

PUBLIC LAW BOARD NO. 3241

In the Matter of:)	National Mediation Board
)	Administrator
)	
BROTHERHOOD OF MAINTENANCE OF)	
WAY EMPLOYES,)	
)	
Organization,)	
and)	
)	
UNION PACIFIC RAILROAD)	Case No. 38
COMPANY,)	Award No. 38
)	
Carrier.)	
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Hearing Date: June 4, 1992
Hearing Location: Sacramento, California
Date of Award: April 16, 1993

MEMBERS OF THE BOARD

Employees' Member: C. F. Foose
Carrier Member: D. A. Ring
Neutral Member: John B. LaRocco

ORGANIZATION'S STATEMENT OF THE CLAIM

1. That the Carrier violated the provisions of the current Agreement when it dismissed Track Laborer Nelson Wilson, without first according Claimant a fair and impartial investigation. Said action being harsh and in abuse of discretion.
2. The Carrier will now be required to return Claimant to his former position with seniority and all other rights restored unimpaired, and with compensation for all wage loss suffered as a result of the aforementioned violation.

OPINION OF THE BOARD

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted by an Agreement dated July 23, 1982; and that all parties were given due notice of the hearing held on this matter.

Claimant entered the Carrier's service on June 8, 1989. Claimant assumed a position as a Laborer on Gang 7307. Less than three months later, on August 24, 1989, Claimant informed the Track Supervisor that he needed to be away from work for awhile because he was undergoing minor surgery. The Track Supervisor granted Claimant a leave of absence through September 30, 1989.

When Claimant came to the work site to collect his paycheck on September 13, 1989, the Supervisor asked Claimant when he would return to work. Claimant responded that he did not have a medical release. The Track Supervisor then reminded Claimant that his leave of absence would expire at the end of September. On September 27, 1989, Claimant contacted a foreman who told Claimant that he needed to renew his leave of absence if he could not return to work on October 1.

Claimant did not report to duty on October 1, 1989. He did not contact any Carrier official until he spoke with the Track Supervisor on October 16. The following day, the Carrier wrote to Claimant that he had been terminated because he had voluntarily forfeited his seniority rights pursuant to Rule 44. Again, on October 31, 1989, the Carrier formally notified Claimant

that it was treating him as having forfeited his seniority for failure to report to duty at the expiration of his approved leave of absence.

Rule 44 reads:

When requirements of the service permit, on request, employees will be granted leave of absence by the officers to whom they report. Employees on leave of absence engaging in other employment will lose seniority unless special provision therefore has been made with the proper officer of the railroad. Leave of absence will not be granted for more than ninety days in one year except in case of injury or sickness.

An employee who fails to report for duty at the expiration of leave of absence shall be considered as forfeiting seniority and will terminate his employment relationship with the company, except that when failure to report on time is the result of unavoidable delay, the leave will be extended to include such delay.

Rule 44 is a self-executing rule. NRAB Third Division Award No. 22837 (Dennis). The rule operates to sever an employee's seniority if the employee fails to report to duty at the end of a leave of absence. However, the rule contains an exception. The rule is not automatically invoked if the employee on a leave of absence is unable to report to duty at the expiration of the leave as "...result of unavoidable delay..." Rather, if an employee is unavoidably delayed in returning to work, the rule automatically extends the leave of absence.

In this case, the Organization contends that Claimant was unavoidably detained from work. In its submission the Organization wrote that Claimant, unfortunately, suffered a broken arm while on the leave of absence. This Board may not consider this excuse since the factual information was not developed on the property. Suffice it to state, there was no documentation that Claimant broke his arm. In sum, Claimant did not bring forward any evidence that he was unavoidably prevented from returning to work on October 1, 1989.

Next, the Organization alleges that the Foreman misled Claimant into believing that he was covered by the original of leave of absence. There is nothing in the record to substantiate the allegation that the Foreman misrepresented Claimant's status to him. Claimant was fully aware that his leave of absence would expire on September 30, 1989. It was Claimant's responsibility to request an extension of the leave of absence. The Foreman reminded Claimant of the necessity to request a renewal of his leave. Claimant did not make any attempt to do so for at least fifteen days after the expiration of his leave and even on October 16, he made only a half-hearted attempt to extend the leave. Before any renewal of the leave, Rule 44 had operated to terminate Claimant's seniority. By his inaction, Claimant forfeited his right to work for the Carrier.

Last, the Organization argued that the self-executing mechanism in Rule 44 had not been strictly applied on the former Western Pacific Railroad Company. Even if true, any past practice cannot alter or vary the unambiguous language in Rule 44. Rule 44 clearly treats an employee as forfeiting the employee's seniority if the employee fails to return to work at the expiration of a valid leave of absence unless extenuating, unavoidable circumstances bar the employee's timely return to service.

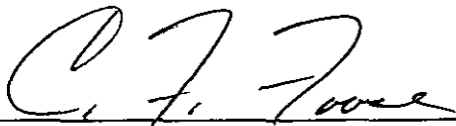
Inasmuch as this case is governed by Rule 44, Rule 20 is inapplicable.¹

¹ The Organization charged that the Carrier dismissed Claimant without first providing him with a fair and impartial Rule 20 investigation.

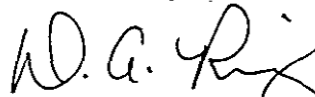
AWARD AND ORDER

Claim denied.

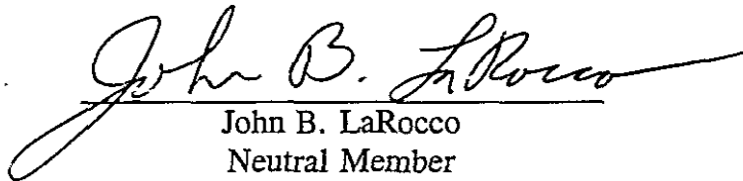
Dated: April 16, 1993



C. F. Foose
Employees' Member



D. A. Ring
Carrier Member



John B. LaRocco
Neutral Member