

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 177
AWARD NO. 170

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1511655

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

System File

J-0848U-263

STATEMENT OF CLAIM

1. The Carrier violated Rule 48 (k) of the Collective Bargaining Agreement effective July 1, 2001 when on August 6, 2008 Claimant, Bernard L. Torres was advised of the forfeiture of his seniority rights and employment relationship for alleged absence from service without proper authority from July 29, 2008 through August 5, 2008.
2. As a consequence of the violation set forth in Part 1, the Organization requests that Claimant be reinstated to service with seniority and all benefits unimpaired and, that he be compensated for all time lost from the date of his removal from service to the date of his return to service; that the compensation include all straight time and overtime hours Claimant would have worked had he not had his employment relationship severed.

STATEMENT OF BACKGROUND

Prior to August 6, 2008, Claimant had accrued service with Carrier of twenty-nine (29) years and held the position of Assistant Foreman on Gang 9055. Prior to February 21, 2008, Claimant voluntarily contacted Carrier's Employee Assistance Program (EAP), requesting assistance for substance abuse. The Carrier's Employee Assistance Manager, Lori Scharff arranged for Claimant to protect his employment by having him placed on a Medical Leave of Absence which commenced on February 21, 2008 and was to continue as long as he participated in the recommended EAP program devised by Scharff. On or before March 24, 2008, while undergoing the recommended

treatment program at Extended Aftercare, Inc. located in Houston, Texas, Claimant developed cellulites (an infection) in his right leg resulting in his being hospitalized from March 24, 2008 through April 25, 2008. Claimant returned to Extended Aftercare following his release from the hospital to continue treatment. Claimant's leg infection reoccurred causing him to be hospitalized a second time from May 6, 2008 through May 13, 2008. Claimant then returned to continue his treatment at Extended Aftercare following his release from the hospital and on July 1, 2008, Claimant was released from his treatment program. From July 1, 2008 through July 9, 2008, Claimant attempted to contact Scharff, to apprise her of his release from his treatment program, leaving messages for her to return his calls. Not hearing from Scharff, on July 10, 2008, Claimant spoke with Mark Jones, Director, Employee Assistance and Support and explained the problem with his leg and the fact that he had to return to his doctor on August 25, 2008 for a return to work evaluation. In this conversation, Jones apprised Claimant his leave of absence extended through August 19, 2008 and on July 11, 2008 when Claimant was finally able to speak with Scharff, she also confirmed his leave of absence extended through August 19, 2008.

On July 28, 2008, Claimant was arrested on a third degree charge of driving under the influence of liquor and was sentenced to jail, the period of his incarceration commencing July 28, 2008 and ending August 19, 2008. Upon learning of his incarceration, Scharff notified Claimant in writing dated July 29, 2008, that due to his being in jail his leave of absence was being rescinded effective immediately. In this same written communication, Scharff recommended to Claimant that he immediately contact his manager and union representative to apprise them of his situation and to request their assistance to determine what options might be available to protect his employment. The record evidence reflects that by letter dated August 6, 2008, Manager Maintenance of Way Equipment Operations, A.C. Stahlnecker notified Claimant that due to his being absent from his assignment without proper authority for the five (5) consecutive workdays from July 29, 2008 through August 5, 2008, under the provisions of Rule 48 (k) of the 2001 Collective Bargaining Agreement, Carrier deemed he had voluntarily forfeited his employment relationship. Claimant was advised he should quickly arrange to return all Company property that was then in his possession and that failure to do so would delay the processing of any wages that were due him. By letter dated August 15, 2008, the Organization apprised Carrier officials Stahlnecker and Manager Labor Relations, Justin T. Wayne of its request on behalf of Claimant to convene a conference in accord with the provisions of Rule 48 (k) to discuss Claimant's severance of employment which Claimant believed was unwarranted, in violation of the Agreement, and/or his rights as a Carrier employee. Said conference occurred by telephone on September 2, 2008 and participating in that conference were Carrier officials Stahlnecker, Deland Humphreys, Director Track Maintenance, and Senior Special Agent Robert Morrison and for the Organization, Vice Chairman, Joe Dean and the Claimant. By letter dated September 5, 2008, Stahlnecker notified Claimant of Carrier's decision it found no justifiable reason for his absence and therefore, by absenting himself from his assignment without proper authority, he had voluntarily

forfeited his employment with Carrier. In this notification letter, Stahlnecker referenced Claimant's having verified during the conference call that he had not contacted his manager when his leave of absence was rescinded.

Upon receiving Carrier's notice to Claimant on September 25, 2008 apprising Claimant of its decision to not change its determination that he had voluntarily forfeited his employment pursuant to the applicable provisions of Rule 48(k), the Organization by letter dated September 30, 2008 filed the subject claim requesting that Carrier reconsider its September 5, 2008 written decision.

ORGANIZATION'S POSITION

The Organization contends that Claimant's medical leave of absence that was granted to him in February 2008 was, in effect extended when, in his conversations with both Jones on July 10, 2008 and with Scharff on July 11, 2008, he informed them of his continuing cellulites condition and that he had a doctor's appointment for a return to work evaluation on August 25, 2008. Claimant did see a Doctor Bart Kolste located in Ogallala, Nebraska, the city in which Claimant resides, on August 25, 2008 and based upon his evaluation, Dr. Kolste issued a medical note stating Claimant needed to be off work until September 23, 2008 due to "cellulites in his right lower leg and aggravated edema." The Organization submits that it was the medical condition of his cellulites and not his involvement with his EAP treatment that prevented him from returning to service and, that at all times relevant following his release from EAP treatment on July 1, 2008, Claimant kept Carrier apprised of his cellulites condition. The Organization relies on a number of past arbitration Awards which have established that employees providing proper documentation of medical requirements to be absent from work cannot be subject to dismissal for voluntarily absenting themselves from their assignments. Additionally, the Organization argues there is not a single shred of evidence in the record proceedings of the handling of this case that Claimant received notice from the Carrier that his medical leave had been rescinded prior to August 7, 2008, the date Claimant asserts he received Scharff's notice to that effect. The Organization asserts that as far as Claimant knew he was still on medical leave up until the time he was notified otherwise on August 7, 2008 and, therefore, Carrier cannot attribute any days prior to August 7th as being absent without authority. Moreover, the Organization asserts, it is inconceivable that Claimant could have received a letter dated July 29, 2008 on that same date or even assuming arguendo that the letter was mailed on July 29th that he would have received it in time to report for duty on the very next day on July 30, 2008. Consequently, according to the Organization, Claimant cannot be considered as being absent without authority on either July 29 or July 30. That being the case, the Organization maintains that Carrier failed to prove Claimant was absent without authority on the first two (2) of the cited dates of the five (5) consecutive dates Carrier charges Claimant with being absent from his assignment without proper authority nor can it prove that Claimant voluntarily absented himself from service on the remaining

three (3) dates of July 31, August 4 and 5 since he did not receive Scharff's letter until August 7th and, as a result, Carrier's application of Rule 48(k) to sever Claimant's employment relationship was based on unproven charges, was unjust and unwarranted and in violation of the Agreement.

Finally, the Organization notes the purpose of Rule 48(k) was never intended to catch employees between a rock and a hard place, but rather the purpose is to implement closure for employees who have elected to no longer remain in the employ of the Carrier but fail to tender a resignation. In Claimant's case, the Organization submits Management was aware of his medical circumstances yet, it still set him up to be dismissed using Rule 48(k) as a means of convenience. The Organization asserts that the plain truth is, Carrier would never have allowed Claimant to return to work based on his doctor's evaluation of his medical condition. Moreover, the Organization submits, it is clear from the whole of the record evidence, that it was never Claimant's intention to resign his employment with Carrier which intent underlies the rationale and whole purpose of Rule 48(k).

CARRIER'S POSITION

First and foremost, Carrier distinguishes the role of EAP and the role of its Health and Medical Department with respect to placing employees on a medical leave of absence. Carrier explains that EAP staff are mental health professionals who assist employees with behavior health, mental or substance abuse issues. As such, EAP staff do not request nor do they collect documentation regarding medical issues. The functions of requesting and collecting documentation regarding medical issues are those reserved for the staff of the Health and Medical Department. Although Carrier acknowledges Claimant mentioned to Jones the condition of his leg nevertheless, all decisions pertaining to the length of Claimant's leave of absence were related solely and only to his EAP treatment plan. As a result, when EAP Manager Scharff learned Claimant had been incarcerated, and therefore unable as a result to continue his treatment plan up to the expiration of his EAP leave of absence, she rescinded his leave effective as of July 29, 2008. Notwithstanding Scharff's recommendation in her written notice to Claimant that he should immediately contact his manager and union representative to alert them of his situation and request their assistance to determine what options might be available to him to protect his employment, Carrier asserts Claimant never obtained nor was granted an additional leave of absence in relation to his claimed cellulites condition. Carrier avers that even assuming arguendo that Claimant had been granted a leave of absence for his cellulites, it still would have the right to find he did not have authority to be absent due to being incarcerated. Carrier submits it is well established through voluminous past arbitral decisions that Rule 48(k) is a self-executing rule stating that if an employee is absent for five (5) consecutive work days without proper authority and there is no justifiable reason forthcoming about why the authority was not obtained, the employee will be considered to have voluntarily forfeited his seniority rights and

employment. In the instant case, Carrier submits the record evidence shows that Claimant was absent from his assignment for five (5) consecutive work days, that he did not receive proper authority for missing the days, and he did not provide a justifiable reason for why he did not obtain proper authority. As a result, Carrier argues, based on the facts presented, it was justified in severing Claimant's employment pursuant to Rule 48(k) and ,therefore, this Board should not rule to reinstate Claimant to its employment.

FINDINGS

Public Law Board No. 6302, 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.

At the outset, the Board concurs that Carrier has the right to invoke the self-executing Rule 48(k) whenever an employee is absent from his/her assignment for five (5) consecutive work days without proper authority for almost any reason which includes such an absence due to incarceration. While the record evidence establishes without doubt that Carrier was within its right to terminate Claimant's EPA leave of absence effective July 29, 2008 upon learning of his incarceration, Carrier was unable to refute Claimant's assertion he did not receive notice of the termination of his leave until August 7, 2008, a date after the fact of Carrier having severed his employment relationship for having been absent from his assignment on the five (5) consecutive days of July 29, 30, 31 and August 4 and 5, 2008. The Board concurs in the Organization's position that even if Scharff had mailed the notice of the termination of his leave of absence on the same date of the notice, July 29, 2008, Grievant would not have received the notice until sometime after July 29th thus making it impossible for Claimant to have reported for his assignment on July 29 or for that matter on the following day, July 30, 2008. The question with respect to the Organization's defense of Claimant is, even if Carrier had specified a series of other dates consisting of five (5) consecutive work days after August 7, 2008, the date Claimant received notice that pursuant to Rule 48(k) he had voluntarily forfeited his seniority and employment relationship with Carrier, would Claimant have had the opportunity to preclude having his employment severed by Carrier invoking Rule 48(k). The answer to this question must be answered in the negative as Claimant had twelve (12) more days beyond August 7th to serve in jail prior to being released on August 19, 2008. As Claimant would be barred from reporting to his assignment in any five (5) consecutive work days falling between the dates of August 8 and August 19, 2008, Claimant still would have been subject to the application of Rule 48(k).

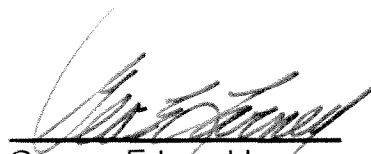
However, in the July 29th notice received by Claimant on August 7, 2008, Scharff recommended to Claimant that he immediately contact his manager and union

representative to alert them of his situation and request assistance to determine what options may be available to protect his employment. The record evidence makes quite clear there was only one (1) option for Claimant to pursue and that was to request a medical leave of absence from Carrier's Health and Medical Department based on his medical condition of cellulites in his right leg. The unrefuted record evidence establishes that during the telephone conference held September 2, 2008, Claimant made an admission against self-interest that he did not, as recommended by Scharff, contact his manager following being informed his EAP leave of absence had been rescinded. Had Claimant made such a contact he might have been advised to apply for a medical leave of absence based on his condition of cellulites in his right leg. But, even assuming he made such an application and assuming too Carrier granted his request, Claimant still would have been unable to report for his assignment during any five (5) consecutive work day period that fell within the remaining twelve (12) days of his incarceration from August 8, 2008 through August 19, 2008. That being the case, Claimant still would have been subject to the invocation of Rule 48(k).

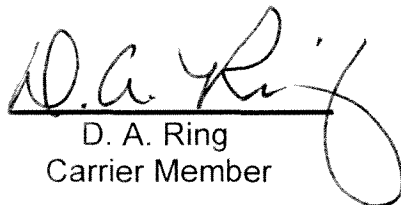
In so finding, the Board rejects the Organization's position that Claimant's EAP leave of absence covered his medical problem of cellulites in his right leg. The Board however concurs in the Union's position that it was never Claimant's intent to forfeit his seniority rights and employment relationship but, because of his inability to report to his assignment on any five (5) consecutive work days falling within the duration of his incarceration commencing on July 28th and ending on August 19, 2008, Claimant ran afoul of Rule 48(k). Accordingly, the Board rules to deny the subject claim in its entirety.

AWARD

Claim Denied



George Edward Larney
Neutral Member & Chairman



D. A. Ring
Carrier Member



T. W. Kreke
Employee Member

Chicago, Illinois
Date: July 27, 2010