

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13092
Docket No. 12958
96-2-94-2-112

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(International Brotherhood of Electrical
(Workers, Local Union No. 214

PARTIES TO DISPUTE: (

(Chicago and North Western Transportation
(Company)

STATEMENT OF CLAIM:

"CLAIM OF EMPLOYEES:

1. That the Chicago and North Western Transportation Company violated the current agreement, in particular Rule 26, when they arbitrarily and capriciously removed Electrician Robert Crittenden from the Proviso seniority roster by letter dated October 14, 1993, without affording Mr. Crittenden an investigation as required by the aforementioned rule.
2. That the Chicago and North Western Transportation Company place Mr. Crittenden back on the Proviso Seniority Roster and promptly restore him to service with all seniority rights unimpaired and make him whole for any and all damages, lost wages and benefits lost, including but not limited to vacation, insurance, hospitalization, railroad retirement rights and benefits lost, as well as interest on all monies lost at 10%, account of the Carrier's most unjust, arbitrary and capricious action, continuing until Mr. Crittenden is restored to 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 employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

Claimant was employed as a diesel shop electrician at the Carrier's Proviso, Illinois Motive Power Facility prior to his removal from service on March 8, 1993 based upon Carrier's determination that he was not qualified to safely and effectively perform the essential functions of his position due to medical restrictions placed upon him by his personal physician on January 13, 1993, and concurred in by Carrier's doctor. The propriety of Claimant's removal from service is the subject of another claim processed by the parties in Docket No. 12987, and is not at issue in this case. However, events occurring subsequent to Claimant's medical disqualification form the basis of the instant claim protesting the Carrier's determination to remove Claimant from the seniority roster effective October 1, 1993.

By letter dated March 22, 1993, Claimant was sent Leave of Absence and Certification of Private Medical Care forms to be filled out in the event he was going to be absent from work for 30 days or more commencing on March 9, 1993. Claimant responded by letter dated April 1, 1993 indicating that he did not want a Leave of Absence, but wished to be returned to work in his position as electrician within his medical restrictions. On the same date the Organization initiated its written appeal concerning Claimant's medical disqualification, taking the position that Claimant should be permitted to return to his position with accommodation for his restrictions.

On April 6, 1993 Claimant's supervisor again sent him instructions about either returning to full duty or filing Leave of Absence papers with supporting medical evidence by May 10, 1993 in order to protect his assignment. This letter informs Claimant that his failure to file the appropriate forms by the deadline would result in his name being dropped from the seniority roster. On June 22, 1993, Carrier sent Claimant a third and final request that he complete the appropriate Leave of Absence forms, giving him until July 12, 1993 to protect his assignment and remain on the seniority roster.

On July 10, 1993, during the processing of the appeal regarding Claimant's medical disqualification, the Organization took the position in writing that Claimant did not need to complete the Leave of Absence papers since he wished to return to work. By letter dated July 30, 1993 to the Local Chairman, a copy of which was sent to Claimant, Carrier indicated that it was unable to accommodate the Claimant's medical restrictions and that he was required, under Rule 25(e), to apply for a Leave of Absence or forfeit his seniority. A deadline of August 6, 1993 was imposed for the filing of the appropriate forms. Instead of filing the forms, Claimant submitted a work release form from his physician with revised restrictions, which were later clarified to indicate that he could engaged in bending, stooping, crawling and kneeling 20% of his work day.

Carrier determined that he was still medically unqualified for service, and on September 9, 1993, the Director of Employee Relations again offered Claimant the opportunity to enter the Vocational Rehabilitation Program, repeating the necessity of filing his leave papers to avoid termination of his seniority. Claimant replied to this, and other letters from Carrier, indicating his ability and willingness to return to work.

By letter dated September 14, 1993, Carrier again advised Claimant of his obligation under Rule 25(e) to obtain an approved Leave of Absence if he is to be off from work for over thirty days "no matter what the reason", clarifying that this applies notwithstanding the fact that Claimant supplied a work release with revised restrictions. This letter advised Claimant that unless the required forms were filed by September 30, 1993, his seniority would be terminated effective October 1, 1993. No such forms were filed and Claimant was advised by letter dated October 14, 1993, that his name had been removed from the Proviso Diesel Facility Electrician Seniority Roster effective October 1, 1993.

The Organization argues that Carrier's improper action in removing Claimant from the seniority list is an arbitrary and capricious abuse of managerial authority, constitutes a "separation from service" by an action of Carrier, and violates the due process requirement for a fair and impartial hearing prior to dismissal found in Rule 26, relying upon numerous cited awards including Second Division Awards 6561, 5847. The Organization contends that Carrier's request that Claimant fill out Leave of Absence forms placed Claimant in a "Catch 22" position and was improper, in light of the fact that Claimant never asked for a leave, expressed his desire to return to work, and since the filing of such forms would have lent credence to Carrier's initial improper action in medically disqualifying him and removing him from service on March 8, 1993.

The Carrier contends that a leave of absence was required under Rule 25(e), and that Claimant's failure to request and obtain such a leave after being advised of the consequences properly resulted in his being dropped from the seniority roster. The Carrier further argues that this action was not discipline and did not require an investigative hearing under Rule 26. It also relies upon numerous cited awards on this property. See Second Division Awards 11780, 8894, 12610.

The applicable portion of Rule 25, Leave of Absence, is set forth below:

"(e) An employee absent from work because of sickness, personal injury or other disability to himself or an immediate member of his family shall notify his supervising officer as soon as possible. Such absences for a full calendar month or more must be covered by formal leave of absence."

This language is identical to that found in Carrier's Agreement with Brotherhood Railway Carmen Division Transportation Communications International Union (BRC), which was the subject of numerous Public Law Board awards relied upon by the Carrier. Those awards clearly hold that the failure of an employee to cover his absence from work for in excess of a one month period by obtaining a formal leave of absence constitutes an automatic forfeiture of seniority under Rule 25, which does not constitute discipline which would require an investigation under Rule 26. See Public Law Board No. 4544 Awards 6, 9, 70 and 85; Public Law Board No. 4043 Award 10; Public Law Board No. 4123 Award 10; Public Law Board No. 2512, Awards 44, 81.

Thus, we are bound to find that there has been no violation of Rule 26 in Carrier's failure to treat Claimant's removal from the seniority roster as a disciplinary matter requiring a formal investigative hearing. While this case does not present the situation of an employee who ignored Carrier's correspondence, the fact remains that Claimant did not submit the appropriate leave forms to "cover" his absence from work as required by Rule 25. It is clear that Claimant continued to maintain his desire and ability to return to work from the date of his removal on March 8, 1993, and adamantly protested Carrier's determination to the contrary, both in his responses to the correspondence herein and in the simultaneous processing of his other appeal. However, after Claimant was repeatedly advised of the consequences of not meeting the Rule 25 leave requirement, he chose to ignore his obligation to protect his assignment in favor of not compromising his position concerning his fitness to return to work.

This Board is convinced that Claimant could have done both by indicating clearly in writing (which he did so often during the processing of these claims) that the filing of the leave papers was being done solely to protect his assignment under Rule 25 in light of Carrier's determination of his medical disqualification (which was under protest) and was not to be interpreted as an admission that he was not able or willing to return to work. Had he done so, he would have protected both his seniority and his legal position concerning his entitlement to return to work.

While the result may seem harsh under the circumstances, this Board has no alternative but to uphold Carrier's contractual right to enforce Rule 25 by removing Claimant's name from the seniority roster. Since Claimant was given sufficient notice and ample opportunity to comply with his obligation to protect his assignment, it cannot be said that Carrier enforced this rule in an arbitrary or capricious manner.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 30th day of December 1996.