

BEFORE PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

UNION PACIFIC RAILROAD COMPANY

Case No. 36

Statement of Claim: Claim of the System Committee of the Brotherhood that:

1. The dismissal (seniority termination) of Mr. J.D. Cornejo under letter dated July 31, 2001 for allegedly being absent from his assignment without proper authority from July 23, 2001 through July 27, 2001 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (Carrier's file 1333182).
2. As a consequence of the violation referred to in Part (1) above, Mr. J.D. Cornejo shall now "... be immediately reinstated to his respective assigned position, that his seniority and all other contractual rights be restored unimpaired, that he be compensated for all net wage loss he has suffered since his wrongful termination, and that his personal record be cleared of being absence (sic) without proper authority."

Background:

J.D. Cornejo, a system laborer with fifteen years' seniority, allegedly was the object of inappropriate sexual comments by a co-worker on June 24, 2001.¹ Claimant reported the incident to management, who conducted an investigation. Claimant also requested time off due to stress and to seek medical assistance. In response, management gave him three days off, and then an additional three days following a telephone request by Claimant.

Telephone records show that Claimant telephoned, or attempted to telephone, management representatives on July 8, 11 and 16. Claimant presented no evidence, however, that he obtained management authorization to remain out of work beyond the six days initially

¹ All dates are in 2001 unless otherwise stated.

authorized. His supervisor, Jose Maldonado, denied that Claimant contacted him after June 22 or supplied any medical documentation to him.

According to Claimant, he met on July 24 with his doctor, who did not clear him to work until July 31. On July 31 when he telephoned management to say that he had been cleared to return to work, he was told that his employment had been terminated.

Indeed, by letter dated July 31, Track Supervisor Maldonado notified Claimant that, because he had been absent from work without authority from July 23 through July 27, he was considered to have voluntarily forfeited his employment with the Carrier pursuant to Rule 48(k). In response, the Organization requested an "unjust treatment" conference pursuant to Rule 48(n). Ultimately, the Carrier granted the Organization's request for a conference, which was held on May 7, 2002. Claimant, who did not attend the conference, was represented there by the Organization. By letter dated May 24, 2002, the Carrier advised Claimant that it had upheld its determination that he had voluntarily forfeited his employment.

In 1997, the Carrier had discharged Claimant for being absent without authority for five consecutive days. After discussions with the Organization, the Carrier reduced the discipline to a letter of reprimand.

Following the filing of the instant claim, it was processed and conferenced on January 28, 2003. Because the parties were unable to reach agreement, the matter is now before this Board for adjudication.

Rule 25, Leave of Absence, provides in pertinent part:

- (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.

* * * * *

- (g) Medical Leave - Requests for leave of absence on account of sickness or injury which are of fifteen (15) calendar days or less duration need not be in writing, but such requests must be advanced by the employee to the Carrier in a timely manner, specifying the nature of the illness or injury and the number of days required.

Requests for medical leave of absence on account of sickness or injury in excess of fifteen (15) calendar days must be made in writing and properly documented and supported by a statement from the employee's physician, which includes the specific reason therefor and the expected duration. Extensions thereof must also be supported by a similar statement from the employee's physician. . .

Rule 48 – Discipline and Grievances

* * * * *

- (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 a 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.

Organization's Position:

The Organization asserts that Claimant ultimately provided medical documentation

which corroborated his inability to safely perform his assigned duties on the dates in question. Accordingly, the Organization contends that the Carrier's decision to terminate him pursuant to Rule 48(k) violated the medical leave of absence provisions contained in Rule 25.

According to the Organization, the Carrier was fully aware that Claimant was under a physician's care as a result of the incident on June 24, 2001. Because Claimant informed management of his condition, and made numerous attempts to contact management during the five days in question, the Organization submits that he complied with Rule 25(g). In that connection, the Organization cites arbitral authority holding that where an employee has complied with Rule 25's requirement of documenting a disabling medical condition, a carrier may not rely on Rule 48(k) to terminate the employee. But even if Rule 48(k) were controlling in the instant case, the Organization asserts that Claimant nonetheless was wrongly terminated because he satisfied the Rule 48(k) exception by showing that there existed a justifiable reason why proper authority to be absent was not obtained.

Carrier's Position:

The Carrier argues, citing arbitral precedent, that Claimant forfeited his seniority and employment pursuant to Rule 48(k) because he did not secure proper authority to be absent from July 23rd to July 27. Although he did obtain authority to remain out of work for six days following the June 24th incident, the Carrier points to the fact that there is no evidence that he obtained authority to remain out of work from July 23 to July 27.

In response to the Organization's reliance on Claimant's telephone records, the Carrier contends that they merely show that Claimant called management for three minutes on July 8, two minutes on July 11, and three minutes on July 16. According to the Carrier, the telephone

records hardly establish that Claimant obtained authority to be absent from work on July 23 to July 27.

The Carrier also argues that Rule 25 supports its position that Claimant self-terminated pursuant to Rule 48(k). Because Rule 25(g) requires that an employee make a written request for a medical leave of absence of more than fifteen days, and because Claimant was absent from work for more than a month, the Carrier argues that Claimant's failure to submit a written request for a leave of absence confirms the unauthorized nature of the absence. Likewise, because Claimant failed to provide proper medical documentation for his absence as required by Rule 25(g), the Carrier asserts that Claimant's absence was unauthorized.

The Carrier, citing arbitral authority, also submits that the instant case is not a disciplinary case but a case of an alleged Rule violation for which the Organization bears the burden of proof. Because Claimant failed to satisfy his burden of proving a violation of Rule 48(k) or Rule 25, the Carrier contends that the claim should be denied.

Findings:

Claimant's employment was terminated 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.

It is undisputed that Claimant was absent from work for over a month -- from shortly after June 24, the day he allegedly was sexually harassed by a co-employee, to July 31. It is also undisputed that Claimant received permission from management to be absent for three days, and

then for another three days after Claimant telephoned for an extension. Claimant presented no competent evidence, however, that he obtained authority from management to take a leave of absence for the multi-week period leading up to July 31, when he sought to return to work. Accordingly, absent proof that Claimant had justifiable reason for not obtaining proper authority for his multi-week absence immediately prior to July 31, Rule 48(k) provides unambiguously that he is deemed to have voluntarily forfeited his job.

The Organization was unable to provide such proof, and Claimant failed to appear at the conference held on May 7, 2002. The Organization presented Claimant's telephone records, which showed that he telephoned management representatives on July 8, 11 and 16. Proof that Claimant telephoned management during his absence, however, does not constitute proof, as required by Rule 48(k), that he obtained authority from management for a leave of absence. Moreover, bare telephone records, which show that he made no attempt to contact management during the last fourteen days of his absence, hardly constitute proof that he had a justifiable reason for failing to obtain authority for his leave.

Because Claimant was absent for more than fifteen days due to alleged illness, Rule 25(g), upon which the Organization relies, required Claimant to apply in writing for a medical leave of absence, with appropriate supporting documentation from a physician. Claimant, however, neither applied for a medical leave of absence in writing nor provided appropriate supporting medical documentation. The only medical documentation was a letter dated September 19, more than a month and one-half after Claimant was terminated, from a psychologist who did not state that he had examined Claimant while he was still employed. Accordingly, Claimant's failure to comply with the requirements of Rule 25(g) further support

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the Carrier's determination that Claimant voluntarily forfeited his employment pursuant to Rule 48(k).

In addition, there are no mitigating circumstances in the instant case. To the contrary, because Claimant had barely escaped termination of his employment in 1997 pursuant to Rule 48(k) because he had been absent for five days without obtaining authority from management, he was on full notice of the need to obtain authority to remain out of work for five days or more. As indicated above, he failed to obtain the required authority, thereby triggering the self-executing provision of Rule 48(k) which resulted in the termination of his employment. Accordingly, the claim is denied.

Award:

The claim is denied.

W.G. Ritz
CARRIER MEMBER
DATED: 7-12-04

Joan Parker
JOAN PARKER, Neutral Member

[Signature]
ORGANIZATION MEMBER
DATED: 7-12-04