

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 148
and	)
	) Award No. 143
UNION PACIFIC RAILROAD COMPANY	)
_____	)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: June 18, 2008

STATEMENT OF CLAIM:

- (1) The dismissal of Mr. John W. Lamons for violation of Rule 48(k) in connection with failing to appear to work or call for authorization to be absent from work between the dates of May 7 and 22, 2007 is unjust, unwarranted and in violation of the Agreement (System File J-0748U-260/1484564).
- (2) As a consequence of the violation outlined in Part (1) above, we request that Mr. Lamons be immediately returned to service with all rights restored unimpaired and that he be compensated for all hours he has been deprived of working since he has been released for work by his physician.

FINDINGS:

Public Law Board No. 6302 upon the whole record and all of 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.

On May 22, 2007, Carrier notified Claimant that he had failed to appear for work or call for authorization to be absent between May 7, 2007 and May 22, 2007. Accordingly, Carrier notified Claimant that his seniority had been forfeited in accordance with Rule 48(k) of the Agreement. Rule 48(k) provides, in relevant part:

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 Organization contends that Claimant complied with Rule 48(k) because he demonstrated that he was absent due to back and knee problems and was under a doctor's care and because he called the Assistant Foreman/Timekeeper and reported that he was off sick in accordance with instructions allegedly given to him by his Foreman. Carrier responds that the medical documentation covers only the period May 5 - May 9, 2007, and therefore does not justify the entire period Claimant was absent. Carrier further responds that Claimant's calls to the Assistant Foreman did not protect his seniority as the Assistant Foreman has no authority to give Claimant permission to be absent or to grant him a medical leave of absence.

We are unable to agree with Carrier's contention that the medical documentation failed to account for the entire period of absence in dispute. The doctor's statement, dated May 15, 2007, did reflect initial treatment on May 4 and the date of last appointment as May 9. However, it also stated, "I am unable to release this patient. I anticipate significant clinical improvement by 6/4/07. Next appointment 6/4/07." We conclude that the evidence does support that Claimant was medically unable to work and under doctor's care throughout the period in dispute.

The Organization submitted copies of Claimant's phone records showing numerous calls to the Assistant Foreman's cell phone purportedly to report absences in 2007. On his phone record of May 7, 2007, Claimant wrote the following statement:

May 7 - 5:33 AM - before work on Monday. A call Whitney Maws, assistant foremans (sic) cell phone. I was told to call Whitney, if I miss work, because he takes care of the timekeeping for payrolls (and he needs to know what to put down; vacation, personal day, etc.)

Claimant may have been advised by his Foreman to call the Assistant Foreman to report the absence for timekeeping purposes but such advise did not mean that Claimant was excused from contacting the Foreman or other appropriate authority to secure approval for his medical leave of absence. Thus, technically, Claimant was absent without authority and under the literal language of Rule 48(k), Carrier acted properly in terminating Claimant's seniority.

However, it is well-established that although "Rule 48(k) is self-executing[,] . . . 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, [Boards have] recognized that confusion in communication 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.

NRAB, Third Division Award No. 31535, at 4; *see also* NRAB Third Division Award No. 36038.

In the instant case, it is clear that Claimant was under a doctor's care and medically

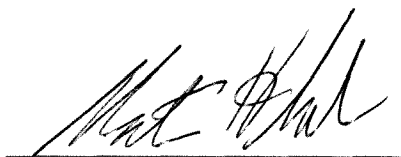
unable to work during the period of his absence. It is also clear that Claimant did contact the Assistant Foreman in accordance with prior instructions from his Foreman. Although Claimant's calling the Assistant Foreman did not relieve him of the responsibility of also contacting his Foreman to obtain a leave of absence, we conclude that the circumstances of this case warrant mitigating the harshness of a literal application of Rule 48(k). Accordingly, in line with established precedent on this property, we shall award that Claimant be reinstated to service with seniority unimpaired but without compensation for time out of service.

AWARD

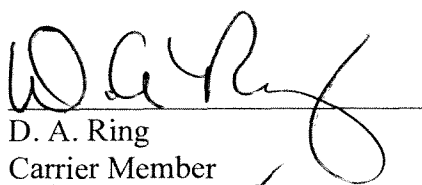
Claim sustained in accordance with the Findings.

ORDER

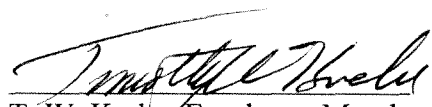
The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto



Martin H. Malin, Chairman



D. A. Ring
Carrier Member
11-12-08



T. W. Kreke, Employee Member
Employee Member 11-13-2008

Dated at Chicago, Illinois, October 30, 2008

It is understood that the retroactive portion of those wage increases shall be applied only to employees who have an employment relationship with a carrier on the date of this Agreement or who retired or died subsequent to June 30, 2005.

Carrier terminated Claimant's employment based on Rule 48(k) on May 22, 2007, i.e. before the date of the July 1, 2007 agreement. The question framed by the Organization's request for interpretation is whether the Award which reinstated Claimant with seniority unimpaired but without compensation for time out of service affected his employment status on July 1, 2007, such that he would be entitled to the retroactive portion of the general wage increases. Carrier agrees that if the Award had reinstated Claimant with full back pay, Claimant would have been entitled to the retroactive wage increases. Claimant's entitlement to the retroactive wage increases turns on the meaning of our Award, specifically the meaning of Claimant's reinstatement "with seniority unimpaired." Because the dispute turns on the meaning of Award No.143, we conclude that it is a proper matter for a request for interpretation of the Award.¹

Timeliness of the Request for Interpretation

The Neutral Chair of the Board signed Award No.143 on October 30, 2008. The Carrier and Employee Members of the Board signed the Award on November 12, 2008. The request for interpretation came in a letter from the Vice Chairman to the Carrier Member of the Board dated March 24, 2009. Relying on Rule 49(a)(1), Carrier contends that the request for interpretation was untimely because it was not filed within sixty days of the date that the Carrier and Employee Members signed the Award.

Rule 49(a)(1) provides, in relevant part:

All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. The date a claim is presented is the date the claim is sent, as evidenced by postmark when the U.S. Mail service is utilized.

On its face, Rule 49(a)(1) applies to "claims or grievances," not a request for interpretation of an Award. A request for interpretation is governed by the Agreement that created the Board. That Agreement provides in paragraph 11:

The Board hereby established shall continue in existence until it has disposed of the disputes submitted to it under this Agreement after which it will cease to exist. In case a dispute arises involving an interpretation or application of an award, the Board, upon

¹Whether the dispute could also have been raised by filing a claim under the July 1, 2007 agreement is not before this Board.

request of either party, shall interpret the award in light of the dispute. If the Board has ceased to exist, the request for an interpretation must be made within ninety (90) days of the date of the award and the Board will convene for the sole purpose of rendering an interpretation.

Thus, the only express time limit contained in the Agreement for requests for interpretation applies only when the Board has ceased to exist. PLB 6302 continues to exist so the ninety day limit does not apply. It might be argued that there is an implied limit that requests for interpretation be filed within a reasonable period of time. We need not decide whether the Agreement contains such an implied time limit because there is no showing that the Organization waited beyond a reasonable time to file its request. Accordingly, we conclude that the request is timely and properly before us.

The Merits of the Request for Interpretation

The Organization contends that because the Award reinstated Claimant with seniority unimpaired, he may no longer be considered as in a dismissed status on July 1, 2007, and therefore is entitled to the retroactive portion of the general wage increases. In essence, the Organization urges that the Award converted Claimant's dismissal to a lengthy suspension. Although Claimant is not entitled to the retroactive wage increases for the period he was effectively suspended, the Organization urges he is entitled to retroactive wage increases for the period he worked prior to being withheld from service.

Carrier maintains that our Award merely restored Claimant's seniority upon his reinstatement but did not change his status as of July 1, 2007. In Carrier's view, under Side Letter No. 2, to receive retroactive wage increases, Claimant had to have had an employment relationship with Carrier as of July 1, 2007, something he clearly lacked. Our Award did not change that. Carrier concludes that Claimant is not entitled to any retroactive wage increases.

Rule 48(k) provides, in relevant part:

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.

In the case before us, the Organization argued that Claimant complied with Rule 48(k) because he established that his absence was due to back and knee problems for which he was under a doctor's care and because he called the Assistant Foreman/Timekeeper and advised that he was off sick. We rejected those arguments. We observed that Rule 48(k) required that Claimant and the Organization establish justifiable reason not for the absence but for the failure to obtain proper authority. Claimant's medical condition may have prevented him from working but there was no showing that it prevented him from calling in and obtaining authority for his absence. We further found that although Claimant's Foreman may have advised him to call the

Assistant Foreman for timekeeping purposes, “such advise did not mean that Claimant was excused from contacting the Foreman or other appropriate authority to secure approval for his medical leave of absence.” We concluded that “technically, Claimant was absent without authority and under the literal language of Rule 48(k), Carrier acted properly in terminating Claimant’s seniority.”

However, we found a significant gloss on the literal language of Rule 48(k) in precedential authority on the property. Specifically, we observed that although Rule 48(k) was self-executing, several on-property Awards had held that in appropriate circumstances, a Board has authority to mitigate the harsh effects of a literal application of the Rule. We observed that Claimant did not abandon his job, that he was medically unable to work and that he did contact the Assistant Foreman to report his absences. We concluded that “the circumstances of this case warrant mitigating the harshness of a literal application of Rule 48(k). Accordingly, in line with established precedent on this property, we shall award that Claimant be reinstated to service with seniority unimpaired but without compensation for time out of service.”

This is not a case where Carrier dismissed an employee for misconduct and the Board found that although Carrier proved the misconduct, dismissal was arbitrary, capricious or excessive. In such a case, it is arguable that an award reinstating a claimant with seniority unimpaired but without compensation converts the dismissal to a lengthy suspension. We express no view as to the validity of such an argument. What is clear in the case before us is that under the literal language of Rule 48(k), Claimant’s seniority was properly terminated on May 22, 2007. Thus, under the literal language of Rule 48(k), Claimant did not have an employment relationship with Carrier on July 1, 2007. However, we found, consistent with established precedent on this property, that we had authority to mitigate the harsh effects of a literal application of Rule 48(k) and that the circumstances presented warranted such mitigation. In accordance with this established arbitral gloss on Rule 48(k), we awarded reinstatement without monetary compensation. Our words “with seniority unimpaired” addressed Claimant’s status upon reinstatement, something that under our Order had to occur within thirty days of November 12, 2008, but did not change Claimant’s status as of July 1, 2007. Accordingly, we conclude that Claimant is not entitled to the retroactive portion of the general wage increases under the July 1, 2007 agreement.



Martin H. Malin, Chairman

Dated at Chicago, Illinois, June 27, 2009