

PUBLIC LAW BOARD NO. 7660
AWARD NO. 183

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The termination of Mr. J. Guardia pursuant to Rule 48(k) of the Agreement in connection with being absent from his assignment for at least five (5) consecutive workdays per letter dated May 1, 2019 was unjust, unwarranted and in violation of the Agreement (System File JN-1948U-406/1724628 UPS).

2. As a consequence of the violation referred to in Part 1 above, Claimant J. Guardia shall now ‘... be re-instated as an employee of the Union Pacific Railroad, paid for his loss in wages accruing since May 1, 2019, reimbursed for any other costs resulting from this job separation, and made whole in any other regard as a result of this action by **Mr. Kevin LaConte**. This payment will be calculated by observing all rules under the current agreement. This is compensation that Claimant would have received absent the violation of our Collective Bargaining Agreement.’ (Emphasis in original) (Employees’ Exhibit ‘A-1’).”

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.

This case involves the termination of Claimant's seniority 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.

* * * * *

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.

Claimant has worked for the Carrier since September, 2008 and was on furlough status when he bid to, and was assigned, a position as Jackson 6700 Tamper Operator on Gang 8539, effective April 11, 2019. That gang was working a T-2 compressed half schedule and was originally headquartered in Oregon, near his residence. On April 22 (the final rest day of the gang), Claimant was informed by Supervisor Stevens that the gang was making a move and relocating to Piedra, Arizona. Claimant told him that he did not have any travel money to make the gang move, and would not have it until he received his unemployment check. According to Claimant, he was told by Stevens that it was fine and he should try to make the move before the end of the month.

Claimant testified that he notified Supervisor Stevens in the morning of April 24 that he had received his unemployment check and would be leaving shortly to come to Arizona. Claimant was told that if he could make it by April 25 they would pay for his

gang move. When asked if he would be there that evening, Claimant informed the supervisor that it was an 18 hour drive and it would take him 2 days to make the gang move. According to Claimant, Stevens said that was fine and not to hurry. Stevens did not recall the April 24 conversation with Claimant, but Claimant presented a screen shot of his call history indicating an outgoing call at 8:20 a.m. on April 24.

When Claimant arrived at the reporting location he believed was where the gang met on April 27, no one was there and he called Stevens at 5:55 a.m. to say he had arrived. He was told that the meeting location was 15 miles away, and he arrived at that location at 6:22 a.m., late for his shift that started at 6:00 a.m. Claimant was told that he could not work, and eventually that he should go home, bid on another job and he would be receiving a letter. A certified letter dated May 1, 2019 and signed by Kevin LaConte, Manager of Special Projects Field Construction, advised Claimant that he had been absent from his assignment without proper authority from April 22 to April 26, 2019, and that he was considered to have voluntarily forfeited his employment under Rule 48(k) for being absent for five consecutive working days without proper authority.

By letter dated May 17, 2019 the Organization requested a conference with the Carrier Officer involved pursuant to Rule 48(k). A conference call was set up by LaConte for June 13, to include himself, Stevens, Dalebout and Ince for the Carrier, and Claimant, and Vice Chairmen Hallgren and Nantista from the Organization. After waiting 15 minutes for others to attend, it appeared to the Organization's representatives and Claimant that only Stevens was present for the Carrier, and Claimant went through the reasons why he was unable to attend between April 22 and 26, and the fact that he had been in touch with Stevens on April 22 and 24, and was informed that he could await his unemployment check before making the move to AZ, and that it would take him 2 days to arrive. After the conference ended on June 13, the Organization wrote a letter to LaConte, indicating that since Stevens was the only Carrier representative present during the

conference that day, Carrier was in violation of Rule 48(k) by not having the Carrier Officer involved present to render a neutral decision.

Hearing no response, the Organization filed a claim on June 26, 2019 alleging a violation of Rule 48(k) by Carrier not having the charging manager present at the conference who could render a decision at its conclusion. By unsigned letter dated July 16, LaConte stated that he was on the call on June 13 and considered what was presented in reaching a decision to uphold the Rule 48(k) violation charged. By another unsigned letter dated July 24, 2019 LaConte set forth the reasons in support of upholding Claimant's "disqualification." The Carrier denied the claim by letter dated August 16, again stating that LaConte participated in the conference, and upholding the forfeiture of Claimant's seniority under the self-executing provision of Rule 48(k). The Organization's August 19 appeal relies on three separate written statements - from Claimant, Hallgren and Nantista - making clear that LaConte was not present during the conference call on June 13, noting that LaConte did not respond to the Organization's June 13 letter taking issue with his absence from the conference until over a month later on July 16, and pointing out that the determination was rendered on July 24, almost 6 weeks after the conference. The Carrier's October 9, 2019 denial points out that there are disputes of material fact which undermine the Organization's ability to meet its burden of proof, requiring that the self-executing provision of Rule 48(k) be upheld.

The Organization argues first that the Carrier failed to comply with the Agreement when it did not hold the properly requested conference under Rule 48(k) with the Carrier Officer involved, as expressly required, thereby denying Claimant the opportunity to explain his position to a Carrier Officer capable of rendering a decision at the conclusion of the conference, citing Third Division Awards 32047 and 28406. The Organization contends that the Carrier's termination of Claimant's seniority was inappropriate, unjustified and excessive on the facts of this case. It notes that at no time did Claimant

abandon or forfeit his employment relationship with the Carrier, since he repeatedly contacted Stevens to inform him that he needed to wait until he got his unemployment check to be able to financially make the move with the gang, and when he received it on April 24, that it would take him 18 hours (over a 2 day period) to get to Arizona from Oregon. The Organization asserts that Claimant took active steps to secure his employment and arrive at the new gang location within the time period communicated to his supervisor, and that his failure to report on time was the result of a miscommunication concerning the gang's meeting point. It avers that the self-executing provisions of Rule 48(k) are understood to apply to employees who abandon their employment willfully, and that its application in this case was inappropriate, should be overturned by the Board, and Claimant should be made whole, relying on Third Division Awards 24413 and 28877; PLB 7258, Award 8; PLB 6089, Award 17; PLB 6302, Awards 24, 34, 143 and 229.

The Carrier contends that Claimant voluntarily forfeited his seniority and employment relationship when he failed to protect his assignment between April 12 and 27, 2019. It asserts that it complied with the provisions of Rule 48(k), and a dispute in fact concerning LaConte's attendance at the June 13 conference exists, which necessitates dismissing the case for failure of the Organization to meet its burden of proof, citing Third Division Awards 39613, 26478, 33895. The Carrier argues that dismissal is the consequence of a Rule 48(k) absence without proper authority violations, relying on PLB 7660, Award 22. It maintains that the Organization's requested remedy is excessive and improper, since "net wage loss" under Rule 48(h) has been interpreted as meaning payment of straight time minus outside earnings, relying on PLB 7660, Award 82.

On the basis of the entire record, the Board concludes that the application of Rule 48(k) to Claimant in this case and the termination of his seniority was inappropriate and excessive. Initially we note that we are unable to agree with the Carrier that there is an irreconcilable dispute in fact concerning whether LaConte was present during the

telephone conference on June 13. Four people were identified as being present - 3 from the Organization and Supervisor Stevens. The three Organization participants each submitted signed written statements concerning who was present and that they waited 15 minutes for other invited Carrier participants but none showed up. Other than a belated (over one month later) unsigned statement from LaConte that he was present, which was rebutted by the Organization's evidence, there was no corroboration from Supervisor Stevens that any other Carrier Officer was present, and no contention that LaConte was on the call. As noted in PLB 6302, Award 229, an almost 6 week delay between the June 13 conference and July 24 decision upholding the Rule 48(k) determination does not meet Carrier's contractual responsibility of making "every effort to render a decision at the conclusion of the conference."

Additionally, it is admitted that Claimant had a phone conversation with Stevens on April 22 wherein he learned that the gang he had just bid on was relocating from Oregon to Arizona, and Claimant informed his supervisor that he did not have the funds to make the trip having just come off of furlough, and needed to wait until he received his unemployment check to join the gang. Claimant recalled Stevens telling him that was fine. It was also admitted that in a phone call between the two of them on April 23, Claimant was told that if he could make the site by April 25 he would be paid for the gang move. Claimant stated that he again spoke with Stevens on April 24 indicating that he had received his check and was leaving shortly, and confirming that it would take him 2 days to make the 18 hour trip. Again, according to Claimant, he was told not to worry and to get there when he could. Even if that call occurred on April 23, it was still within the time period cited in the letter for unexcused absence being relied upon by the Carrier to invoke Rule 48(k).

Whether these facts constitute approval for the delay in reporting, or for the time off work between April 22 and 26, they certainly support the finding that Claimant did

not willfully abandon his job, and that he explained to his supervisor his delay in joining the gang after the move to Arizona. Claimant was never informed not to report to Arizona, and was encouraged to arrive as soon as he could. Clearly, his supervisor understood that Claimant intended to join the gang and commence work in the new location as of April 27, when he arrived at what he believed to be the designated meeting point prior to his 6 a.m. starting time. The fact that the meeting point was actually 15 miles away accounts for his lateness that morning. The circumstances of this case do not meet the situation of an AWOL employee, whose inaction amounts to an abandonment of his employment, which Rule 48(k) was designed to cover.

As noted in Third Division Award 31535:

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, also PLB 6302, Award 241. In the circumstances of this case, we are of the opinion that Claimant's seniority was not forfeited by any inaction on his part, and that the Carrier acted arbitrarily in applying Rule 48(k) to him. Claimant is entitled to a restoration of his seniority and resumption of his employment status with the Carrier. Although the Organization requests compensation for all time lost, including missed overtime opportunities, the precedent between the parties makes clear that there is no contract basis for any compensation for Claimant at the overtime rate. See, e.g. PLB 7660, Case 82. The Board directs the parties to ascertain the lost hours of work based upon Claimant's location on the seniority roster, and to compensate him at his straight time hourly rate for such time, less any interim earnings. Claimant's record shall not contain any MAPS status pertaining to this matter.

AWARD:

The claim is sustained in accordance with the Findings. The Carrier is ordered to make the Award effective on or before 30 days following the date of the Award.

Margo R Newman

Margo R. Newman
Neutral Chairperson

Chris Bogenreif

Christopher Bogenreif
Carrier Member

John Schlismann

John Schlismann
Employee Member

Dated: March 31, 2022

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