

The Second Division consisted of the regular members and in addition Referee Thomas F. Carey when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
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(National Railroad Passenger Corporation

Dispute: Claim of Employees:

- (1) That the Carrier erred and violated the contractual rights of Edward Gillum when they invoked the provisions of Rule 28(b) of the IBEW-Amtrak Agreement and considered him to have resigned.
- (2) That, therefore, he be returned to service with seniority and all other rights, benefits and privileges restored, and,
- (3) That he be compensated for all lost time including overtime and holiday pay, and,
- (4) That he be made whole for health and welfare benefits, and,
- (5) That he be made whole for all vacation rights, and,
- (6) That he be made whole for pension benefits, unemployment and sickness insurance, and,
- (7) That he be made whole for any and all other benefits, not specifically mentioned herein, that he would have received or would have earned had he not been withheld from service.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The record indicates that the Claimant was employed by the Carrier as a regularly employed hourly Electrician (employed by the National Railroad Passenger Corporation (Amtrak), hereinafter referred to as the Carrier,) at their 21st Street Coach Yards in Chicago, Illinois.

The Claimant had been off duty from April 24, 1978. On May 10, 1978 the Claimant maintains he telephoned the Carrier and advised the Carrier that he would return to service on Monday, May 15, 1978.

The Claimant did not report for duty on May 15, 1978.

On May 19, 1978, the Carrier directed a letter to the Claimant advising that he was removed from the service of the Carrier for violation of Rule 28(b) of the IBEW-Amtrak Agreement of September 1, 1975.

The Claimant reported to the Carrier on May 23, 1978 and presented a doctor's release stating that he was fit to resume duty on that date. The Claimant was not allowed to go to work.

The Employees note the Claimant entered the employ of the Carrier as a journeyman electrician on July 3, 1976. Up until the time he was removed from service he received no formal discipline.

The Claimant commenced his absence from duty on April 24, 1978. He was under the care of his personal physician, Dr. R. R. Vollala, for Acute Irritable Bowel Syndrome and Acute Anxiety.

It is the position of the Employees that the Claimant complied with the requirements of Rule 28(b) when he presented medical evidence that he was physically incapacitated during the period of his absence.

Rule 28(b) of the controlling agreement reads, and we quote:

"(b) Employees who absent themselves from work for five days without notifying the Company shall be considered as having resigned from the service and will be removed from the seniority roster unless they furnish the Company with evidence of physical incapacity as demonstrated by a release signed by a medical doctor or that circumstances beyond their control prevented such notification." (Emphasis added)

The Carrier asserts that Claimant was absent from work for more than five days without notifying the Corporation in accordance with Rule 28(b), Claimant severed his employment relationship with Amtrak by effectively resigning from its service.

Claimant did not report to work on May 15 as had been prearranged with his supervisor, nor did he communicate with the Carrier until he attempted to return to work on May 23, 1978.

The record indicates that the Claimant did furnish the Carrier "with a release signed by a medical doctor" both on May 23, 1978, when he returned to work, and again on June 5, 1978. The May 22, 1978 note indicated:

"Above patient has been under my care for Irritable Bowel Syndrome from 4/24/78 to 5/22/78. He is fit to resume work from 5/23/78."

In the June 5, 1978 letter, the same medical doctor expanded his comments as follows:

"The above named patient has been under my care from 4/24/78 for Acute Irritable Bowel Syndrome and Acute Anxiety. Physcially (sic) and Mentally incapacitated in the early stages of his illness was unable to communate (sic) with his employer regarding his ill health. Now he is better fit to resume his work."

Rule 28(b) is clear and unambiguous. When an employee absents himself for five days without notifying the Company he is considered to have automatically resigned from the service of the Carrier.

Some dispute exists as to whether the Carrier received a telephone call from the Claimant on May 10, 1978. However, the Parties agreed that the Claimant did advise his supervisor of his intention to return to work on May 15, 1978. The record also reveals that the Claimant was at least sufficiently physically able to see a doctor on May 17th.

Rule 28 "unauthorized absences" Section (b) relates primarily to the obligation of employees to properly notify the Company in cases of unauthorized absences. Each case must be judged on its own merits and fact pattern. The rule is clear that medically verified evidence of "physical incapacity" can be grounds to demonstrate inability to properly notify within the prescribed five day requirement.

The proffered medical evidence (June 5th letter) only supports such incapacity to notify during the "early stages" of his 4/24/78 to 5/22/78 illness. Certainly the Claimant's ability to go to his doctor's office on May 17th, during the last five days of his absence, gives evidence of a change both in his mobility and capacity to communicate.

Neither the record nor the medical evidence supports the contention of the Claimant that he was still so physically incapacitated on May 17th to prevent him from notifying the Company that he would be out beyond the originally specified return date of May 15th. His failure to fulfill the notification requirement of Article 28(b) during the May 15-20 period, absent any medical evidence of physical incapacity for that period, is sufficient grounds to consider, that by his lack of action during that five day period, the Claimant had resigned from the service.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of January, 1982.