

**BEFORE PUBLIC LAW BOARD NO. 6621**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**And**

**UNION PACIFIC RAILROAD COMPANY**

**Case No. 39**

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

1. That the Union Pacific Railroad Company violated Rules 1 and 48 of the current agreement when it advised that Mr. Gary Ribeiro, II, [Claimant] that due to his being absent from work without authority for five consecutive days [02/01 through 05/2003], he automatically forfeited his seniority and terminated his employment relationship pursuant to the self-executing provisions of Rule 48(k).
2. As the Carrier violated the terms and conditions of the current Agreement, the Carrier shall be ordered to reinstate the Claimant to his former position with full seniority rights and other rights and compensate Claimant for all time lost.

**Background:**

G.R. Ribeiro, II, a laborer with six years' seniority, was on a medical leave of absence in California due to a surgical procedure in January 2003.<sup>1</sup> On January 10, Claimant telephoned Supervisor Karl Siemon, who allegedly told him that his gang had voted to reverse its compressed work week schedule (T-1) to a T-2, with rest days during the first and third weeks of the month. On January 29, Claimant's physician released him to return to work. Because, as confirmed by Carrier records, Claimant's gang had not voted to reverse its compressed work schedule (T-1), the next scheduled work day for Claimant's gang was February 1 in El Paso, Texas. After Claimant was released to return to work, he left a message on January 29 for Supervisor Siemon on his pager, stating that he intended to return to work. According to Siemon, Claimant left a number for him to call – his mother's number in California. Siemon

called that number and left a message with Claimant's sister to let him know where to show up for work. Claimant's sister, however, did not pass on the message to Claimant. According to Claimant, he also left his cell phone number on Siemon's pager.

Claimant, who was living in Antioch, California, began driving to El Paso on January 30. On Friday, January 31, Grievant, while in Chandler, Arizona, 22 miles southeast of Phoenix, allegedly had car problems that he could not get resolved until Monday February 3. Claimant then drove the final 430 miles to El Paso, arriving on February 4. Upon his arrival, Claimant allegedly left two messages for Supervisor Siemon at the La Quinta Motel, but Siemon had checked out and was at a different motel in El Paso.

Claimant did not report to work on February 5 because he was feeling tired. That day, while at a retail store he ran into a co-worker who told him that his gang was working the T-1 schedule, not the T-2 schedule allegedly reported by Supervisor Siemon on January 10.

On February 6, Claimant reported to work. By letter of same date, Manager D. Neuner advised Claimant that, pursuant to Rule 48(k), he had forfeited his seniority because he had absented himself from work for five consecutive working days (February 1-5) without proper authority and had terminated his employment relationship. Following the filing of the instant claim, it was processed and conferenced. Because the parties were unable to reach agreement, the matter is now before this Board for adjudication.

*Rule 48 – Discipline and Grievances*

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(k) Employees absenting themselves from their assignments for five (5) consecutive working days without proper authority will be considered as

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<sup>1</sup> Unless otherwise stated, all dates are in 2003.

voluntarily forfeiting their seniority rights and employment relationship, unless justifiable reason is shown as to why proper authority was not obtained.

The General Chairman will be furnished a copy of letter written to an employee pursuant to this Section. The format utilized will be standardized.

Employees who voluntarily forfeit their seniority rights and employment relationship pursuant to this section and who desire to furnish a reason why proper authority was not obtained, may request a conference with the Carrier Officer involved. If such a conference is requested, the employee will have the prerogative of furnishing a written reason for the unauthorized absence, or Carrier may record the reason offered for the unauthorized absence for five consecutive working days. The Carrier will make every effort to render a decision at the conclusion of such conference.

**Organization's Position:**

The Organization asserts that Claimant was a victim of several miscommunications and car trouble, and should not have been terminated pursuant to Rule 48(k). In support, the Organization cites the fact that, although Claimant provided Supervisor Siemon both his mother's telephone number and his own cell phone number, on January 30 Siemon left a message only with Claimant's unreliable sister at his mother's house and did not try to reach Claimant on his cell phone. Similarly, Claimant forgot to bring Siemon's pager number with him when he left for El Paso, making it impossible for him to contact Siemon directly. To compound the problem, when Claimant tried to contact Siemon at his El Paso motel, Siemon had left that motel for another one.

In addition, the Organization argues that Claimant reasonably believed that he was not expected to start work until the second week of February because Siemon had told him on January 10 that the gang was working a T-2 schedule, with the first and third weeks of the month as rest days. Because it was not until February 5 that he happened to learn from a co-employee

that his gang was working a T-1 schedule, Claimant reasonably believed up to that point that he was not expected to return to work until the second week in February.

The Organization also emphasizes that, but for car problems that delayed him by three days en route to El Paso, Claimant would have arrived in ample time to commence work before Rule 48(k) was triggered. In support, the Organization stated that it was prepared at the conference to submit receipts from the car repair work.

Given all the above circumstances, the Organization emphasizes that Claimant did not voluntarily abandon his job. Rather, the Organization contends that Claimant was a victim of unfortunate circumstances and communication breakdowns that made it impossible for him to report to work by February 5.

**Carrier's Position:**

The Carrier contends, citing arbitral precedent, that Claimant forfeited his seniority and employment pursuant to Rule 48(k) because he was absent for five consecutive working days from February 1 through February 5. Because Claimant did not secure proper authority to be absent for the five days in question, the Carrier asserts that under the self-executing language of Rule 48(k) Claimant forfeited his seniority and employment.

In addition, the Carrier submits that Claimant's excuse that he thought that his gang had rest days during the first week of February does not make sense. Had he truly believed that he would not resume work until the second week of February, the Carrier claims that he would not have left California as early as January 30. Likewise, according to the Carrier, Claimant's excuse that he could not get his car repaired over the weekend from January 31 to February 3 does not ring true because he was only about twenty miles from the metropolis of Phoenix,

which surely had weekend car repair available.

Similarly, the Carrier questions why Claimant left his mother's telephone number for Supervisor Siemon to call if he wanted Siemon to call his cell phone number. If, as Claimant now contends, his sister was so unreliable to receive messages, the Carrier argues that Claimant should bear full responsibility for Siemon's inability to reach him to provide the details of when and where to report.

Because the Organization bears the burden of proof in Rule 48(k) cases, and because it failed to prove that the Carrier authorized his five-day absence from February 1-5, the Carrier argues that its position should be upheld.

**Findings:**

Claimant's employment was terminated pursuant to Rule 48(k), which provides in pertinent part:

Employees absenting themselves from their assignments for five (5) consecutive working days without proper authority will be considered as voluntarily forfeiting their seniority rights and employment relationship, unless justifiable reason is shown as to why proper authority was not obtained.

It is undisputed that Claimant was absent from work for five consecutive work days, from February 1 through February 5. Accordingly, absent proof that Claimant had justifiable reason for not obtaining proper authority for his absence, Rule 48(k) provides unambiguously that he is deemed to have voluntarily forfeited his job.

The Organization was unable to provide such proof. For example, its reliance on Supervisor Siemon's alleged statement on the telephone to Claimant on January 10 that his gang had voted to go on a T-2 schedule, with the first and third weeks of the month as rest days, is

misplaced. Voting records show no such vote, and no such change in schedule was effected. Accordingly, the Board does not credit Claimant's assertion that he was misled as to his gang's correct schedule.

Moreover, the fact that Claimant departed California on January 30 is inconsistent with his alleged understanding that he would not start work until the second week in February. It is quite consistent, however, with an understanding that the first week of February was a workweek and that he had to get to El Paso as soon as possible.

No more persuasive is the Organization's argument that Siemon should have called Claimant's cell phone number, rather than his mother's phone number, to inform him of where and when he should report. It is undisputed that Claimant left his mother's telephone number to call. Even if Claimant also had left on Siemon's pager his cell phone number, Siemon was entitled to rely on the assumption that a message left with someone at Claimant's mother's house would be conveyed to Claimant, who had given him that number.

In addition, it defies logic that Claimant was unable to call Siemon on his pager number after Claimant had departed for El Paso, simply because he had forgotten to take Siemon's pager number with him. Surely Claimant could have called someone to retrieve Siemon's page number.


Moreover, it does not make sense that Grievant, who spent February 4 driving the 430 miles from Chandler, Arizona to El Paso, did not show up for work on February 5. His excuse – that he was too tired – rings hollow when his previous day was simply spent driving for six to eight hours. Likewise, it is puzzling that Claimant, who admitted that he learned on February 5 from a co-employee that his gang was on a T-1 schedule, did not immediately try to catch up


with Siemon to let him know that he was available for work. His decision to wait until the following day to appear at work meant that he had failed to show up for work for five consecutive days without authority, resulting in his Rule 48(k) termination.

Under all the circumstances, Claimant and the Organization failed to prove that Claimant justifiably failed to obtain authority to be absent for the five working days from February 1 through February 5. Accordingly, the self-executing provisions of Rule 48(k) were properly applied, resulting in the forfeiture of Claimant's seniority and the termination of his employment.


**Award:**

The claim is denied.

  
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JOAN PARKER, Neutral Member

  
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CARRIER MEMBER

DATED: August 11, 2004

  
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ORGANIZATION MEMBER

DATED: 8-11-04