

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 21
)
) Award No. 24
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: November 7, 2001

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier terminated the seniority of Mr. J. C. Epting on August 27, 1998 (System File W-9848-163/1163562D)
2. As a consequence of the violation referred to in Part (1) above, Mr. J. C. Epting shall be reinstated to service, compensated for all wage loss suffered and have his record cleared of this incident.

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.

On July 29, 1998, Claimant sustained an injury when a claw bar dropped on his foot. On July 31, after his foot worsened, Claimant went to a V.A. hospital, where his foot was x-rayed. The following day, Claimant's doctor restricted him from working. Claimant called his supervisor and advised him of the situation. The following day, Claimant spoke with his supervisor again. The supervisor advised Claimant not to report to work until he had a complete release from his doctor.

Claimant spoke with his supervisor on August 3 and 4. Claimant's supervisor reiterated that Claimant needed a full medical release to return to work. On August 5, Claimant advised his supervisor that he still was unable to secure the release. On August 6, Claimant advised his supervisor that he would return to work on August 10. The supervisor advised Claimant that he was beginning a vacation and told Claimant to contact the ARASA supervisor who would be covering during the vacation.

Neither Claimant's regular supervisor nor the supervisor covering during the regular supervisor's vacation heard from Claimant again until August 24. There is a dispute as to whether Claimant's regular supervisor gave Claimant authority to take August 17, 18 and 19 off for a trip to Chicago. Claimant maintains that the supervisor did so, while the supervisor maintains he told Claimant to raise the issue with the ARASA supervisor covering during vacation. In any event, Carrier terminated Claimant pursuant to Rule 48(k) which provides:

Employees absenting themselves from their assignment for five (5) consecutive working days without proper working 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.

Carrier maintains that Rule 48(k) is self-executing and clearly resulted in Claimant's forfeiture of his seniority and employment. Carrier urges that Claimant advised his supervisor that he would return to work on August 10 and then was not heard from until August 24, by which time he had triggered Rule 48(k). Carrier urges that there is a dispute of fact as to whether Claimant was given authority to be absent on August 17, 18 and 19, and that the Board cannot resolve that dispute. However, in Carrier's view, even if those three days are not counted, Claimant remained absent for five consecutive working days without proper authority.

The Organization contends that Claimant did not abandon his job. Rather, Carrier was aware that Claimant was off injured and Carrier had instructed Claimant not to return to work until he had a complete medical release. In the Organization's view, Claimant was merely following Carrier's instructions.

The Board has considered the record carefully. The record reflects that, although Claimant's supervisor advised Claimant not to report to work until he had a full medical release, Claimant advised his supervisor that he would obtain a release and return to work on August 10. Claimant then did not show up for work and did not contact his regular supervisor or the ARASA supervisor covering during vacation until August 24. Claimant maintains that during this period, he was in contact with the claims agent. However, the claims agent was dealing with Claimant's injury report and claim and was not the proper official to contact for authority to continue to be off work.

Rule 48(k) is self-executing. Claimant met the literal terms of Rule 48(k), i.e. he was off for at least five consecutive working days without authority. However, there is considerable precedent that a Board should review all of the surrounding circumstances and that, under appropriate circumstances, the Board has authority to temper the harshness of a literal application of Rule 48(k).

In Third Division Award 31535, an on property award in which the Chair of this Board sat as referee, the Board wrote:

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. See, e.g., Third Division Awards 28877 and 29483. In those cases, the Board restored the claimant to service with seniority unimpaired, but without compensation for time lost. We find a similar result is appropriate in the instant case.

In the instant claim, we find that the surrounding circumstances warrant a result similar to Award 31535. It is clear that Claimant did not completely abandon his job. Claimant was off work and was unable to obtain a complete medical release. Claimant had been advised that he should not return to work until he obtained a full release. Claimant was in contact with the claims agent. This does not excuse Claimant's failure to maintain contact with his supervisors and his failure to continue to obtain authority for his absences. However, it reflects poor judgment and confusion on Claimant's part, rather than an intent to abandon his job. Under the circumstances, the Board finds that the harshness of Rule 48(k) should appropriately be tempered in accordance with prior on property precedent. Carrier shall restore Claimant to service with seniority unimpaired but without compensation for time lost.

AWARD

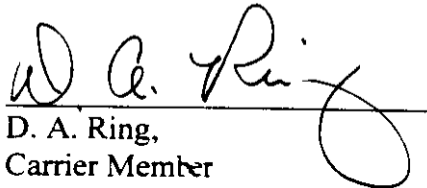
Claim sustained in accordance with the Findings.

ORDER

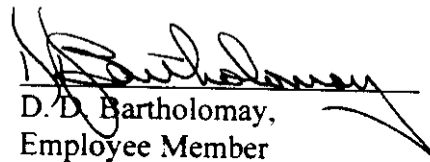
The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto.



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, November 16, 2001.