimant was absent for well over five consecutive working days following January 24, 2004, that he made only a verbal request for FMLA leave, that the Carrier properly sent FMLA forms to the Claimant at his address of record, and that

the Claimant simply failed to check for mail while attending to his sick father. His reason for ignoring his mail, that he was overwhelmed with caring for his invalid father, is unfortunately not sufficient to excuse his complete failure to communicate with the Carrier after January 24, 2004 for at least six weeks, until notified of the forfeiture of his seniority on March 5, 2004. Barring unusual circumstances, the Carrier can reasonably expect employees either to check their mail, or to have it checked on their behalf, or to notify the Carrier of a change of address, during periods of their own or a family member's illness. Thus the Claimant bears primary responsibility for failing to return the forms as required, in order to obtain clear authority for his absence. As a result, the Carrier had substantial evidence upon which to determine that the Claimant had no justifiable reason as to why proper authority was not obtained and upon which to sustain the forfeiture of seniority under Rule 62D.

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 27th day of March 2008.