

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
) Case No. 36
and)
) Award No. 34
UNION PACIFIC RAILROAD COMPANY)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: April 1, 2003

STATEMENT OF CLAIM:

1. The discipline (seniority termination) of Mr. W. Tsosie for allegedly being Absent from his assignment without proper authority on June 11, 12, 13, 14 and 15, 2001, was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (System File J-0148-59/1304072).
2. The agreement was further violated when the claim filed under date of July 6, 2001 by Vice General Chairman J. Larsen to Manager J. M. Tausz was not timely denied and shall now be allowed pursuant to Rule 49.
3. As a consequence of the violations referred to in Parts (1) and (2) above, Mr.W. Tsosie's request for leave of absence shall now be honored, his seniority restored, claim for loss of work opportunity would begin on June 8, 2002, which is the expiration of the leave. All wages lost are claimed beginning on June 8, 2002, continuing untile such time as he is allowed to return to service..

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.

On June 20, 2001, Carrier notified Claimant that he had forfeited his seniority because he had been absent without authorization for five consecutive work days. By letter dated July 6, 2001, the Vice General Chairman purported to file a claim with the Manager Special Projects. The Manager Special Projects did not respond to the claim. By letter dated January 21, 2002, the Vice General Chairman advised the Manager Special Projects that no response had been received

and, in accordance with Rule 49(a)(1), requested that the claim be sustained as presented. By letter dated, March 18, 2002, the Manager Special Projects responded that he had never received the alleged claim and that any such claim as filed on January 21, 2002, was untimely.

Both parties urge that this matter be resolved on procedural grounds. Carrier maintains that the claim must be dismissed because it was not timely filed. The Organization maintains that the claim must be sustained as presented because Carrier did not deny it within sixty days of its filing in accordance with Rule 49(a)(1). We find neither position persuasive.

The record reflects that during handling on the property the Organization advised that the claim and a copy were mailed simultaneously to The Manager Special Projects and to Claimant on July 6, 2001, and produced a copy of the letter and the enveloped in which the letter was delivered to Claimant, showing a postmark of July 6, 2001. There is no reason to believe that the Vice General Chairman mailed the letter to Claimant but not to the Manager Special Projects. However, there also is no reason to disbelieve the Manager Special Projects' representation that he never received the claim. Thus, it appears that Carrier's failure to receive the claim in a timely manner and its failure to respond to the claim in a timely manner are attributable to the Postal Service's failure to deliver the claim to Carrier. Where the parties have as a matter of practice relied in good faith on regular mail delivery of their communications, they should not be held to have forfeited claims or defenses due to delay or loss by the Postal Service. See Third Division Awards 24232 and 26456. Accordingly, we will resolve this claim on the merits.

Rule 48(k) provides:

Employees absenting themselves from their assignment for five (5) consecutive working days without proper working 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.

There is no question that Claimant was absent for five consecutive work days. The reason for Claimant's absence was his incarceration. Claimant requested a leave of absence but Carrier did not grant the request. Incarceration is not an acceptable reason for an employee's failure to protect his job assignment nor is Carrier obligated to grant a leave of absence when an employee is unavailable to perform his duties due to incarceration. Thus, there is no question that Claimant was absent without authority for five consecutive working days and under Rule 48(k) he is considered to have forfeited his seniority rights "unless justifiable reason is shown as to why proper authority was not obtained."

The record reflects that Claimant was incarcerated and tried on a charge of sexual assault. His trial resulted in a hung jury, with a majority of the jurors favoring acquittal. Thereafter, on April 9, 2002, the Assistant United States Attorney prosecuting the case filed a motion to dismiss without prejudice. The motion stated:

In August, 2001, this matter was tried to a jury before this Court resulting in a hung jury

mistrial, the majority of the jurors finding for acquittal of both defendants. On subsequent review of the case and the available evidence, undersigned attorney no longer believes there is a reasonable likelihood of conviction, should this matter be retried. The victim in this matter has been contacted and, based on the present status of the case, concurs with the proposed dismissal.

On April 12, 2002, the United States District Judge granted the motion dismissing the case without prejudice. The issue thus is whether, on these peculiar facts, the Organization has established justifiable reason for Claimant's absence without authorization. We conclude that it has.

Carrier argues that incarceration does not provide justifiable cause. As a general matter, we agree. However, as indicated above, this is not the typical case of absence without authorization due to incarceration. Rather, Claimant's incarceration was followed by a trial which resulted in a hung jury with a majority of the jurors voting to acquit. The trial was followed by a review of the evidence by the prosecutor and his determination that there was not a reasonable likelihood of conviction should the matter be retried. On this record, we see no basis for holding Claimant responsible for his incarceration and consequent absence without authorization.

Carrier contends that the charge was dismissed without prejudice and, therefore, could be reinstated in the future. Although this is true in theory, the motion to dismiss recited the prosecutor's determination, after reviewing the evidence, that there was no reasonable likelihood of conviction if Claimant was retried. Under these circumstances, the theoretical possibility that the charge could be reinstated does not persuade us that Claimant has failed to establish a justifiable reason for his absence without authorization.

Carrier relies on Third Division Award No. 28874. In that case, an employee was notified that his seniority had been terminated under Rule 48(k). The employee's absence was due to his incarceration. Subsequently, the criminal charges against the employee were dismissed without prejudice. The Board held that the employee had not established justifiable reason for his absence without authorization. The Board reasoned:

Here we have a situation in which there is no indication that Claimant ever attempted to secure authorization for his absence beyond the one (1) day (September 22, 1988) on which he stated that his Supervisor told him "... I had the day off to take care of the matter." Neither does the subsequent dismissal of the charges in the manner as exists here, i.e. "without prejudice ... for the reason that the victim could not be served" automatically create a situation of "justifiable reason" for not obtaining proper authority for the absence on the dates which formed the basis of the initial action, namely September 23 to 29, 1988. This Claimant, based upon the evidence in this case file, made no attempt to obtain proper authorization for his absence on the dates in question.

Third Division Award No. 28874 differs from the instant case in two very significant

ways. First, the claimant in Award No. 28874 made no attempt to secure authorization for the absences in question. Claimant in the instant case expressly requested a leave of absence. Second, the dismissal of the criminal charges in Award No. 28874 was the result of an inability of the prosecutor to serve (presumably with a subpoena) the victim of the alleged offense. In the instant case, the dismissal was the result of a hung jury in which a majority of the jurors voted to acquit Claimant and a review of the evidence by the prosecutor who determined that there was no reasonable likelihood of conviction should Claimant be retried. Accordingly, we find that Claimant established justifiable reason for his absence without authorization.

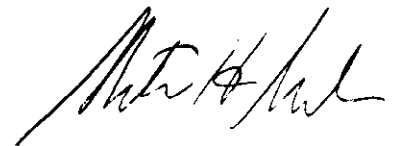
We turn to the question of remedy. At the time that Carrier invoked Rule 48(k), it was within its rights not to grant Claimant's request for leave of absence. Thus, at that time, all Carrier knew was that Claimant was absent without authorization. Carrier is not clairvoyant and cannot be expected to have foreseen the events that took place many months later. Indeed, Carrier did not become aware of the basis for the prosecutor's motion to dismiss and the judge's granting of the motion until late in the handling of this matter on the property. Under these circumstances, we do not consider it appropriate to award Claimant any compensation for time held out of service. Claimant shall be reinstated with seniority unimpaired but without compensation for time lost.

AWARD

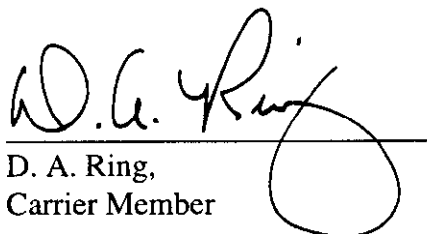
Claim sustained in accordance with the Findings.

ORDER

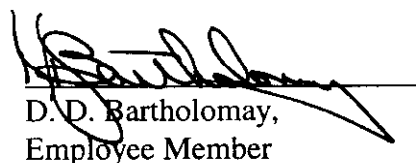
The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto.



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, May 31, 2003.