

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT 1049

Brotherhood of Maintenance of Way Employees)	
Division – IBT Rail Conference)	
)	Case No. 259
And)	
)	Award No. 259
Norfolk Southern Railway Company)	
(Former Southern Railway Company))	
_____)	

Richard K. Hanft, Chairman and Neutral Member
D. M. Pascarella, Employee Member
D. L. Kerby, Carrier Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s cancellation of all Mr. D. Boring’s seniority rights and deeming that he had quit the service of the Norfolk Southern Company and consideration of his record with the Company as being closed, as detailed in a letter dated August 15, 2012 was in violation of the current working Agreement (Carrier’s File MW-ATLA-12-49-SG-386 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Boring shall be made whole by being paid for all hours he would have worked beginning September 2, 2012 had the Carrier not improperly terminated the Claimant and refused to allow him to return to work.”

FINDINGS:

Special Board of Adjustment 1049, upon the whole record and all of 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.

This Award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other cases.

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

Claimant in this matter was a Track Repairman Helper on Flash Butt Welding Truck #4 and held seniority back to May 7, 2005. The events under consideration took place from June until August 2012. Thus, Claimant had already attained seven (7) years of seniority.

On June 16, 2012 Claimant requested of his immediate supervisor and was granted a sixty (60) day leave commencing on July 2, 2012. Claimant's supervisor recalled that Claimant had inferred to him that the General Division Engineer ("GDE") was aware of and approved of Claimant's request. As will become evident below, that was not necessarily true.

On June 20, 2012, the record reveals, Claimant sent an e-mail to his immediate supervisor stating that he would be "...taking a leave of absence beginning July 2, 2012 and will be returning to work no later than September 2, 2012..." Claimant's immediate supervisor never replied to the correspondence. There was, however, evidence that Claimant had verbally explained that he may need only six weeks to attend to his personal business, but would in any event, return no later than September 2, 2012.

On July 19, 2012, the GDE happened to be patrolling the area where Claimant's gang was working. Noticing that the gang was working short-handed, the GDE asked the welding supervisor why. When the welding supervisor explained that Claimant was on sixty (60) day leave that he thought was approved by the GDE, he learned that the GDE knew nothing of it.

The GDE returned to his office and referenced the parties' Agreement to reacquaint himself with the policies concerning leave. Upon researching Rule 44, the GDE ascertained that while Claimant's immediate supervisor had authority to grant leave of up to thirty (30) days verbally, leaves exceeding thirty days had to be given in writing by the supervisor, division engineer or other proper officer of the Company. Since the Claimant's immediate supervisor did not have authority to grant sixty (60) days leave verbally, the GDE instructed the welding supervisor to contact Claimant, explain that only thirty (30) days leave was approved and to direct him to report for service at the end of thirty (30) days on August 1, 2012. The welding supervisor did as instructed on July 30, 2012 directing Claimant to return to service on August 1, 2012.

Claimant advised the welding supervisor that he was not finished with his personal business and could not return for another two weeks. Claimant failed to return as instructed on August 1, 2012.

On August 15, 2012 Claimant received a letter from the Manager of Administrative Services notifying Claimant that because he had not returned to service at the end of his thirty (30) day leave of absence, pursuant to the self-executing provisions of Rule 44 that he had forfeited all seniority rights and was deemed to have quit.

On August 23, 2012, the Organization, on Claimant's behalf, appealed the Carrier's action by letter to the Manager of Administrative Services and sent an appeal to the General Division Engineer on September 20, 2012.

The General Division Engineer denied the Organization's appeal and the matter was appealed to the Chief Engineer, Program Maintenance, who concurred with the GDE's denial of the Claim.

After being processed as described above on the property, up to and including denial of the claim by the highest Carrier official designated to hear appeals and discussions in conference, this dispute now comes before this Board for final adjudication.

This dispute between Carrier and the Organization presents a thorny situation that is only complicated by the fact that there was no investigation held on the property and the only record for appellate review are the letters exchanged between the parties. The Claimant in this matter has not had the opportunity to make a statement on the record and was really held to strict liability by a self-executing rule that goes into effect regardless of the circumstances of the situation. Moreover, the only evidence on this record supporting the Carrier's position is a written statement by Claimant's immediate supervisor that was never subject to cross-examination.

The Carrier implies that Claimant falsely told his immediate supervisor that the GDE knew about and approved his request for sixty (60) days leave. That has not been proven because neither Claimant nor his supervisor testified to that. Carrier further maintains that regardless, Claimant's immediate supervisor did not have authority to grant leave exceeding thirty (30) days duration verbally and that any such permission, by rule, had to be written. While that is true, Claimant and his supervisor did have a meeting of the minds: that Claimant was going to take a leave of between six (6) and eight (8) weeks and that is apparent from the e-mail that it is undisputed was sent by Claimant to his supervisor on June 20, 2012 and never negated or commented on. That e-mail cannot be construed, as the Organization avers, as written consent, but it is evidence of a meeting of the minds upon which Claimant relied.

In reliance on the understanding Claimant had with his supervisor, he set about attending to the business that necessitated his leave. It was not until more than two weeks later that the GDE unwittingly happened upon Claimant's gang and discovered that he was on leave, unbeknownst to him, that dissection of the rule occurred. Claimant was ordered to return early from what he and his supervisor had arranged.

Claimant failed to report on August 1, 2012. He may have thought that it was not compulsory or that it was unfair, but the rule in labor/management relations is "obey now, grieve later". Claimant had a duty to report as instructed and then take up the matter of the order's impropriety.

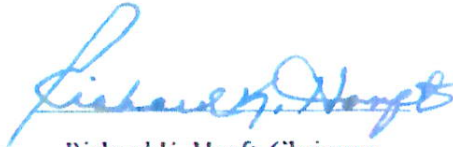
The Board however, in perusing Rule 44 does not believe the intent of the rule is to address the situation at hand. This was not a circumstance of an employee abandoning or walking away from his position, but rather a pre-arranged leave being cut short.

Given the above, the Board determines to dispose of this matter as follows:

Claimant is to be reinstated without compensation for time out of service. Claimant's seniority shall be restored to the point it was at on the date of the violation, August 1, 2012.

AWARD:

Claim sustained in accordance with the findings. Carrier is directed to make this Award effective within thirty (30) days following the date two (2) members of this Board affix their signatures thereto.



Richard K. Hanft, Chairman



D. M. Pascarella, Employee Member



D. L. Kerby, Carrier Member

Dated at Chicago, Illinois, February 8, 2018