

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 178
AWARD NO. 168

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

Carrier's File
1511634

System File
D-08-13D

STATEMENT OF CLAIM

1. The Carrier violated Rule 48 (k) of the Collective Bargaining Agreement effective July 1, 2001 when, on May 2, 2008, Carrier, by letter advised Claimant, Duane L. Weber, Consolidated System Gang Laborer that by being absent, allegedly without authority for consecutive work days between April 16, 2008 and May 2, 2008, he was considered to have voluntarily forfeited his seniority rights and employment relationship.
2. As a consequence of the violation in Part 1 set forth above, the Organization requests that Claimant be reinstated to service with seniority unimpaired and that the status of authorized medical leave of absence be restored. In the event of Claimant being released for return-to-work duty by his counselors and therapists on a subsequent date, Claimant is to be allowed compensation at the Consolidated System Gang Laborers rates of pay for all loss of straight-time and overtime wages suffered, to commence from such date as Claimant would be released to mark up for duty and to continue until such time as Claimant is restored to active duty and service with the Carrier.

STATEMENT OF BACKGROUND

The following is a chronology of relevant events set forth in the record evidence as a means of providing the Board with an understanding of the series of events that led Carrier to sever Claimant's employment.

January 31, 2008

Claimant was seen by a physician specially trained in emergency care at the Exempla Lutheran Medical Center Emergency Department in and around 5:30pm and diagnosed with the following condition: 1. Depression; 2. Anxiety; and 3. Mental Health Evaluation. Claimant was instructed to see his therapist in 2 to 3 days for a follow-up appointment.

February 1, 2008

According to one of his physicians, Kevin R. Clemmer, D.O., a Board Certified Osteopathic Family physician and surgeon, Claimant was hospitalized for suffering from a severe, incapacitating episode of depression and anxiety.

It is noted that Claimant suffered the loss of his wife who died on February 7, 2003 and commenced seeing therapist, Marcia A. Osteroos, LCSW on April 4, 2003. Osteroos' initial diagnosis of Claimant was, "major depressive disorder, recurrent, severe without psychotic features; bereavement; and attention-deficit/hyperactivity disorder, combined type". According to Osteroos, she continues to see Claimant on an inconsistent and random basis.

February 5, 2008

By letter of this date, Claimant was notified by United Behavioral Health (UBH), among other things, that it was the entity that manages the behavioral health benefits for his plan and was confirmation that UBH had approved benefits for routine outpatient services with any non-network clinician. According to the Organization, it was on this date after receiving approval from UBH to seek services of any non-network clinicians that he applied for leave under the Family and Medical Leave Act. However, other record evidence suggests Claimant applied for FMLA leave earlier than this date.

February 6, 2008

By Certified letter - Return Receipt Requested of this date, Carrier provided information to Claimant regarding the conditions of his family and medical leave under the Family and Medical Leave Act (FMLA). The letter noted he had recently been absent from work using leave under FMLA and that in order to be eligible for FMLA leave, he had to sign and return two (2) forms, to wit; Form 16873 and 16874, no later than February 27, 2008, and that he was conditionally approved to use FMLA until that date. The record evidence reflects that Claimant's last day of work was January 23, 2008. The letter cautioned Claimant that if the forms were not timely provided or did not substantiate a serious health condition as defined by FMLA, any leave taken would not be considered authorized FMLA leave and might be subject to review under the Attendance Policy. Carrier apprised Claimant that if he had any questions concerning his medical certification he could contact the Health Services Department and too, if he had any questions or concerns regarding his absences, he could contact Aletha Ellison.

February 8, 2008

Claimant received Carrier's letter of February 6, 2008 at his residence in Arvada, CO.

February 11, 2008

By handwritten letter of this date, Claimant apprised he was requesting a medical leave of absence beginning on February 1, 2008. Claimant further indicated that said request superseded any request he might have made for a FMLA leave. Although the Organization submits Claimant requested FMLA leave on February 5, 2008, the record evidence suggests this request was made in and around or shortly after January 23, 2008, his last day of work with Carrier.

Additionally, on this date, Claimant submitted an Application for Sickness Benefits with the Railroad Retirement Board. In conjunction with this application, Claimant also filed a Notice of Disability Form with Broadspire Services, Inc, the claim administrator for Claimant's Railroad Supplemental Sickness Benefit Plan. Additionally, Claimant filed a Medical Information Release Authorization with Aetna Life Insurance Company to assist Aetna in administering his claims for benefits under the Railroad Supplemental Sickness Benefit Plan.

February 13, 2008

Claimant's physician, Kevin Clemmer filed a Statement of Sickness with the Railroad Retirement Board as part of Claimant's Application for Sickness Benefits dated February 11, 2008. In the Diagnosis section of said Statement, Dr. Clemmer indicated Claimant's condition as "GAD/Depression".

February 14, 2008

On this date, the Organization received a copy of Claimant's handwritten letter of February 11, 2008 wherein he requested a medical leave of absence and indicated that said request superseded his request for FMLA leave. It is noted that this letter was without designation as to who would be the recipient nor did it contain any address where it was to be sent. According to the record evidence, Claimant faxed this letter to the Organization. It is noted that the Carrier asserts it never received a copy of this letter.

February 22, 2008

Notice from the Office of Programs-Operations of the Railroad Retirement Board to Claimant apprising it had received his Application for Benefits and informing him of how he was to file for benefits if so entitled.

February 28, 2008

Notice of Waiting Period Requirement from the Office of Programs-Operations of the Railroad Retirement Board to Claimant apprising it had received his claim for benefits for the period beginning January 31, 2008 and that the claim satisfied a one-week waiting period. This Notice also apprised Claimant that a period of continuing unemployment or sickness ends when an employee returns to work, stops claiming benefits or exhausts rights to benefits.

March 20, 2008

Certified Letter – Return Receipt Requested from Carrier to Claimant apprising that, to date, Carrier's Health and Medical Department had yet to receive the forms for FMLA leave it had requested that Claimant submit no later than February 27, 2008. Carrier informed Claimant that because there was not sufficient information to support his request for FMLA, he was not eligible for FMLA leave until the Health and Medical Department receives the Certification of Health Care Provider Form (form 16874). Carrier further informed Claimant he was to discontinue his usage of FMLA leave until the form was provided and that all previous time taken as FMLA was subject to review under the Attendance Policy.

March 25, 2008

Date Carrier's letter of March 20, 2008 was received by Claimant at his residence address in Arvada, CO.

April 10, 2008

Date Claimant's therapist, Marcia A. Osteros referred Claimant to see Dr. John (Jack) McInroy, Ed.D., P.C. Ms. Osteros noted as part of the record evidence that notwithstanding this referral, she continues to see Claimant.

April 24, 2008

By letter of this same date Addressed to "Dear Sirs" without any designation as to where this letter was directed, Claimant's therapist, Marcia A. Osteros stated she was writing at the request of Claimant "to verify his mental health diagnosis and length of treatment." This was the letter wherein she noted she had been providing therapeutic support to Claimant since April 4, 2003 on an inconsistent schedule and also the letter wherein she explained the reasons for referring Claimant to Dr. John "Jack" McInroy on April 10, 2008. Osteros set forth the following four (4) reasons for her referral:

- 1. Bereavement.** Duane's wife Debbie died February 2, 2003. Duane has had difficulty resolving the way he was treated in the hospital as well as with her death.
- 2. Depressed Feelings.** Duane has expressed feelings of depression and feelings of disorganization. He lacks energy, has trouble getting out of bed and motivating himself to do things. He has been unable to manage his personal finances or even pay his bills on time.
- 3. Disorganized and Out-of-Control.** Duane describes his disorganized thinking process, lack of focus, inability to pay attention to details, organize household jobs, remember to pay his bills or even manage his money (Added spring of 2006)
- 4. Anger.** Duane describes feeling very angry and at time explosive. He speaks of his anger at the way he was treated by hospital personnel when Debbie was dying. Duane is sensitive to the way people respond to him and feels judged or that people are making assumptions about him based on his appearance.

May 2, 2008

Certified Letter-Return Receipt Requested of this date to Claimant from Clinton D. Mitchell, Claimant's supervisor (Supervisor Gang 9073), advising Claimant he had been absent from his position of assignment without proper authority for more than five (5) consecutive working days from April 16, 2008 through and including May 2, 2008 and, as a result, pursuant to the provisions of Rule 48 (K) of the controlling Collective Bargaining Agreement between the Carrier and Union, he was deemed to have voluntarily forfeited his employment with Carrier. Mitchell advised Claimant he should quickly arrange to return all company property in his possession and that any failure on his part to do so would delay the processing of any wages due to him.

In this letter, Mitchell cited in pertinent part, the applicable portion of Rule 48 (K) that governed the prevailing circumstances of Claimant's absence as follows:

Employees absenting themselves from their assignments 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.

May 6, 2008

Claimant received Carrier's letter of May 2, 2008 at his residence in Arvada, CO.

Apparently, after receiving Carrier's letter informing him he had forfeited his employment relationship, he contacted his therapist, Dr. Jack McInroy who provided him the following letter also dated May 6, 2008 by fax addressed to Whom It May Concern which, in turn was eventually provided to Carrier. This letter reads as follows:

I have just begun psychological treatment with Mr. Weber last month after he was referred by Ms. Marcia Osteros, LCSW.

Mr. Weber has many psychological problems the worst of which is his depression and it is most likely related to the death of his wife Debbie on February 7, 2003. He scored very high on a test of depression and anxiety.

Duane had lack the energy and focus to take care of his personal duties as well as his financial ones due to his disorganized thinking. Controlling his anger was difficult for him also. I introduced him to a new treatment modality, Alpha-Stim, which is a form of cranial electrical stimulation. This device has been researched and found to be significantly effective in the treatment of depression, anxiety, insomnia and substance abuse. Duane purchased a unit two weeks ago and has

found it to be very effective in decreasing his level of depression and anxiety.

I am hopeful that Mr. Weber will make a full recovery within a reasonable period of time with proper treatment.

Estimated Treatment Period: 3-4 months

Frequency: once a week

Prognosis: Good if he continues to follow through with this treatment

**Diagnosis: Major Depressive Disorder, Severe; Generalized Anxiety
Anxiety**

Estimated time for Release to Work: May 26 to June 15, 2008.

May 7, 2008

Apparently, Claimant also contacted his therapist, Kevin R. Clemmer to write a letter on his behalf in response to Carrier's letter informing him of his having voluntarily forfeited his employment relationship. In a handwritten note, Clemmer wrote the following:

To Whom It May Concern,

I am writing regarding my patient Duane Weber whom I have treated since 11/10/05 for bipolarism, anxiety, obsessive-compulsive disorder, and adult (not legible) deficit disorder. He has been treated with medications and counseling.

He suffered and is still suffering from severe incapacitating episodes of Depression and beginning 1/31/08 was hospitalized for this on 2/1/08. He needs to be in the Denver Metro area for treatment follow-up and counseling.

It is noted that this letter too, was devoid of any designation as to where it was intended to be sent. Eventually, however, this letter and the other two letters from Osteros and Clemmer were submitted by the Organization by fax to the Carrier.

May 14, 2008

In accord with the provisions of Rule 48 (k), the Organization requested an unjust treatment hearing. Said provision reads as follows:

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 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.

August 4, 2008

Telephone conference was held pursuant to the Organization's request that a conference be held.

August 14, 2008

Manager Track Programs – Tie North / West, J. M. Haverstick upheld the charged violation by Claimant of Rule 48 (k) and the decision by Supervisor Clinton Mitchell that Claimant voluntarily forfeited his seniority and employment relationship.

September 19, 2008

The Organization filed the subject claim.

CARRIER'S POSITION

The Carrier submits that Rule 48 (k) is a self-executing rule stating that if an employee is absent for five (5) working days consecutively without proper authority and there is no justifiable reason forthcoming about why the authority was not obtained, the employee will be considered to have voluntarily forfeited his seniority rights and employment. The Carrier cites a number of prior arbitral awards that support the invocation of Rule 48 (k) under highly similar surrounding circumstances as presented by Claimant's case. The Carrier notes that Claimant was absent from work for far more than five (5) consecutive working days without receiving proper authority for his absence and he failed to provide a justifiable reason at conference for why he did not obtain the proper authority. The Carrier argues that the excuse of a medical condition was not sufficient to show a reason or reasons why Claimant did not contact his Supervisor for the purpose of obtaining proper authority. The Carrier asserts that simply put, Claimant disappeared and even though he may have been in contact with his Union Representative, he was certainly not in contact with any Carrier official. In consideration of all the facts presented, Carrier maintains that Claimant forfeited his employment and that it was justified in terminating Claimant. Accordingly, the Carrier requests the Board to deny the subject claim.

ORGANIZATION'S POSITION

The Organization submits that the intent of Rule 48 (k) is to provide Carrier a means of purging the ranks of employees who abandon or simply walk away from their jobs. The Organization asserts that a review of the record evidence in this case leaves absolutely no doubt that Claimant did not abandon his job as documentation provided to the Carrier's Health Services Department on May 6, 2008, the very same date Claimant

received notification of his employment relationship having been severed, makes it clear that Claimant's medical condition at the time he was charged with having violated Rule 48 (k) mitigated his capacity to respond to the Carrier for the purpose of protecting his assignment. The Organization asserts that what is particularly disturbing with regard to the manner in which Carrier has proceeded in this case is, that no consideration was given to the medical documentation by Manager Track Programs, Havestick in rendering the decision following the telephone conference to affirm the applicability of Rule 48 (k) to Claimant's circumstances, thereby finding Claimant had voluntarily severed his employment relationship. Equally disconcerting according to the Organization is the fact that Havestick solicited information from Claimant's former Supervisor to support his decision to affirm the applicability of Rule 48 (k) under the circumstances of Claimant's case when that supervisor was not a party to the telephone conference that was conducted on August 4, 2008. Additionally, the Organization submits, there is no evidence that Carrier consulted its Health Services Department at any time during the claim handling process to determine if the Claimant had justifiable reason for his absence. The Organization further submits that employees providing proper documentation of medical conditions supporting absence from work cannot be deemed to have voluntarily severed their employment relationship under provisions of Rule 48 (k) of the Controlling Agreement.

Based on the foregoing argument asserted, the Organization requests the Board to sustain the claim and finding Claimant to be entitled to the full remedy requested.

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.

The Board is persuaded by the sense of the record evidence in its entirety and, therefore, in concurrence with the Organization's central position, Claimant had no intention to abandon his employment with Carrier. This finding is supported by the fact that, after receipt of Carrier's Certified Letter on February 6, 2008, requesting that he submit two (2) forms to substantiate his leave of absence from work was covered under the provisions of the Family and Medical Leave Act, Claimant responded five (5) days later by informing he was rescinding his request for FMLA leave and, instead was requesting a medical leave of absence beginning on February 1, 2008. However, the record evidence makes clear that Claimant committed the crucial error of submitting this response to the Organization which received the handwritten letter dated February 11, 2008 on February 14, 2008 and that he failed to also submit a copy of this same letter to the proper Carrier authority which would have been Carrier's Health Services

Department. Proof that Carrier never received this letter is supported by the fact that on March 20, 2008, it sent Claimant a second request by Certified Letter, Return Receipt Requested for him to submit the forms substantiating his leave was covered by FMLA since he had not submitted said forms by the deadline date of February 27, 2008 as was indicated in its first letter of request of February 6, 2008. Receipt of this letter should have quite clearly and without question indicated to Claimant that Carrier was unaware that on February 11, 2008, he had informed of his withdrawal of his request for leave under FMLA and, instead had requested a medical leave of absence. However, as the record evidence indicates, Claimant failed to respond to this second written request by Carrier even though it was more than apparent that Carrier had not known of his rescission a month earlier to have his leave of absence from work covered under the requirements of FMLA. Claimant's first mistake in misdirecting his handwritten letter of February 11, 2008 to the Organization and not to the Carrier is deemed by the Board to have been a "crucial" mistake but, this second mistake of failing to respond properly to Carrier's second request for submission of forms in substantiation of FMLA to cover his leave of absence from work which would have been to immediately notify Carrier he had acted five (5) weeks earlier to correct his leave status as a medical leave of absence is deemed by the Board to have been a "fatal" mistake. Had Claimant so acted to correct his leave status, the entire issue of his having voluntarily severed his employment relationship pursuant to the provisions set forth in Rule 48 (k) would never have arisen.

The Board is not in concurrence with the Organization's position that Carrier failed to consider the medical documentation of Claimant's medical condition when, following the telephone conference, Carrier official Havestick affirmed the applicability of Rule 48 (k) to Claimant's circumstances, thus finding Claimant had voluntarily severed his employment relationship. Quite the contrary as Carrier made clear that it determined that Claimant's medical condition was no excuse for his failing to properly respond to Carrier's two (2) requests by timely filing the two (2) forms in connection with substantiating his leave of absence from work qualified as leave under FMLA. However, the Board is in concurrence with the Organization's position that Carrier, in its determination as to the applicability of Rule 48 (k) to Claimant's circumstances should have attached greater import to Claimant's capacity to protect his assignment given the state of his mental health from February 1, 2008 and going forward. During this period of time leading up to May 6, 2008, the date Claimant received notice that his employment relationship with Carrier had been severed, the Board finds the record evidence to be mixed as to Claimant's capacity to respond to any set of circumstances revolving around his state of mental health. For example, during the dates set forth in the above Statement of Background for the month of February, Claimant is shown to have had the capacity and presence of mind to first, apply for FMLA leave, then to withdraw that application and to apply for his absence from work as a medical leave, and then to deal adequately with all the issues surrounding insurance and filing for benefits associated with his disability. On the other hand, while Claimant was shown to possess the capacity and ability to deal with all those circumstances, the record evidence also has shown that Claimant's incapacitation caused him to commit the two


(2) very integral mistakes referenced above which resulted in Carrier severing Claimant's employment relationship. The Board is persuaded that given what Carrier knew at the time it acted appropriately when it subjected Claimant to the self-invoking Rule 48 (k). However, the Board is persuaded that when Carrier, in retrospect learned from documentation submitted by the Organization that Claimant had acted to change his leave status from a leave covered by FMLA to a leave covered by a medical leave of absence almost immediately after being apprised he was required to file forms in substantiation of a FMLA leave of absence from work, Carrier should have attached greater significance to this fact and deemed it to constitute a justifiable reason in explanation as to why proper authority had not been obtained for his absence from work albeit that Claimant failed to file his request for a change to the Carrier's proper authority.

Based on the foregoing finding, it is the Board's ruling that Carrier withdraw its application of Rule 48 (k) and to honor Claimant's request to cover his absence from work with a medical leave of absence, thus leaving his seniority unimpaired. However, the Board is not requiring Carrier to implement the requested remedy of compensation as Claimant's mistakes as set forth above were the catalyst that brought about the imposition of Rule 48 (k).

AWARD

CLAIM SUSTAINED AS PER FINDINGS


George Edward Larney
Neutral Member & Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois

Date: 5-25-2010