

**PUBLIC LAW BOARD NO. 6621**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**And**

**UNION PACIFIC RAILROAD COMPANY**

**Case No. 35**

**Statement of Claim:** It is the claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. M.R. Marin on August 2, 2001 for allegedly being absent from his assignment without proper authority from June 21 through August 2, 2001 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement.
- (2) As a consequence of the violation referred to in Part (1) above, Mr. M.R. Marin shall now '...be compensated for net wage and benefit loss suffered by him as a result of his wrongful dismissal from August 2, 2001 and continuing until such time as he is returned to service of the Carrier on his respective assigned position. Payment shall include, but not be limited to, all straight time, overtime, holiday pay, travel pay and per diem allowance.

**Background**

Claimant Michael R. Marin entered the service of the Union Pacific Railroad Company (former Southern Pacific Transportation Company – Western Lines) on November 1, 1979. He established and held seniority rights in the various classes within the Track Subdepartment, Group 26, and at the time of his dismissal, he was assigned to System Gang 8557.

The facts that precipitated this dispute are largely undisputed. On May 15, 2001, Claimant was observed by his supervisor, Darren Peterson, limping as he walked.

Peterson instructed Claimant to go to the doctor, and transportation was provided by Gang 8561 foreman Jay Farrar. After the doctor's appointment, Claimant was sent home by his supervisor. Thereafter, Claimant visited his doctor again on May 17, 2001, and he called Mr. Peterson the next day to advise him as to the outcome of his medical appointment. Claimant was told by Peterson that he would need a full duty release before he could return to work, and, in addition, he approved Claimant's request for vacation pay. Based upon the documentary evidence in the Record, Claimant saw his doctor on May 22 and May 29 and almost weekly during the next two months.

On June 21, 2001, Claimant was allegedly told by his doctor that his foot was improving and that he might soon be released to return to work on light duty. Thinking that another Gang might be better suited to accept his light duty status, Claimant bid for a position on Gang 8557 and was awarded that position on June 21, 2001. However, on June 28, 2001, Claimant was told by his physician that the healing of his foot had not progressed as expected. Consequently, the doctor did not release Claimant to work. In fact, the records reflect that he continued to treat Claimant weekly until August 9, 2001.

By letter dated August 2, 2001, the Carrier notified Claimant that he had been absent from work without proper authority since June 21, 2001. Therefore, pursuant to Rule 48(k) of the Agreement between the BMWE and Union Pacific, Claimant was determined to have voluntarily forfeited his employment. Rule 48(k) provides as follows:

Employees absenting themselves from their assignments 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.

The Organization appealed the Carrier's action on September 28, 2001. Thereafter, the claim was progressed through the grievance procedure and was ultimately submitted to this Board for adjudication.

**Contentions of the Parties**

The Carrier contends that the self-executing provisions of Rule 48(k) were correctly applied to Claimant because he did not obtain proper authority to be absent. This position is supported by Rule 25(a) which states:

- (a) A request for a leave of absence of fifteen (15) calendar days or less duration need not be made in writing, but employees desiring such a leave of absence must secure approval from their immediate supervisor. A request for a leave of absence in excess of fifteen (15) calendar days must be made in writing to the employee's immediate supervisor.

According to the Carrier, after June 15, 2001, Claimant was no longer protected by a verbal leave of absence. He either had to return to work or secure a written leave of absence. He did not secure a written leave, however; nor did he contact his supervisor. Instead, he bid a position, which indicated that he was returning to work. By failing to come to work or obtain an authorized leave, he voluntarily forfeited his seniority and employment.

The Carrier further contends that the fact that Claimant was legitimately ill does not nullify the application of Rule 48(k). Numerous arbitration awards have recognized that Rule 48(k) refers to the securing of proper authority rather than the ability to perform work. In the Carrier's view, its action was completely in accordance with applicable contract language, and the Organization has failed to meet its burden of proof in making a showing that Claimant had proper authority to be absent from work.

The Organization submits that Claimant was under the impression that he had complied with all contractual requirements for a medical leave. It asserts that while Claimant was on Gang 8561, the supervisory personnel were fully aware of his medical situation. When Claimant placed his bid, he did so thinking that the work requirements on Gang 8557 would be better suited to his medical condition and to his easing back into the work force. In the Organization's view, it was wrong to punish Claimant for wanting to place himself in a position where he could best serve the needs of the Carrier.

### **Opinion**

The Organization argues persuasively that this case does not involve an employee who willfully abandoned his job. Undisputedly, Claimant was suffering from a serious foot infection related to diabetes, and he was taking all reasonable steps to obtain medical treatment and regain his health.

Unfortunately, however, both Claimant and supervisor Peterson apparently took too much for granted. Claimant mistakenly believed that since the supervisor of Gang 8561 knew about his medical condition, and had verbally authorized his absence, he was covered throughout the period of his leave. This misunderstanding was perpetuated because Supervisor Peterson approved Claimant's request for vacation pay to help him manage financially during his leave, and knew that Claimant was under a physician's care.

Claimant also assumed incorrectly that he would be returning to work in June, and he bid into a job that he felt would be appropriate for his condition. When it turned out that

his doctor would not release him to return to the job he bid, Claimant took it for granted that the supervisor of Gang 8557 knew about his medical condition and the reason for his absence. Therefore, he did not take affirmative steps to secure a written leave of absence from the Carrier.

The Carrier contends correctly, however, that under Rule 25(a), while a leave of fifteen calendar days or less can be obtained orally through an employee's supervisor, anything over fifteen calendar days must be submitted in writing. Claimant had no right to be absent for any period in excess of fifteen calendar days without proper authority, regardless of the validity of his absence. Moreover, it was incorrect for Claimant to assume that the supervisor of Gang 8557 necessarily knew about his pre-existing medical condition and/or had authorized Claimant's continuing absence from work.

As the Carrier has emphasized, neither Claimant nor his supervisor had the right to bypass Rule 25, regardless of the legitimacy of Claimant's absence. While there is no doubt that Claimant had a foot infection and was under a doctor's care, he needed to file a written request for leave once his absence exceeded fifteen calendar days.


Nevertheless, there are mitigating circumstances that must be taken into account. As the Organization points out, on Gang 8561, Supervisor Peterson knew that Claimant's absence was due to a serious foot infection. When Claimant's verbally-authorized leave expired, neither Peterson nor any other supervisor instructed him to file a written request for leave. It appears that only after Claimant bid onto a different gang, and didn't report to work, that the Carrier decided to invoke Rule 25(a) and Rule 48k). Even Rule 48(k), however, contains a proviso to the self-executing terms. That is, employees who are

absent from work for five consecutive days without proper authority will be considered to have forfeited their seniority rights, *unless justifiable reason is shown as to why proper authority was not obtained.* In the instant case, the evidence supports that conclusion that both Claimant and Supervisor Peterson believed that Claimant was absent with proper authority. There was no willful attempt by Claimant to circumvent the Carrier's rules; rather, Claimant failed to pay sufficient attention to the requirement that an extended medical leave had to be requested in writing. This unintentional error, coupled with Claimant's long years of service, justify the rescission of his termination.

For all of the foregoing reasons, the Board has determined to reinstate Claimant, but without back pay. Furthermore, he will be required to pass the Carrier's standard physical examination and present an appropriate medical release certifying his ability to return to work.

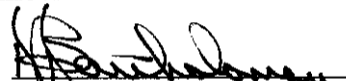
#### Award

The claim is granted in part. Claimant shall be reinstated to his former position without back pay, but with full restoration of his seniority. His reinstatement shall be predicated on his passing the Carrier's standard physical examination and presenting a medical release certifying his fitness to return to work.

  
Joan Parker, Neutral Member

  
Carrier Member

Dated: 7-12-04

  
Organization Member

Dated: 7-12-04