

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6089

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 14
)
)
) Award No. 17
)

Martin H. Malin, Chairman & Neutral Member
R. B. Wehrli, Employee Member
D. A. Ring, Carrier Member

Hearing Date: August 26, 1999

STATEMENT OF CLAIM:

1. The dismissal of Track Gang employee G. Garcia for allegedly being absent from his assignment without proper authority on August 11, 12, 13, 14, and 15, 1997, was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (System File D-293/1092835D).
2. As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record cleared of the August 15, 1997 forfeiture of seniority letter and he shall be compensated for all wage loss suffered.

FINDINGS:

Public Law Board No. 6089, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Claimant was dismissed from service pursuant to Rule 48(k), which provides:

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 Organization requested a conference on Claimant's behalf, pursuant to Rule 48(n) which provides:

An employee in service who feels he has been unjustly treated may request a conference through the General Chairman or other officer of the organization. If the matter cannot be resolved in the interim, the representative may make written request for a conference to the appropriate Carrier manager involved and such request shall contain the precise nature or cause of the complaint. Such request for conference must, however, be made within twenty (20) calendar days of the cause of the complaint. If the asserted unjust treatment is left unresolved, it may be handled as a claim or grievance under the provisions of Rule 49.

The record reveals that on July 5, 1997, Claimant sustained an off-duty injury to his ankle. At the time, Claimant was assigned to System Gang 9039 and was working compressed work halves. According to Claimant's statement, he paged his supervisor on July 6. According to the supervisor's statement, Claimant paged him on July 8, the first day following the injury on which Claimant was scheduled to work. In any event, the supervisor returned the page on July 8, authorized Claimant's absence for five days and advised Claimant to keep him informed if the situation changed.

Claimant's doctor extended Claimant's period of disability. According to Claimant's statement, he paged his supervisor on July 20 and August 3 or 4. According to the supervisor's statement, Claimant paged him on July 24, the supervisor attempted to return the call on July 24 and 25, and the supervisor received no answer and no answering machine both times. According to the supervisor, Claimant was not heard from again.

Meanwhile, Claimant's gang was moved to a different location and a different supervisor was placed in charge. Claimant's doctor extended his period of disability and did not release him to return to work until August 18. According to Claimant's statement, he did not know that the gang had a new supervisor until mid August. He paged the new supervisor on August 20. On August 22 he obtained the new supervisor's cell phone number and called him. The new supervisor advised Claimant to return to service on August 24, but then called him back and told him his seniority had been terminated under Rule 48(k).

As numerous boards including this Board, see Award No. 16, have recognized, Rule 48(k) is self-executing and no pre-termination hearing is required. However, as boards also have recognized, there are infrequent occasions where "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." Third Division Award No. 31535. After careful consideration of the record, we conclude that this case presents one of those infrequent occasions. We do so for several reasons.

First, there is no question that Claimant was medically unable to work through August 18.

During handling on the property, the Organization submitted doctor's statements documenting Claimant's condition and there is nothing in the record that questions their validity. Second, there is no question that at the outset of his injury, Claimant contacted his supervisor and obtained authority to be absent.

Third, although there is conflict in the record concerning Claimant's efforts to obtain an extension of the authority that had been granted to him, there is reason to question the supervisor's statement. The statement itself provided an incorrect telephone number for Claimant, thereby suggesting either that when the supervisor attempted to return Claimant's page he dialed the wrong number or that the supervisor's diary was not an accurate record. These inferences are reinforced by the supervisor's statement that he received no answer and no answering machine, which is inconsistent with the Claimant's telephone bill which showed that the Claimant had subscribed to voice messaging with the phone company. Claimant's statement that he paged the supervisor and left detailed messages on July 20 and August 3 or 4 is at least as credible as the supervisor's statement.

Fourth, Claimant's statement during handling on the property that he did not learn until mid-August of the change in supervisors was uncontradicted. Furthermore, Carrier offered no evidence or explanation during handling on the property that would indicate that Claimant knew or should have known of the change in supervisors. We infer from the record that Claimant learned of the change in supervisors from the letter dated August 15, 1997, signed by the new supervisor, informing Claimant that he had forfeited his seniority pursuant to Rule 48(k).

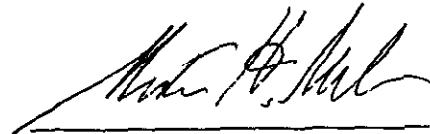
Claimant is not completely without fault for his predicament. He could have been more diligent by following up more frequently with calls to supervision about the condition of his ankle. However, we find that under all of the circumstances and in accordance with prior awards, the harshness of Rule 48(k) should be mitigated and Claimant should be returned to service with seniority and benefits unimpaired but without compensation for time held out of service.


AWARD

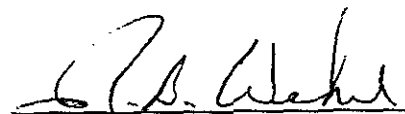
Claim sustained in accordance with the Findings.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto


Martin H. Malin, Chairman


D. A. Ring,
Carrier Member


R. B. Wehrli
Employee Member

Dated at Chicago, Illinois, February 14, 2000.