

PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

UNION PACIFIC RAILROAD COMPANY

Case No. 34

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. W. Benson for allegedly being absent from his assignment without proper authority from July 17, 2000 through July 28, 2000 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement.
- (2) The Agreement was further violated when the Carrier failed and refused to allow Mr. Benson a conference in accordance with Rule 48(n).
- (3) As a consequence of the violation referred to in Part (1) and/or (2) above, '...Claimant Wayne Benson's seniority and benefits connected thereto be restored unimpaired. We are also requesting that upon his release from his doctor that he be returned to full duty.'

Background

Claimant Wayne Benson entered the service of the Union Pacific Railroad Company (former Southern Pacific Transportation – Western Lines) on May 31, 1984. At the time his employment was terminated, he was working on System Steel Gang 8501.

On June 16, 2000, Claimant sustained an on the job injury. He received medical treatment from S. L. Mandaro, MD at the UC Davis Medical Center and physical therapy through Healthsouth Rehabilitation Center, both in Rancho Cordova, California. It appears that Claimant returned to work for a short period but then began an approved vacation from June 26 through July 14, 2000. However, Claimant did not return as

as scheduled. The Organization claims that “[f]ollowing his vacation Dr. Mandaro again removed the Claimant from service and the Claimant telephoned Manager Track Programs Sosa to inform that he would be undergoing physical therapy and provided the name and telephone number of the therapist.” (Org. Ex Parte Submission, Third Div., NRAB). According to the Organization, Claimant attended therapy until August 1, 2000 and was placed on temporary total disability on August 3, 2001.

The Carrier denies that Claimant ever contacted Sosa or any other manager. According to Sosa, Claimant did not have permission to be off work after July 14, 2000. He expected Claimant to go to therapy and then to report to work. Nevertheless, after Claimant went on vacation, Sosa never heard from him. In fact, as of January 28, 2002, Sosa still had not received any word from Claimant.

On July 31, 2000, Sosa sent Claimant a letter, advising him that he had been absent without authority from July 17 through July 28, 2000 and, therefore, had forfeited his seniority rights. Rule 48(k) of the Collective Bargaining Agreement states as follows:

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.

On August 11, 2000, the Organization made a request for a conference, pursuant to Rule 48(n), which provides, in relevant part:

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....Such request for conference must, however, be made within twenty (20) calendar days of the cause of complaint. If the asserted unjust treatment is left unresolved, it may be handled as a claim or grievance under the provisions of Rule 49.

In a letter received by the Organization on January 12, 2001, Manager of Track Programs S. J. White denied the Organization's request, stating that unless Claimant could provide a "justifiable reason" as to why he did not obtain proper authority for his absence, there was no valid basis for scheduling a conference. If, however, Claimant had a justifiable reason, White was willing to review that reason and any supporting documentation, even though Claimant was no longer "in service" at the time of his request.

The Organization responded by letter dated March 12, 2001, charging that White's response was untimely and that Sosa was aware of Claimant's work related injury. On July 6, 2001, White replied to the Organization, again asserting that there was no basis for a Rule 48(n) conference. On August 22, 2001, the Organization filed a claim on behalf of Claimant. The Claim was processed through the grievance procedure and was conferenced on February 26, 2002. The dispute remained unresolved following additional correspondence between the parties, and ultimately it was submitted to this Board for adjudication.

Opinion

There is no doubt that the Carrier was less than diligent in responding to the Organization's request for a Rule 48(n) conference. While the request was filed in August 2000, the Carrier did not reply until January 2001. The Organization was also untimely, however, in presenting the instant claim. Rule 48(n) provides that an employee *in service* who feels he has been unjustly treated may request a conference. Claimant Benson was not in service at the time the request was made as a result of the operation of

Rule 48(k). Moreover, Rule 48(n) specifically permits a grievance to be filed pursuant to Rule 49 if the asserted unjust treatment is left unresolved. The Organization's claim was not filed until August 22, 2001, outside the 60 day time limit of Rule 49(a) and almost a year after Sosa sent the Rule 48(k) letter.

Given the procedural deficiencies of both the Carrier and Organization, the Board has turned to the merits of the case. Based on the evidence in the Record, there is no doubt that Claimant forfeited his seniority. He contended that he was under a doctor's care and submitted a letter dated February 2, 2001 from Dr. Mandaro affirming that Claimant was temporarily totally disabled as of August 3, 2000. But this letter still did not provide a reason as to why Claimant never secured proper authority to be out of work. The fact that Claimant was legitimately disabled did not excuse him from adhering to the leave of absence requirements set forth under Rule 25. Pursuant to that provision, an employee who is absent for more than fifteen calendar days must submit a written request for leave to his immediate supervisor.

Claimant did not follow this procedure. Undisputedly, he failed to return to work after his vacation. Thus, it was his burden to prove that he contacted his supervisor and submitted the required leave request. Although he insisted that he called Sosa, there is no evidence in the Record in support of this assertion, and Sosa emphatically stated that Claimant never contacted him to advise as to his medical condition and/or to request a leave.

Claimant was aware of his responsibilities under the applicable rules of the Collective Bargaining Agreement. He underwent a similar process from September

1996 through April 1999. As an experienced and long-term employee, he knew that failure to obtain proper authority for an extended leave would result in a forfeiture of his employment.

Rule 48(k) is very clear. When an employee fails to appear for his assignment for five consecutive working days without proper authority, he voluntarily forfeits his seniority. Here, there was no justifiable reason as to why proper authority was not obtained. Hence, the claim must be denied.

Award

The claim is denied.

D.G. Y. j.
Carrier Member
Dated: 7-12-04

Joan Parker
Joan Parker, Neutral Member

[Signature]
Organization Member
Dated: 7-12-04