

BEFORE PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

UNION PACIFIC RAILROAD COMPANY

Case No. 37

Statement of Claim: Claim of the System Committee of the Brotherhood that:

1. The dismissal (seniority termination) of Mr. R. Chee under letter dated November 1, 2000 for allegedly being absent from his assignment without proper authority was arbitrary, capricious, without just and sufficient cause and in violation to the Agreement (Carrier's file 1261541).
2. As a consequence of the violation referred to in Part (1) above, Mr. R. Chee shall now "... be reinstated with seniority and all other rights restored unimpaired. We further request that if Claimant has been released by his doctor that he be compensated for any wage loss suffered as a result of the Carrier's actions."

Background:

R. Chee, a system laborer with three years' seniority,¹ incurred an injury to his back on August 15, 2000² while on the job and obtained a medical leave of absence. On August 22, Claim Specialist J.C. Bushnell met with Claimant in Chinle, Arizona to advise him about his responsibility to maintain a current leave of absence. By letter dated September 13, 2001, management advised Claimant that, based on the medical documentation, his medical leave of absence would be continued until September 30. The letter also stated that Claimant was obligated to supply, in advance of September 30, supporting medical documentation if he was unable to return to work at the expiration of the leave.

¹ Claimant also was employed by the Carrier as a laborer from June 7, 1990 until January 25, 1991, at which time he voluntarily forfeited his seniority and employment for being absent from his assignment for five consecutive workdays under Rule 48(k).

² Unless otherwise stated, all dates are in 2000.

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On September 27, Claimant saw Dr. B.S. Kamps, who issued a Release to Return to Work/School stating that Claimant was unable to return to work to perform all duties from 9/27/00 to 10/31/00. In a letter dated October 5, management advised Claimant that, based on medical documentation, his leave of absence had been extended until October 31. Again, the letter advised that, if Claimant was unable to return to work at the expiration of the leave, he was required to provide advance medical documentation to support an extension of the leave.

On October 10, Claimant told Claim Specialist Bushnell that he had been seen by Dr. Kamps, who released him to go to work on October 15. Later that day, Claimant drove to Chinle to pick up a cash advance.

On October 13, Claimant telephoned Supervisor J. Swore, who directed him to report to Topeka, Kansas. Three days later, on October 16, Claimant called Swore and told him that his doctor had advised him to take an additional week off.

On October 18, Claimant attended an outpatient physical therapy session for his lower back under the care of Dr. Kamps, whose notes did not address the date on which Claimant could return to work. His notes indicated, however, that Claimant was to undergo bi-weekly therapeutic exercises for four weeks. The rehabilitation facility faxed Dr. Kamps' October 18 notes to management on November 3.

On October 30, Claimant drove to Chinle to pick up another cash advance. He did not, however, report to work on November 1. Because Claimant did not return to work on November 1 or provide medical documentation supporting an extension of his leave, management sent Claimant a letter dated November 1 notifying him that he was considered to have voluntarily forfeited his employment under Rule 25(b).

On November 8, Claimant once again saw Dr. Kamps, who issued a Release to Return to Work/School stating that Claimant was unable to return to work to perform all duties from 10/30 to 12/4/00. On the same day, the Board of Supervisors of Apache County issued a letter dated November 8, 2000 stating: "During the month of October Chinle area [sic] as well as most of Navaholand, there was a lot of rain and many of the dirt roads had gotten impassable, one of the roads being the road to Mr. Chee's place." (Car. Ex. D).³

On December 4, Dr. Kamps examined Claimant, and estimated that he would be able to return to work on February 1, 2001. On December 18, the Organization requested that a conference be held pursuant to Rule 40(N).⁴ By letter dated February 5, 2001, the Carrier denied the Organization's request on the ground that Rule 25, under which Claimant's employment was terminated, does not contemplate a request for a conference.

In a December 28 letter, the Organization submitted a claim, alleging that the Carrier had violated numerous rules, including Rule 25, by notifying Claimant that he had voluntarily forfeited his seniority. According to the Organization, Claimant could not get to his doctor because the roads were impassable. After the Carrier denied the claim by letter dated February 21, 2001, the Organization appealed in a letter dated May 3, 2001. The Carrier denied the appeal both on timeliness grounds and on the merits in a letter dated June 27, 2001. Because the parties were unable to reach agreement at a conference on August 30, 2001, the matter is now before this Board for adjudication.

³ The Board of Supervisors' November 8, 2000 letter appears to have a 1995 fax date printed at the top.

⁴ As was made clear in the Organization's submission to the Board, it intended to cite Rule 48(n), which relates to an unjust treatment conference, instead of Rule 40(N).

Rule 25, Leave of Absence, provides in pertinent part:

- (a) A request for a leave of absence of fifteen (15) calendar days or less duration need not be made in writing, but employees desiring such a leave of absence must secure approval from their immediate supervisor. A request for a leave of absence in excess of fifteen (15) calendar days must be made in writing to the employee's immediate supervisor.
- (b) Employees granted leave of absence in writing by proper authority of the Company will retain their seniority. Employees failing to return before the expiration of their leave of absence will lose their seniority rights unless an extension has been obtained. When leave of absence or extension has been requested and is denied, the employee will be so advised and required to return to service within five (5) calendar days after receipt of such notice or forfeit all seniority rights.

* * * * *

- (g) Medical Leave - Requests for leave of absence on account of sickness or injury which are of fifteen (15) calendar days or less duration need not be in writing, but such requests must be advanced by the employee to the Carrier in a timely manner, specifying the nature of the illness or injury and the number of days required.

Requests for medical leave of absence on account of sickness or injury in excess of fifteen (15) calendar days must be made in writing and properly documented and supported by a statement from the employee's physician, which includes the specific reason therefore and the expected duration. Extensions thereof must also be supported by a similar statement from the employee's physician. . .

Organization's Position:

The Organization asserts that the Carrier improperly failed to take into account compelling mitigating circumstances that, under well-established arbitral authority, should have pre-empted the self-executing termination of seniority provision of Rule 25(b). According to the Organization, the purpose of the self-executing provision of Rule 25(b) is to deal with employees who voluntarily fail to report to their assignments.

In the instant case, the Organization argues that Claimant did not voluntarily fail to report to work, but instead made every reasonable effort to advise management that his back condition rendered him unable to return to work on November 1. According to the Organization, the Carrier lost Claimant's telephone message advising that the rehabilitation facility would be transmitting documentation to support an extension of his medical leave of absence beyond October 31. Moreover, the Organization asserts that it was not Claimant's fault that the rehabilitation facility did not fax to management the medical documentation until November 3.

In addition, the Organization claims that, as documented by a November 8 letter from the Board of Supervisors of Apache County, heavy rains throughout the month of October prevented Claimant himself from obtaining before November 1 medical documentation to substantiate the needed extension of his medical leave of absence. According to the Organization, management refused to accept Claimant's November 27 letter enclosing the Board of Supervisors' November 8 letter, together with Dr. Kamps' November 8 Release to Return to Work/School stating that Claimant could not return to work until December 4. Because there was ample medical documentation supporting an extension of Claimant's medical leave of absence, and because it was not Claimant's fault that management did not receive the documentation before November 1, the Organization contends that it was arbitrary and capricious for the Carrier to apply the self-executing provision of Rule 25(b) under the circumstances of this case.

Carrier's Position:

The Carrier contends preliminarily that the Organization's appeal letter dated May 3, 2001 was untimely because it was not filed within the mandatory sixty-day period set forth in Rule 49. Because the Carrier disallowed the claim in a February 21, 2001 letter, it submits that

the Organization's May 3, 2001 appeal fell far outside the sixty-day appeal period. For that reason alone, the Carrier urges that the claim be dismissed.

On the merits, the Carrier argues, citing arbitral precedent, that Claimant forfeited his seniority rights under Rule 25(b) by not obtaining an extension of his medical leave of absence prior to the expiration of his leave on October 31, 2001. The Carrier emphasizes that Claimant was reminded three times of the need to supply supporting medical documentation for an extension of the leave before the expiration of the leave. Under these circumstances, the Carrier contends that Claimant voluntarily forfeited his seniority under Rule 25(b).

Findings:

The Carrier contends preliminarily that the claim should be dismissed because the Organization's appeal was not filed within the mandatory sixty-day period prescribed by Rule 49. While there may be some question about the timeliness of the Organization's appeal, there is no doubt that the claim must be denied on the merits.

Claimant's employment was terminated pursuant to Rule 25(b), which provides:

Employees granted leave of absence in writing by proper authority of the Company will retain their seniority. Employees failing to return before the expiration of their leave of absence will lose their seniority rights unless an extension has been obtained. When leave of absence or extension has been requested and is denied, the employee will be so advised and required to return to service within five (5) calendar days after receipt of such notice or forfeit all seniority rights.

It is undisputed that Claimant was absent from work on November 1, 2001, the day after his last medical leave of absence expired. It is also undisputed that Claimant did not obtain an extension of his medical leave of absence beyond October 31, 2001. According to Rule 25(g), which governs medical leaves of absence, an employee must submit supporting medical documentation

to obtain an extension of a leave. Because Claimant failed to submit such medical documentation prior to the expiration of his medical leave on October 31, he triggered the self-executing provision of Rule 25(b) under which he was subject to forfeiting all seniority rights.

The Organization contends its claim is supported by Rule 48(k), which provides that employees who are absent for five consecutive days without proper authority will be deemed to have forfeited their seniority, but which also contains the proviso: “. . . unless justifiable reason is shown as to why proper authority was not obtained.” The Board sees no reason, however, to rewrite Rule 25(b) to include an exception similar to that which exists in Rule 48(k). But even assuming, *arguendo*, that a similar exception should be read into Rule 25(b), the Organization has not cited justifiable reason for Claimant’s failure to obtain an extension of his medical leave of absence. For example, the Organization suggests that management lost Claimant’s telephone message in mid-October advising that the rehabilitation facility would be faxing medical documentation supporting an extension of his medical leave of absence. That argument, however, ignores that it was Claimant’s responsibility, not merely to request an extension, but to submit to the Carrier the medical documentation supporting an extension before the expiration of his leave.

Claimant tries unsuccessfully to blame the rehabilitation facility and bad weather for his failure to submit supporting medical documentation before November 1. For example, the medical documentation from Claimant’s October 18 visit to the rehabilitation facility does not support an extension of the leave. Instead, that documentation only showed that Claimant attended rehabilitation on October 18 and that he should undergo bi-weekly therapeutic exercises for four weeks. It did not state that Claimant could not return to work on November 1. Thus, the

rehabilitation facility's failure to transmit the documentation to the Carrier until November 3 is of no moment. In fact, it was not until November 8, eight days after the expiration of his leave of absence, that Claimant obtained medical documentation that might have supported an extension of his medical leave of absence. It was on November 8 that Claimant again visited Dr. Kamp, who stated on a Release to Return to Work/School form that he was unable to return to work until December 4.

Likewise, Claimant's argument that bad weather prevented him from obtaining and transmitting to management supportive medical documentation must be rejected. The November 8 letter from the Board of Supervisors of Apache County, which stated that the road to Claimant's residence was impassable during the entire month of October, is belied by undisputed facts.⁵ For example, the road to Claimant's residence could not have been impassable on October 18, when he drove to his doctor's office for rehabilitation, or on October 15 and 30, when he drove to Chinle to collect advance checks. If Claimant was able to make those three trips in October, including one on October 30, just two days before he was required to report to work, he certainly could have obtained and submitted to the Carrier, prior to the expiration of his leave on October 31, documentation to support an extension of his medical leave of absence.

Curiously, Claimant informed the Carrier on October 10 that his doctor had released him to return to work on October 15. After Claimant was told to report to Topeka, Kansas, he telephoned management on October 16 to say that his doctor now wanted him to take off an additional week. At that point, the Carrier reasonably believed that Claimant would be returning to work in accordance with the medical leave of absence previously granted through October 31.

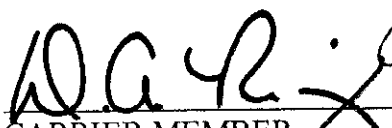


⁵ The accuracy of the fax also is subject to question by the 1995 fax date imprinted at the top.

Because Claimant did not appear for work on November 1 and had not obtained an extension of his medical leave of absence beyond October 31, the Carrier appropriately considered Claimant to have voluntarily forfeited all seniority rights pursuant to Rule 25(b).

For the foregoing reasons, the claim must be denied.

Award:

The claim is denied.

 CARRIER MEMBER	 JOAN PARKER, Neutral Member	 ORGANIZATION MEMBER
DATED: <u>7-12-04</u>		DATED: <u>7-12-04</u>