

PUBLIC LAW BOARD NO. 6302
CASE NO. 241

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES

PARTIES
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it improperly terminated the seniority of Claimant J. Johnson (System File G-1248U-51/1570466).
2. As a consequence of the violation referred to in Part 1 above, the Carrier must reinstate Claimant Johnson with benefits and seniority unimpaired and compensate him for all wage loss suffered as a result of the Carrier’s improper seniority termination.”

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant, a Track Inspector, experienced a medical situation on his way to work on February 8, 2012 resulting in his seeking medical attention and not reporting to work. The following day, after waiting for his wife to return to drive him, Claimant got to his Manager’s office after hours, slid his doctor’s note (excusing him from work from

February 9 - March 9) under his Manager's door, and left his Manager a detailed voicemail concerning his doctor's note and his inability to work, and left a phone number where he could be reached in the event his Manager had any questions. He also left his company laptop and cell phone on the desk in the office. His Manager admitted receiving the doctor's note and seeing the computer in the office on February 10 or 11, but denied getting a message; his attempts to call Claimant's company cell phone were unsuccessful. Claimant remained off work believing that he had been granted a medical Leave of Absence (MLOA).

By letter dated February 21, 2012, Claimant was notified that he had voluntarily forfeited his seniority under Rule 48(k) for being absent without proper authority for more than five consecutive days between February 8 and 21, 2102, and that Carrier considered his employment ended. The Organization sent a letter to Carrier's Labor Relations Department on February 22, 2012 indicating that Claimant had gained proper authority for his absence and had a justifiable medical reason to be off work, asking Carrier to reconsider its decision. When Carrier did not do so, the Organization requested a conference by letter dated February 28, 2012, which was followed by multiple verbal requests until such conference was convened on March 13 and 14, 2012. During the conference, Claimant provided medical evidence showing that he had a valid medical reason for his absence as well as telephone records supporting his claim that he had made a call to his Manager on February 9. His Manager acknowledged receiving the medical note timely and indicated that it was in acceptable form. According to the claim filed on April 17, 2012, there had been no decision received on this case from Carrier, despite being told by the Director that he would have an answer within a few days of the conference. Carrier's written decision to the Vice General Chairman upholding the Rule 48(k) action is dated May 2, 2012.

The pertinent language of Rule 48, Discipline and Grievances, provides:

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.

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 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.

The Organization initially argues that Carrier's failure to issue a timely decision after the unjust treatment hearing (56 days later) is a procedural defect that renders the discipline void without reaching the merits. It notes that such a lengthy delay without any explanation is insufficient to meet Carrier's contractual responsibility of making "every effort to render a decision at the conclusion of the conference."

The Organization next contends that Claimant's termination was inappropriate and a violation of the Agreement, since he did not fail to obtain proper authority under Rule 25, his Manager's failure to follow up led to his reasonable belief that he had been granted a MLOA, and Claimant established that he had a justifiable reason for his absence between February 8 and 21. It asserts that Rule 48(k) was intended to apply to situations where employees abandon their jobs and do nothing to protect their positions, which is clearly not the case here as Claimant made reasonable efforts to provide medical documentation and timely contact his Manager about his condition. The Organization relies on prior precedent for overturning Carrier's Rule 48(k) termination of seniority including Third Division Awards 24413, 28877, 31535; Public Law Board No. 6089, Award 17; Public Law Board No. 6302, Awards 24 & 34. It requests that Claimant's seniority be reestablished and that he be made whole.

Carrier contends that there are no procedural errors or affirmative defenses that exist to void the discipline, noting that the time limits applicable to discipline issued pursuant to other sections of Rule 48 do not apply to Rule 48(k) forfeiture of seniority cases, which have no specified time period within which to respond after a conference. Carrier also argues that Rule 48(k) is a self-executing forfeiture provision, and its application here was reasonable and consistent with policy and precedent, citing Public Law Board No. 6302, Award 59. It maintains that the Organization failed to meet its burden of proving a violation of the Agreement in this case.

A careful review of the record convinces the Board that the application of Rule 48(k) to Claimant in this case and the termination of his seniority was inappropriate and excessive. First, Carrier did not meet its express obligation to “make every effort to render a decision at the conclusion of such conference” by waiting over 50 days to issue its decision upholding the termination of Claimant’s seniority. Although Carrier is technically correct that the 20 day time limit specified elsewhere in Rule 48 does not appear in this subparagraph, by use of the noted language the parties clearly contemplated that Carrier would be diligent in making a timely decision. The delay in this case does not meet that required standard.

However, even if Carrier’s failure to meet its procedural obligation is considered an insufficient basis alone to void the action in this case, the facts brought forward at the conference (as set forth in the parties’ correspondence) and during the claim processing reveal that this is not a case where Claimant did nothing, and took no initiative to protect his job or notify his Manager of his medical status, or could prove no medical justification for his absence, as in Public Law Board No. 6302, Award 59. Rather, this situation falls within the parameters of those cases where Claimant did not completely abandon his job and made an effort, albeit perhaps without necessary follow-up, to notify his supervisor and present medical justification for his absence. See, e.g. Third Division

28877, 31535; Public Law Board 6089, Award 17; Public Law Board No. 6302, Award 24. Once Claimant was able to establish that he did call his Manager on February 9, 2012, his evidence of the nature of his voicemail message and the fact that he left a number at which he could be contacted if his supervisor had any questions concerning his proffered medical note, stands undenied. Under such circumstances, we cannot say that it was unreasonable for Claimant to assume that his medical was accepted to support his absence during the period relied upon to terminate his seniority when he did not hear back from his Manager.

We believe that the following rationale, expressed in Third Division Award 31535 is applicable in this case:

We recognize that Rule 48(k) is self-executing. In the past, however, when faced with a claimant who had not followed through to the extent that he should have but who also had not completely abandoned his job, this Board has recognized that confusion in communications contributing to the claimant's predicament can mitigate against the harshness resulting from a literal application of self-executing rules calling for forfeiture of seniority.....

While the Board's approach in these type of cases is to restore the employee to service with seniority unimpaired but without compensation for time lost, the procedural violation by Carrier in this case provides a basis for finding that some compensation for time lost is appropriate, as does our finding that Claimant's belief that his medical note had been accepted was reasonable. Therefore, the Board concludes that Carrier's reliance upon Rule 48(k) to terminate Claimant's seniority was excessive, and directs that he be restored to service with his seniority unimpaired, and made whole for all lost wages and benefits suffered as a result of Carrier's action. This remedy is based upon the unique facts of this case, and takes into account both Carrier's delay in making a determination after the hearing, as well as the fact that, by the time such determination was made, Carrier had all of the medical evidence it needed to verify the *bona fides* of Claimant's

absence during the relevant time period, and presented no evidence to contest its legitimacy.

AWARD:

The claim is sustained in Accordance with the Findings.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

K. N. Novak

K. N. Novak
Carrier Member

Andrew Mulford

Andrew Mulford
Employee Member

Dated: 9-17-14

Dated: 9-17th Aug-14