

PUBLIC LAW BOARD NO. 7660  
AWARD NO. 185

BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when Carrier served Claimant Michael Goodman (0350127), with a separation letter on July 22, 2019, informing him that he had voluntarily forfeited his seniority under Rule 48(k), without substantiating the allegation.
2. As a consequence of the violation referred to in Part (1) above, the Organization requests Claimant be reinstated 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. (Organization File A-1948U-010/Carrier File 1726348).”

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 has been employed by the Carrier for 19 years and worked as a System Tie Ballast Foreman on Gang 0721 at the relevant time, and the traveling gang was

working compressed halves. Claimant was in compensated service from July 1-3, was on approved vacation from July 4-6, celebrated a holiday on July 8, and was marked as being on unauthorized absence on July 7, and from the 16th onward. On July 22, 2019 Carrier sent Claimant a letter advising him that since he was absent without proper authority from July 7, he is considered to have voluntarily forfeited his employment under the provisions of Rule 48(k), which states:

Employees absenting themselves from their assignment 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.

Carrier also turned off Claimant's access to his computer on that date. On July 25, 2019 the Organization requested a conference call, which was held on August 2, 2019.

From reviewing the claim filed on August 7, 2019, and Carrier's denial of September 25, 2019, with attachments, it appears that Claimant made 14 attempts to call his supervisor on each day between July 18 and 22, to explain the he had lost his driving privileges and could not get to work, and was requesting vacation time covering the period until he could bid on a job closer to home, but that his supervisor failed to pick up the phone, return his calls or texts until July 22, when he informed Claimant that he was being considered as having voluntarily resigned under Rule 48(k). After the conference, the supervisor sent a one line email to Carrier officials stating that he responded to Claimant through text when he got out of jail but that Claimant continued his unauthorized absence. There are no other specifics about when that response occurred, and no contention that it was between July 18 and 22, 2019.

The Organization initially argues that incarceration was not the cause of Claimant's absence, and is irrelevant to this dispute, since the basis for his failure to

report to work on the cited dates was his inability to travel to get to work due to the revocation of his driver's license. It points out that Claimant made no less than 14 attempts to contact his supervisor by phone and text between July 18 and 22 to explain why he could not get to work and request vacation until he could bid closer to home, but that his supervisor failed to pick up the phone or return his calls. The Organization asserts that Carrier cannot arbitrarily ignore an employee's attempts to notify Carrier officers of the reason for his absence, and terminate his seniority under Rule 48(k), citing Third Division Awards 32047, 31535, 35926; PLB 6089, Award 17. It contends that the termination of Claimant's seniority in the circumstances of this case - where he had vacation time to cover his absence, intended to bid on a job closer to home and made numerous efforts to notify his supervisor and attempt to obtain authorization, showing a lack of intent to abandon his job - as well as his long service without any attendance issues, was unjustified, inappropriate and excessive, and requests that Claimant be returned to service, relying on numerous cases including PLB 7258, Award 8; PLB 6302, Awards 34, 121, 134, 229; Third Division Awards 31535, 28877, 24413.

The Carrier contends that Rule 48(k) is a self-executing rule, that is not considered discipline, citing PLB 7660, Award 22 and PLB 6302, Award 211, and that it is the Organization's burden to prove that Claimant does not fit within its parameters. It maintains that there is no dispute that Claimant was absent without proper authority for the 9 days cited in the July 22 letter, that he received the requested conference where he had a chance to explain his absences, and that Carrier rightly concluded that his explanation did not present a justifiable reason and complied with the provisions of Rule 48(k). Carrier notes that his supervisor did communicate with Claimant after his release from jail, but that he continued his absence knowing it was unauthorized. It argues that dismissal is the consequence for a Rule 48(k) absence. Carrier asserts that the Organization failed to meet its burden of proof in this case, as there is a dispute in

material facts as to what occurred in the telephone conference relative to his supervisor's communication with Claimant, requiring that the claim be dismissed, relying on Third Division Awards 39613, 33895. It also contends that the remedy requested by the Organization is excessive.

We first note that we disagree with Carrier, that an irreconcilable dispute in material facts exists in this case. The supervisor's written one line general email concerning a conversation with Claimant when he got out of jail did not dispute Claimant's evidence that he attempted to call his supervisor over 14 times between July 18 and 22 to explain his situation and reason for absence (which did not involve incarceration), and that his supervisor never returned his calls or picked up the phone until July 22.

A careful review of the record convinces the Board that this is one of the "infrequent occasions" when the application of Rule 48(k) was excessive and unreasonable. See, e.g. PLB 6089, Award 17. There is no doubt that Rule 48(k) is self-executing, and not discipline. And there is no dispute that Claimant was absent for 5 consecutive days without proper authorization. However, unlike the situation in the cases relied upon by the Carrier, there is no doubt that Claimant attempted numerous times to contact his supervisor during the period of his 5 consecutive day absence, and was never given the opportunity to request vacation coverage or other approved leave to enable him to bid off his traveling gang so that he could work closer to home. Claimant was a 19 year employee with no record of any attendance issues, held a position of trust as a Foreman, and clearly showed that he had no intent to abandon his job. Under these circumstances, we agree with precedent that the Board must review all surrounding circumstances and temper the harshness of a literal application of Rule 48(k) if appropriate circumstances exist. See, e.g. PLB 6302, Awards 34, 121, 143, 229; Third Division Awards 31535 and 35926.

The Board finds that such circumstances exist in this case. Accordingly, and in line with the above-cited precedent, we direct that Carrier restore Claimant to service with seniority unimpaired, but without compensation for time lost. 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*

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Margo R. Newman  
Neutral Chairperson

*Chris Bogenreif*

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Chris Bogenreif  
Carrier Member

*John Schlismann*

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John Schlismann  
Employee Member

Dated: August 25, 2022

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