

PUBLIC LAW BOARD NO. 7660
AWARD NO. 191

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES 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. T. Tsosie 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 November 6, 2019 was unjust, unwarranted and in violation of the Agreement (System File JN-2048U-402/1734115 UPS).
2. As a consequence of the violation referred to in Part (1) above, Claimant T. Tsosie shall now be ‘... reinstated as an employee of the Union Pacific Railroad, paid for his loss in wages accruing since October 30, 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. Blair Brown. 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.’ (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.

Claimant was an 11 year employee who worked as a System Tie Gang Foreman on Gang 9036 at the relevant time. On October 29, 2019 Claimant was notified of a family emergency requiring his presence, so he left his work location in Utah (away from his gang) after finishing his job and began his 2 day drive to his home in Arizona. On October 30 Claimant texted his supervisor advising him of this fact, and then got into a serious car wreck basically totalling his vehicle. Claimant called his supervisor and informed him of what was occurring, and he was told that he was being marked on unauthorized absence (UA), and when he questioned about how many days he could be in that status, his supervisor was unsure and told him to either bid off his gang or give up his seniority. Claimant indicated that he followed these instructions and bid off the job. Claimant's wife came to get him and his grandmother was admitted to the hospital on October 31, 2019. Claimant contacted Carrier's LR to inquire about the proper course of action, and they told him they would phone back. Claimant also contacted his Timekeeper to check on his status and the time he was permitted to be off on UA. On November 3, 2019 LR advised Claimant to contact his Union, which he did, but did not make the appropriate connection until November 6, 2019.

On November 6, 2019 Carrier sent Claimant a letter advising him that since he was absent without proper authority from October 30, he is considered to have voluntarily forfeited his employment under the provisions of Rule 48(k), which states:

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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.

On November 18, 2019 the Organization requested a conference, which was held on January 3, 2020. Therein, Claimant submitted a written statement explaining what had occurred and listing his contacts with various Carrier personnel. He submitted photos of his wrecked car and a note from the hospital concerning the admission of his grandmother. By email dated January 15, 2020, Carrier informed the Organization's representative that information received did not justify Claimant's absence. The Organization requested reconsideration.

The Organization filed a claim on January 27, 2020 protesting the termination of Claimant's seniority based on the fact that he had a justifiable reason to be absent, had made multiple attempts to communicate with his supervisor and LR, and never intentionally walked off or abandoned his job. Carrier's denial on March 2, 2020 reiterated that it properly utilized Rule 48(k) for Claimant's absence without authority between October 30 and November 6, 2019.

The Organization argues that Carrier's wanton termination of Claimant's seniority was inappropriate and unjustified, since Claimant had a family emergency resulting in a hospitalization and wrecked his car on the trip home, and made numerous attempts to contact his supervisor and obtain Carrier's advise on how he should proceed to best safeguard his job. It notes that Claimant received conflicting and incomplete information on what to do and followed his supervisor's direction to bid off his job, indicating that he was not a walk away employee who abandoned his position, which is what Rule 48(k) was intended to address, citing PLB 6302, Awards 24 & 229; Third Division Awards 31535,

35926, 28406, 32047. The Organization requests that Claimant be returned to service and made whole for lost wages and benefits.

The Carrier contends that Rule 48(k) is a self-executing rule, that is not considered discipline, citing PLB 7660, Award 22 and Third Division Award 36214. It maintains that there is no dispute that Claimant was absent without proper authority for the days cited in the November 6, 2019 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 that it complied with the provisions of Rule 48(k). Carrier asserts that the Organization failed to meet its burden of proving a justifiable reason for the absence in this case, and the existence of a dispute in fact as to whether there was a justifiable reason requires that the claim be dismissed, relying on Third Division Awards 39164 & 39613. It also contends that the remedy requested by the Organization is excessive, since the Agreement calls for a net loss of earnings making deductions for interim earnings proper, relying on Second Division Award 1638, and no overtime payment is appropriate, citing PLB 7660, Award 82.

We first note that we disagree with Carrier that an irreconcilable dispute in material facts exists in this case. To say that Carrier's belief that the presentation of evidence supporting the reasons for Claimant's absence - family medical emergency requiring hospitalization and a car accident rendering his vehicle unusable - was insufficient to justify his unauthorized absence, while the Organization's contention that it provides sufficient justification, is a dispute in material fact would make every claim with differing opinions a valid basis for dismissal, which is not what is intended by awards such as Third Division Awards 39613, 26478, 33895. There is no dispute concerning what actions Claimant took to notify Carrier of his circumstances, or what documents he submitted during his conference to support the reasons for his absence.

A careful review of the record convinces the Board that this is one of the occasions when the application of Rule 48(k) was excessive and unreasonable. See, e.g. PLB 6302, Awards 24 & 229. 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 and technically meets the language of the Rule. However, unlike the situation in the cases relied upon by the Carrier, there is no doubt that Claimant did contact his supervisor twice on October 30 (the first day of his absence), to inform him of the family medical emergency requiring him to go home as well as the car accident totalling his vehicle. He asked for advice on how best to protect his job, both from his supervisor and from LR over the next day or two, contacted his Timekeeper for the same purpose, and stated that he followed his supervisor's advice to bid off the gang, since no one else had any answer for him. Claimant held a position of trust as a Foreman, and clearly showed that he had no intent to abandon his job. Additionally, during the conference, Claimant provided written support for his reasons for absence, and a detailed explanation of the efforts he made to protect 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, unlike the above-cited precedent returning the employee to service with seniority unimpaired but without compensation, there are circumstances in this case that justify the imposition of a monetary award. Claimant took immediate steps, and sought guidance from various Carrier officials, about how he could protect his assignment during his unfortunate absence, caused by circumstances beyond his control. He presented proof to Carrier during the conference to substantiate his claims and justify his absence, and asserted that he followed the instructions of his supervisor to bid off the job. Carrier was unable to explain why it determined that these facts did not justify Claimant's absence,

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or why following his supervisor's instructions did not protect his job. While it is the Organization's burden to establish a justification for Claimant's unauthorized absence, the Board is of the opinion that it met that burden and proved that Claimant had a justifiable reason not to report to work from October 30 to November 5, the period relied upon by Carrier in initiating his separation under Rule 48(k). Under these circumstances, we direct that Carrier restore Claimant to service with his seniority unimpaired, and compensate him for his net loss of earnings (not including overtime and deducting his interim earnings).

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

Chris Bogenreif
Carrier Member

John Schlismann

John Schlismann
Employee Member

Dated: August 25, 2022

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