

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 79

)

) Award No. 79

)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: September 15, 2005

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier terminated the seniority of Mr. Inez Ramos on April 19, 2004 (System File RJ-0448-204/1403661).
2. Mr. Inez Ramos shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

FINDINGS:

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On February 5, 2004, Claimant called Carrier to report that he needed a leave of absence for medical and personal reasons. On February 6, 2004, Claimant brought in a doctor's note dated that same day that merely stated, "on leave of absence for 30+ days." There appears to be no dispute that Claimant was receiving medical treatment for depression and because his diabetes was out of control. On February 18, 2004, Carrier wrote to Claimant requesting by February 27, 2004, updated medical information from Claimant's doctor treating his diabetes and his clinical therapist. On February 23, 2004, Claimant called Carrier requesting disability forms.

The record contains a handwritten note from Claimant's doctor, dated March 10, 2004, which states, "Please excuse from work until 3-23-04." It also contains a letter from Claimant's doctor dated March 9, 2004, addressed, "To Whom It May Concern." In the letter, Claimant's doctor related that on that date he was given the letter from Carrier that requested a reply by

February 27, 2004. Claimant's doctor further related that Claimant was suffering from "poorly controlled type II diabetes," aggravated by anxiety and depression. After providing additional details concerning Claimant's condition and treatment, the doctor opined that Claimant was "almost at a stage where he could get back to work."

Notes from the North Platte Service Unit reflect that on March 9, 2004, Claimant called, stated that he had just seen his doctor and that his doctor wanted him to remain off work a bit longer. Claimant asked about the disability forms and was told that he needed to send them in but that the disability forms would not satisfy the request for medical information. Carrier explained what was required and Claimant advised that "his diabetes doctor had the letter we sent out and that he would get it done." Claimant was also advised that he needed to provide information from his therapist and Claimant requested another copy of the February 18 letter because his doctor had retained the original. According to the notes, "Admin. said she would make a copy for him and to come pick it up. He didn't come get it for two days."

Apparently, Carrier never received the March 10 note or the March 9 letter. On March 15, 2004, Carrier sent Claimant a second request for medical information and gave Claimant until March 20, 2004, to provide it. The letter warned Claimant that failure to comply might result in disciplinary action for failure to comply with instructions.

On April 14, 2004, Carrier wrote Claimant requiring him to provide the requested information by April 19, 2004, and warning him that failure to do so would be considered insubordination and handled under Carrier's UPGRADE discipline policy. Notes from the North Platte Service Unit reflect that on April 15, 2004, Claimant called and asked if Carrier had received any material from his doctor. Carrier advised that it had not and reminded Claimant that it was Claimant's responsibility to provide the requested information. Claimant stated that his doctor and therapist had stated several times that they would send the information. Claimant also stated that he had spoken with his manager who was going to inquire to see if the information had been received. The notes report, however that Claimant's manager stated that Claimant had merely called to say that he was ready to return to work and then did not show up. The notes further indicate, "Admin phoned him & explained that this was very serious and how important it was that he get the information in by no later than close of business on April 19th. He started going on about all his problems with his family life, that he had been going to therapy with his daughter and the therapist did not think he was ready to come back to work however he says he needs to have money coming in."

On April 19, 2004, Carrier sent Claimant a letter terminating his seniority in accordance with Rule 25(b). A letter dated April 16, 2004, from Claimant's therapist advised that he was being treated with anti-depressant medication for a major depressive disorder, brought on by severe marital conflict and significant trauma involving his children. The letter said that the therapist had ongoing concerns with Claimant's short term memory and his self-care for his diabetes but continued, "[I]t may be beneficial from him to resume his regular activities, with consideration of the concerns noted above." On April 21, 2004, Claimant left the letter with additional, but inadequate, information from his doctor, under the door of the North Platte

Service Unit.

During handling on the property, Claimant submitted a written statement averring that on several occasions, his doctor's office had assured him that it had sent the requested information to Carrier. Regardless of whether that statement is accurate, it was Claimant's responsibility to ensure that the requested information was provided and Claimant was expressly admonished to that effect by the North Platte Service Unit. Furthermore, Claimant's statement did not explain why he waited until March 9, 2004, to provide his doctor with the February 18 request or why he waited apparently until mid-April to request information from his therapist.

Rule 25(b) provides, in relevant part, "Employees failing to return before the expiration of their leave of absence will lose their seniority rights unless an extension has been obtained." The record reflects that Claimant's leave of absence expired on March 7, 2004, and Claimant failed to take the necessary steps to have it extended despite being given ample opportunity by Carrier to do so and despite being warned of the consequences of his failure to do so. Rule 25(b) is self-executing and, on this record, Carrier cannot be faulted for acting in accordance with it.

However, there is considerable precedent for the proposition that substantial and compelling circumstances may mitigate against the harsh literal operation of such self-executing rules. We found such mitigation present in Case No. 21, Award No. 24, wherein we wrote:

Rule 48(k) is self-executing. Claimant met the literal terms of Rule 48(k), i.e. he was off for at least five consecutive working days without authority. However, there is considerable precedent that a Board should review all of the surrounding circumstances and that, under appropriate circumstances, the Board has authority to temper the harshness of a literal application of Rule 48(k).

In Third Division Award 31535, an on property award in which the Chair of this Board sat as referee, the Board wrote:

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, e.g., Third Division Awards 28877 and 29483. In those cases, the Board restored the claimant to service with seniority unimpaired, but without compensation for time lost. We find a similar result is appropriate in the instant case.

In the instant claim, we find that the surrounding circumstances warrant a result similar to Award 31535. It is clear that Claimant did not completely abandon his job. Claimant was off work and was unable to obtain a complete medical release. Claimant had been advised that he should not return to work until he obtained a full release.

Claimant was in contact with the claims agent. This does not excuse Claimant's failure to maintain contact with his supervisors and his failure to continue to obtain authority for his absences. However, it reflects poor judgment and confusion on Claimant's part, rather than an intent to abandon his job. Under the circumstances, the Board finds that the harshness of Rule 48(k) should appropriately be tempered in accordance with prior on property precedent. Carrier shall restore Claimant to service with seniority unimpaired but without compensation for time lost.

See also NRAB Third Division Award No. 28877 ("Claimant may well be guilty of poor judgment for not contacting his gang after the October 24, 1988 conversation or for not pushing harder for release of the medical documentation, but he did not just disappear without doing anything. He tried.").

In the instant case, Claimant did not simply abandon his job. He did contact Carrier on several occasions and did advise Carrier that he thought his doctor was supplying the information. Claimant did convey Carrier's request to his doctor and, eventually, to his therapist. Moreover, in evaluating Claimant's action, we must recognize that he was suffering from out-of-control diabetes and major depressive disorder. As late as April 16, 2004, Claimant's therapist continued to express concerns with Claimant's short term memory and with Claimant's ability to self-administer the insulin necessary to control his diabetes. We conclude that the Organization has carried its burden of proof, establishing substantial and compelling circumstances that mitigate against the harsh effects of a literal application of Rule 25(b).

Accordingly, Claimant shall be reinstated to service with seniority unimpaired but without compensation for time held out of service. However, the record is not clear whether Claimant is fit to return to service. Therefore, Claimant's reinstatement is conditioned on his providing Carrier with all medical information that Carrier may reasonably request within ten days of his receipt of such request. If Claimant fails to provide such information within the ten day period, absent an extension agreed to by Carrier, Claimant shall revert to a dismissed status. Claimant's reinstatement is further conditioned on his providing unconditional releases to return to work from his doctor and his therapist and on his complying with any further reasonable requirements that Carrier may impose to ensure that he is fit to return to service.

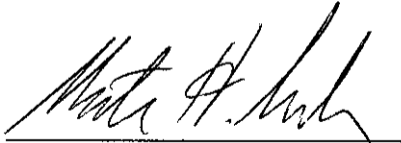
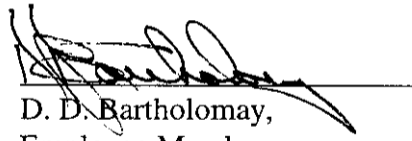
AWARD

Claim sustained in accordance with the Findings.

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ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto


Martin H. Malin, Chairman
D. A. Ring,
Carrier Member
D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, January 20, 2006