

PUBLIC LAW BOARD NO. 7660  
CASE NO. 22

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 Carrier’s dismissal of Claimant M. Hunsaker, by letter dated June 5, 2013, for allegedly being absent without proper authority between May 29, 2013 and June 5, 2013 was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File M-1348U-402/1596349 UPS).

2. As a consequence of the violation referred to in Part 1 above, the Carrier shall now remove any mention of the discipline from Claimant M. Hunsaker’s personal record, fully reinstate him along with all vacation, insurance and retirement benefits and compensation for all straight and overtime work opportunities missed as a result of the inappropriate discipline.”

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.

Claimant was working as a Welder helper on the Utah Service Unit at the relevant time. There is no dispute that he contacted his supervisor on May 27 informing him that he would be absent on May 28, and made contact again on May 28 saying that he was in the process of applying for FMLA. According to the timeline submitted by management, Claimant had no contact with his supervisor or other manager on May 29, 30, June 3, 4 or 5, 2013, nor did he attempt to apply for FMLA or make an application for a Medical Leave of Absence (MLOA) under the provisions of Rule 25(g) during that period.

On June 5, 2013 Claimant was sent a letter advising him that he has been absent without proper authority for more than 5 days and had voluntarily forfeited his seniority under Rule 48(k), and informing him that he had 10 days to request a conference to show justifiable reason for his absence. A conference was held on September 11, 2013 during which time, according to the Organization, Claimant showed video recordings from his iPhone indicating that he attempted to contact management and left messages during that period, and also claimed to have made contact with EAP on May 28 receiving instructions on how to get a profile started and filling out necessary paperwork. The Organization argued that Claimant was informed by EAP Manager Ford that his LOA would date back to his first day of absence on May 29, so he assumed that he was covered by a MLOA. By letter dated October 8, 2013, Carrier upheld the decision that Claimant forfeited his seniority under Rule 48(k).

In the Organization's December 2, 2013 claim, it argues that there was no intent by Claimant to relinquish his seniority or jeopardize his employment, noting that he informed his supervisor that he was unable to attend work for personal reasons, attempted to further contact management, and was told that his MLOA would date back to May 29, 2013 and cover his period of absence. It also notes that the purpose of Rule 48(k) is to cover people who intend to quit and abandon their employment, which is not the situation here, pointing out that there was no question that Claimant had serious personal issues that he was dealing with at the time and sought help from EAP in this regard. In its final appeal the Organization cited Public Law Board No. 6402, Award 179 in support of its argument.

The Carrier's subsequent denials include documents from the supervisor revealing no record of any contact by Claimant after May 28, a letter from EAP Manager Ford indicating that the first contact Claimant made with EAP was on June 5 to open a profile, and that it was June 11 when he set up a MLOA for Claimant, not knowing that he had previously been issued a Rule 48(k) letter, and that there was no contact by Claimant to request FMLA during this period. The Carrier took issue with Claimant's assertions to the contrary, pointing out that the Organization had produced no evidence during conference or otherwise, proving any attempts at making contact during the May 29-June 5 period, nor any documents substantiating that Claimant had asked for authorized leave or was unable to do so. In its April 9, 2014 denial, the Carrier asserts that, even if the Organization is successful in its challenge to the imposition of Rule 48(k) in this case, there was no established wage loss since Claimant admitted not being able to come to work during this period, relying on Public Law Board No. 6302, Award 59 and Public Law Board No. 6621, Case 34 to support its application of Rule 48(k) in this case.

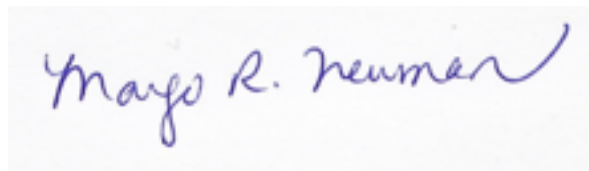
On the basis of the entire record, the Board concludes that the Organization has failed to meet its burden of proving that the Carrier improperly applied the self-executing provision of Rule 48(k) in this case. The correspondence on the property makes clear that there is a dispute of fact as to what, if any, evidence Claimant produced showing ongoing attempts at contact with management, and the record contains no voice mail messages or other documents supporting the contention that he called and left messages, or requested FMLA paperwork or help from EAP, prior to his receipt of the June 5, 2013 letter informing him of the forfeiture of his seniority. It is undisputed that Claimant did not utilize the procedures contained in Rule 25(g) to request a MLOA, and the record contains no affirmative evidence that the MLOA initiated by EAP on his behalf on June 11 was, in fact, retroactive to May 29. Rather, Ford's documentation reveals that it was determined on August 26, 2013 that the MLOA was invalid due to the prior issuance of the Rule 48(k) letter. Additionally, the record contains no statement from Claimant explaining the basis for his belief that his absence commencing May 29 was protected by a valid MLOA, or otherwise. It was his responsibility to show that his reason for not timely securing the proper authority was justified. Unlike the situation in Public Law Board No. 6402, Award 179, there was no lack of internal communication in this case.

The result of strictly applying Rule 48(k) after 5 days of absence without proper authority in this case appears extremely harsh. Claimant has more than 15 years of service with the Carrier, communicated to his supervisor that he was going through personal difficulties requiring help from EAP, and perhaps FMLA leave, on the day before the commencement of his absence, and eventually followed through with EAP seeking a MLOA, albeit untimely. While the intent of Rule 48(k) may well have been to cover the situation of an employee who, by his lengthy unauthorized absence, abandons his job, the Carrier has the right to apply the Rule as written, which it did in this case, and has done in the past. See, e.g. Public Law Board No. 6621, Case 34. Despite the fact that

Claimant may not have intended to forfeit his seniority, there is no evidence in the record that provides a valid basis to find that the Carrier's decision in this case was arbitrary.

AWARD:

The claim is denied.



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Margo R. Newman  
Neutral Chairperson

Dated: August 2, 2016



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K. N. Novak  
Carrier Member



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Andrew Mulford  
Employee Member