

PUBLIC LAW BOARD NO. 6621

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE**

AND

UNION PACIFIC RAILROAD COMPANY

Case No. 48

* * * *

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

1. The Carrier's decision to terminate the seniority of Laborer L.K. Tsosie for his alleged violation of Rule 48(k) in that he was allegedly absent from service on September 23 through September 27, 2003 without authorization was without just and sufficient cause.
2. Laborer L. K. Tsosie shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered

Facts

Claimant L. K. Tsosie, with seniority dating from 1986, was working as a Laborer in September 2003 when the incident at issue occurred. On September 28, 2003, he was issued a letter advising him that he had forfeited his employment relationship with the Carrier pursuant to Rule 48(k). The rule was invoked because Claimant had missed work without proper authority on September 23, 24, 25, 26, and 27, 2003.

By letter dated October 31, 2003, the Organization requested that a conference be held in regard to the Carrier's allegation that Claimant had absented himself from work

without proper authority. A conference was held on January 5, 2004. The circumstances surrounding Claimant's absence from work were discussed, and Claimant represented that his father had died and his wife, a cancer patient, needed to be admitted to the hospital on the days in question. As a result of this discussion, Claimant was told that he would be considered for reinstatement if he promptly submitted documentation of his father's death and his wife's admission to the hospital. Claimant did not provide such documentation, and the Carrier, therefore, determined that Claimant did not have a valid reason for missing work for five consecutive days without authority. By letter dated March 4, 2004, the Carrier closed out the conference and denied Claimant reinstatement.

On March 26, 2004, the Organization filed a claim, charging that the Carrier violated Rules 1 and 48 by dismissing Claimant. The Organization contended that the Carrier had prejudged Claimant when the decision of the conference was rendered. It also argued that Claimant had valid reasons for missing work on the days in question. On May 12, 2004, the Carrier declined the claim, and the Organization appealed, by letter dated May 19, 2004. The Carrier issued its final declination on June 25, 2004. The matter was not resolved, and it was ultimately submitted to this Board for adjudication.

Contentions of the Carrier

The Carrier contends that Rule 48(k) is a self-executing rule and, therefore, Claimant's failure to comply with the terms of Rule 48(k) in providing proper authority for his absence September 23 through September 27 resulted in his dismissal. Rule 48(k) states:

- (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 the 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 Carrier argues that Claimant was not disciplined under the terms of the Agreement; rather, he voluntarily forfeited his seniority rights under Rule 48(k). Claimant missed work for five consecutive days without permission. The Carrier granted his request for a conference at which Claimant made representations as to his father's death and wife's hospitalization. Thereafter, he was given opportunity to document his reasons for being absent, but even after 90 days had elapsed, he never furnished the required written documentation.

Additionally, the Carrier submits that the instant claim was advanced outside the time limits allowed by Rule 49, which states: "All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the Claim or grievance is based." The conference was held on January 5, 2004. At that time, Claimant was told that he would be considered for reinstatement if he provided the requested information. The Carrier argues that Claimant's sixty days from

which to submit a claim in accordance with Rule 49 started on January 5, 2004. The Organization's claim, however, was not filed until March 26, 2004.

While the Organization asserts that a written decision should have been issued following the conference, the Carrier contends that Claimant clearly understood exactly what was required of him in order to be considered for a leniency reinstatement. The Carrier adhered to a long standing practice by orally conveying the decision reached at the conclusion of the conference. Moreover, nothing in Rule 48(k) states that the Carrier must provide the Organization and Claim with a written determination of the conference.

Claimant never provided written documentation for his unauthorized absence. He claimed that he did not have access to a telephone, but it was his responsibility to make arrangements to secure proper authority to miss five days of work. In these circumstances, the Carrier contends that Rule 48(k) was properly applied.

Contentions of the Organization

The Organization contends that on the days in question Claimant was coping with extraordinary personal issues, of which his MTM, Jim Gilbert, was aware, and that it was never his intention to abandon his job. The purpose of the automatic, self-executing language of Rule 48(k) is to deal with employees who are not interested in preserving their employment relationship with the Carrier. But the evidence in this Record does not support the conclusion that between September 23 and 27, Claimant was simply walking away from his job.

The Organization further argues that the Carrier acted prematurely when, in its letter of March 4, 2004, it stated that Claimant's claim for reinstatement was denied. As of that date, the Organization had not yet filed a claim on his behalf because it was still

waiting for a formal decision from the January 5, 2004 conference. Thus, the Organization submits that the Carrier prejudged Claimant's case because it rushed to a decision even before it had received a claim from the Organization. In this regard, the Organization also cites the Carrier's failure to provide a written decision with the results of the conference.

The decision to dismiss Claimant, argues the Organization, was unreasonable and arbitrary because he had valid reasons for his absence from work between September 23 and 27. As he explained during the January 5, 2004 conference, his father's funeral had to be postponed to September 22, 2003 in order to accommodate arriving relatives. The funeral was held on the Reservation at Gallop, New Mexico. MTM Jim Gilbert was informed of the circumstances surrounding the scheduling of the funeral. Compounding the situation was the fact that during the same week, Claimant's wife, a cancer survivor, was admitted to a local hospital for evaluation. Claimant resided on the Reservation and did not have a telephone. The nearest telephone was forty miles away.

The Organization submits that between September 23 and 27, 2003, Claimant was preoccupied with making funeral arrangements and caring for his wife, who feared a possible relapse of her cancer. As soon as he was able to contact his supervisor, he did so and explained the circumstances behind his absence from work. Given these facts, as well as Claimant's lengthy seniority and excellent work history, the Organization contends that his dismissal should be overturned.

Opinion

It is undisputed that the provisions of Rule 48(k) are automatic and self-executing:

"Employees absenting themselves from their assignments for five (5) consecutive 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 forfeited his employment under Rule 48(k) by being absent for five consecutive days in September 2003. He was granted a conference in January 2004, however, at which he verbally presented reasons for his absence. Significantly, he was told that if he documented those reasons, he would be considered for reinstatement.

The Carrier afforded Claimant ample time to submit the required documentation as to his father's death and wife's hospitalization. While the Organization argues that the Carrier's invocation of Rule 48(k) was inappropriate because neither it nor Claimant received written conference results, that argument is not persuasive. At the conclusion of the conference on January 5, 2004, the Carrier's Conducting Officer clearly told Claimant what he had to submit for reinstatement. There is neither contractual language nor a past practice requiring that conference results be furnished in writing. Consistent with what was often done in the past, at the end of the January 5 conference, the Conducting Officer told Claimant what he needed to do in order to stand a chance of getting back his job.

Unfortunately, Claimant never produced the required documentation. Not surprisingly, his failure to submit the required paperwork foreclosed his opportunity for reinstatement and likewise ended his case. While the Organization insists that Claimant had valid reasons for his absence on the days in question, his failure to furnish the requested documentary information left him in the status of an employee who voluntarily forfeits his job. His inability to provide the documentation also makes his excuses highly suspect.

Also without merit is the Organization's argument that the Carrier violated the Agreement by dismissing Claimant prior to the Organization's filing of a claim on his behalf. Rule 48(k) controlled Claimant's situation. He was not assessed discipline; rather, he voluntarily forfeited his seniority rights and employment under a self-executing rule.

There is ample arbitral precedent which recognizes that Rule 48(k) operates automatically when an employee misses five consecutive working days without proper authority. In fact, this Board has held that under Rule 48(k), there is a voluntary forfeiture of seniority when an employee has five consecutive unauthorized absences. See *Public Law Board No. 6621, No. 36 (Parker)*. (See also *NRAB, Third Division, Award 24681 (McAllister)*).

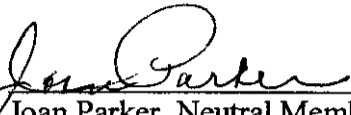
Given Claimant's unauthorized absence from work September 23 through September 27, 2003, the Carrier was within its rights in demanding documentation prior to reinstating him. He did not comply with the instructions he received at his conference, and after waiting two months, the Carrier legitimately denied his request for reinstatement. The contention that Claimant was preoccupied with family problems during the September period when he was absent may be true. But his failure to document these alleged problems left the Carrier with no choice but to apply Rule 48 (k).

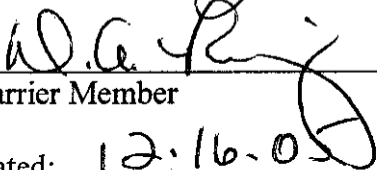
Moreover, it was Claimant's decision to live forty miles from a telephone. Regardless of where he chose to live, however, he was responsible for meeting the requirements of his job, which included making arrangements to get to a telephone to explain his absenteeism. Claimant knew the proper way to obtain authority for an absence because, as the Record demonstrated, he had prior discipline for absenteeism. In

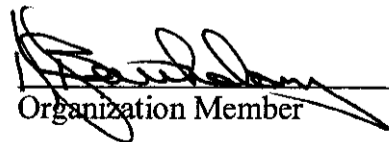
this case, he missed five consecutive days of work without permission, thereby triggering the application of Rule 48(k). The Carrier was willing to consider reinstatement if Claimant documented the excuses he offered for his absences. Claimant never provided that documentation. Therefore, Claimant voluntarily forfeited his seniority rights, and the Carrier properly invoked Rule 48(k).

Award

The claim is denied.


Joan Parker, Neutral Member


Carrier Member
Dated: 12-16-05


Organization Member
Dated: 12-16-05