

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **19806**
Docket Number CL-19969

Frederick R. Blackwell, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
{ Freight Handlers, Express and Station Employees
PARTIES TO DISPUTE: {
(St. Louis Southwestern Railway Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (CL-7207)
that:

(1) Carrier violated the Clerks' current Agreement when it arbitrarily terminated seniority of General Clerk J. P. Hogan, Jr., **Commerce**, Texas, on September 13, 1971.

(2) That Carrier now be required to reinstate Mr. J. P. Hogan, Jr. to the service of the Carrier with all his rights, including seniority, vacation, sick leave, Health and Welfare rights, unimpaired, and be reimbursed for all hospital, medical and surgical expenses incurred from September 13, 1971.

OPINION OF BOARD: June 2, 1971 was the last day on which claimant performed service for Carrier. From June 3 to July 12, he was off due to a death in the family. Between July 12 and September 2, 1971, he marked up for work twice but on each occasion he marked off sick before reporting for work. On September 2, 1971, the Carrier gave notice to claimant that he must furnish medical proof of illness within ten days or forfeit his seniority under Rule 26-2(b) of the Agreement. Claimant failed to furnish the requested proof and also failed to give any reason for not doing so. On September 13, 1971 the Carrier terminated claimant's employment under the seniority forfeiture provisions of Rule 26-2(b). Shortly afterwards, on September 18, 1971, the claimant was hospitalized for treatment of what appears to have been a serious illness.

Petitioner contends that Carrier's action violated the Agreement in that Carrier should have conducted an investigation and hearing under Rule 23 (discipline) to determine whether there was a satisfactory reason for claimant's non-compliance with Rule 26-2(b). Petitioner also asserts that claimant was under a physical disability at the time in question, and for that reason, could not furnish the proof of illness. Carrier asserts that a Rule 23 investigation and hearing was not necessary because Rule 26-2(b) is self invoking and that a physical disability, on the part of claimant, was not shown to have existed at the pertinent time.

Rule 26-2(b) reads as follows:

"An employee absent from work for reasons stated in paragraph (a), i.e., sickness, disability, maternity leave, et cetera, will furnish to the supervising officer proof of right to continued absence within ten (10) days after having been absent ninety (90) consecutive **calendar** days, or give satisfactory reason for not doing so, **and** within ten (10) days following each ninety (90) day period thereafter, such proof to be in the form of letter or statement from a reputable doctor to the effect that the employee's physical condition is such that he cannot perform his or her assigned duties. The supervising officer **may**, however, request such proof at any time to be furnished within ten (10) days following receipt of such request. An employee failing to furnish letter or statement from a reputable doctor as provided above will forfeit all seniority rights and be considered out of the service." (Emphasis supplied)

The plain sense of the above rule is that when an employee fails to comply with the proof requirements of the first **two** sentences of the rule, the third and last sentence is automatically invoked and, thereunder such an employee "will forfeit all seniority rights and be considered out of service." Further, from the record before us, there is no doubt that the above underlined text authorized Carrier's September 2, 1971 notice to claimant to furnish medical proof of illness within ten days; such proof was not furnished as required by the rule and, thereupon, the forfeiture provisions of the third sentence of the rule became applicable. Thus, we conclude that what occurred here cannot be regarded as having a disciplinary nature and, consequently, Carrier was under no obligation to conduct a Rule 23 investigation and hearing.

As regards the issue of physical disability, we have no doubt that a physical disability would constitute a "**satisfactory** reason" under Rule 26-2(b) for not furnishing the required medical proof of illness. Therefore, if claimant was subject to a physical disability from September 2 through **September** 13, 1971 (respectively, the date of notice to provide proof and the deadline date for providing same), this would amount to an excusable reason for not complying with the rule. The record contains two doctors' statements which show that claimant was unquestionably under a physical disability on September 18, 1971, but the statements do not render an opinion on how long claimant's illness had been in the serious category or otherwise touch upon the subject of his possible disability during the pertinent period. The record also shows that, prior to September 18, 1971, the claimant had had contact with a third physician who referred him to the hospital on September 18, 1971. The record contains no statement from this physician, however, **and**, in the absence of a statement from this physician, there is no reliable evidence tending to show claimant was subject to a physical disability prior to his admittance to the hospital **on September** 18, 1971. In these circumstances, and on the whole record, we must conclude that the evidence is insufficient to establish the claimant's physical disability during the **pertinent** period, September 2-13, 1971.

In **view** of the foregoing we shall **dismiss** the claim,

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FINDINGS: The Third Division of the Adjustment Board, upon the **whole** record and **all** the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively **Carrier** and **Employees** within the meaning of the Railway **Labor Act**, as approved June 21, 1934;

That this **Division** of the **Adjustment** Board has jurisdiction over the **dispute** involved herein; and

The Agreement was not violated.

A W A R D

Claim dismissed.

NATIONAL RAILROAD **ADJUSTMENT** BOARD
By Order of Third Division

ATTEST:

E. A. Killian
Executive Secretary

Dated at Chicago, Illinois, this 20th day of **June 1973**.