

PUBLIC LAW BOARD NO. 7660
AWARD NO. 37

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 termination of Mr. S. Groelle, Jr.’s seniority, by letter dated October 31, 2014, for allegedly being absent without proper authority between August 5, 2014 through August 12, 2014 was arbitrary, unsupported by the record and in violation of the Agreement (System File B-1448U-102/1614955 UPS).
2. As a consequence of the violation referred to in Part 1 above, Claimant S. Groelle, Jr. ‘*** must be returned to service with any reference to this event expunged from his employment record, he must be made whole for all loss, such as but not limited to, loss of wages, credit for months of railroad retirement for the months he was out of work and should have been compensated, and all fringe benefits either reimbursed or retroactive coverage.’”

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, an 18 year employee, was working as an Assistant Foreman on System Gang 8005. By letter dated August 19, 2014, Claimant was notified that he had voluntarily forfeited his seniority under Rule 48(k) for being absent without proper authority for more than five consecutive days on August 5, 6, 7, 11 & 12, 2014, and that Carrier considered his employment ended. After receiving a copy of the letter, the Organization requested a conference, which was convened on September 12, 2014. During the conference, it was admitted that Claimant talked to his Gang Foreman about his absence, and left messages for his Supervisor on August 5, 6, 7 & 11 requesting leave for the entire period. Claimant's Supervisor was on vacation from August 4 to 11, 2012, and, although admitting he received the messages, did not return any of the calls to Claimant, feeling he had no obligation to do so to let him know that his time off request was denied. Claimant did not contact any other supervisor during his absence, and believed that he satisfied his Supervisor's instructions for calling off by calling and leaving a message. Only preparatory work was performed by the gang when the Supervisor was on vacation, and no one worked Claimant's job or unusual overtime as a result of Claimant's absence.

A claim was initiated on October 15, 2014 asserting that there had been no formal decision received from Carrier, after the Director stated at the end of the conference that he was not convinced Claimant obtained authority for his absence but agreed to review the case considering the arbitration cites presented by the Organization. The claim states that the only way the Organization knew of a decision was by seeing Claimant's employment status changed in I-track after the conference, and that any decision going forward would be untimely. It asserts that Claimant followed the gang protocol for calling off and did not intend to relinquish seniority or jeopardize his employment. Carrier's written decision to Claimant upholding the Rule 48(k) action is dated October 31, 2014.

Carrier's denials notes that placing phone calls to a supervisor who is known to be on vacation, and leaving messages, is not enough to obtain authorization for an absence or for Claimant to assume that he had it, and he should have called his Manager, especially

since he had no personal leave or vacation to use to cover the absence. Carrier also points out that Claimant could not have reported to work prior to August 13 since he was unavailable due to incarceration, which is not a justifiable reason for Carrier to grant a Leave of Absence (LOA).

In subsequent appeals, the Organization included statements supporting Claimant's initial reasons for requesting leave (that he was moving), and an explanation that his arrest record reveals that Claimant was on probation hold until August 7, after which time he could have made bail and returned to work. Claimant's statement states that he waited for a bail hearing until August 12 in the hopes of having the amount reduced, but would not have done so if he did not believe that he had been granted the time off from work as leave without pay (LWOP), which his initial pay code confirms.

The pertinent language of Rule 48, Discipline and Grievances, provides:

(k) 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.

The General Chairman will be furnished a copy of letter written to an employee pursuant to this Section. The format utilized will be standardized.

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.

The Organization argues that Carrier's failure to issue a decision until 49 days after the conference does not meet its contractual responsibility to make "every effort to render a decision at the conclusion of the conference," is excessive and unreasonable and violates the spirit and language of Rule 48(k), citing PLB No. 6302, Award 229. It contends that Claimant's termination was inappropriate and a violation of the Agreement, since he followed gang protocol in calling to obtain proper authority, and his Supervisor's failure to

follow up, despite receiving his messages, led to his reasonable belief that he had been granted the requested leave.

The Organization asserts that Claimant could have returned to work on August 8, after his probation hold was lifted, by making bail (which he had), and would have done so if he thought his leave request was not approved, showing that his incarceration did not render him unavailable for work during the 5 consecutive day period. It maintains that Rule 48(k) was intended to apply to situations where employees abandon their jobs and do nothing to protect their positions, which is clearly not the case here, since Claimant kept in constant contact with his Foreman, notified his Supervisor, and returned to work on August 13 when he learned his status had been changed. The Organization relies on prior precedent for overturning Carrier's Rule 48(k) termination of seniority including Third Division Awards 24413, 28877, 31535; PLB No. 6089, Award 17; PLB No. 6302, Awards 24, 34 & 229. It requests that Claimant's seniority be reestablished and that he be made whole.

Carrier contends that there is no specified time period within which to respond after a conference under Rule 48(k), and that the Director met his obligation by verbally rendering his decision at the conclusion of the conference. It notes that a written response is not mandated, and the October 31 letter was issued because the Organization's claim stated that no response had been received. Carrier asserts that Claimant did not obtain proper authorization for his absence, since silence in response to messages left for a vacationing supervisor does not amount to authorization to be absent, and Claimant made no effort to contact his Manager.

Carrier notes that Claimant was arrested on August 4 and remained in jail until the evening of August 12, and it has no obligation to grant a LOA to cover the period of incarceration, which is not a justifiable reason for failure to protect an assignment, citing PLB No. 6302, Award 85; Third Division Awards 38366, 27666, 24606. Carrier argues that Rule 48(k) is a self-executing forfeiture provision, and its application here was reasonable and consistent with policy and precedent, citing PLB No. 6621, Award 34.; PLB No. 7660,

Award 22. It maintains that the Organization failed to meet its burden of proving a violation of the Agreement in this case.

A careful review of the record convinces the Board that the Organization did not establish that Carrier failed to meet its express obligation to “make every effort to render a decision at the conclusion of such conference,” since there is no dispute that the Director informed all present at the conclusion of the conference that he was not convinced that Claimant had obtained authority for his absence. The Agreement does not require a written decision at that point. See, PLB No. 6621, Award 48. The fact that the Director also agreed to review the precedent furnished by the Organization does not negate the fact the he communicated his decision at the time. His written decision on October 31, 2014 was sent to Claimant to confirm what was stated previously in response to the Organization’s claim that no decision had been rendered.

There is no dispute that Claimant was absent for the 5 consecutive days cited, (August 5, 6, 7, 8 and 11, 2014) and that he was incarcerated from the evening of August 4 until his release on the evening of August 12, 2014. The issue presented is whether Claimant fulfilled his obligation to obtain proper authorization for his absence or proved that he had a justifiable reason for not obtaining proper authority.

It is undisputed that, while Claimant may have talked to his Gang Foreman about wanting time off for a move, he understood that the Foreman was not empowered to grant authorization for an absence, and that he was to call and obtain such authority from his Supervisor. The record is clear that Claimant called and left messages for his Supervisor on August 5, 6, 7 and 11, and that he received no return calls granting or denying his requested leave. Claimant reasoned that this effort was sufficient to excuse his absences, since he heard nothing to the contrary. The Organization has argued that it is the practice on this gang to call and leave a message for the Supervisor if you are going to be absent. The only practice evidence introduced was an email from another gang member stating that they are instructed to let the Supervisor know if they are going to take off from work,

and that it is not unusual for that to occur the morning of the day requested off. There is no dispute that the Supervisor was the one to call to request authorization. It is also uncontested that gang members were told that the Supervisor would be on vacation from August 4 to 11, 2014. There is no evidence that calling and leaving a message, without specifically talking to the Supervisor, or another Manager, is sufficient to grant authorization. See, e.g. Third Division Awards 38366, 31535.

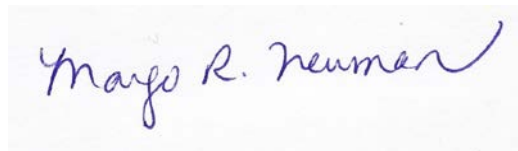
Under these circumstances, Claimant could not be sure that his messages were received when they were left, or reasonably assume that his request for time off due to incarceration would be granted. Carrier has consistently refused to approve leave for incarceration, which has been held not to be a sufficient justification for absence. See, e.g. Third Division Award 27666. Whether the Supervisor should have responded to messages he received from Claimant while he was on vacation, at least to inform him that his leave was not authorized, does not change the fact that Claimant was not entitled to assume authorization without speaking to a Supervisor or Manager who had the authority to grant it. Thus, the Organization has failed to prove that Claimant had the authorization to be absent for 5 consecutive days, or could reasonably believe that he did. Further, it failed to prove a justifiable reason that Claimant could not obtain authorization, since he was clearly able to make phone calls while incarcerated. Knowing that Carrier does not approve leave for incarceration, if Claimant could have been released by posting bail after August 7, as he claims, he should have done so to protect his assignment in the absence of specific authorization from his Supervisor.

The result of strictly applying Rule 48(k) after 5 days of absence without proper authority in this case appears extremely harsh. Claimant has 18 years of service with Carrier, and did make phone calls to, and leave messages for, his Supervisor seeking authorization for his absence while he was incarcerated. 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. PLB No. 6621, Case 34. Despite the fact that Claimant may not have intended to forfeit his seniority, the Organization did not meet its burden of proving that Claimant complied with an accepted practice in acting no further than to call and leave a message for his Supervisor to obtain authorization for his continued absence. Thus, 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.

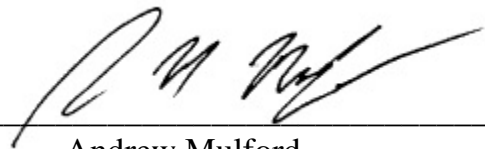


Margo R. Newman
Neutral Chairperson

Dated: November 27, 2017



K. N. Novak
Carrier Member



Andrew Mulford
Employee Member