

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number **21061**
Docket Number MW-21348

James C. **McBrearty**, Referee

(Brotherhood of Maintenance of Way **Employees**
PARTIES TO DISPUTE: (
(Illinois Central Gulf Railroad Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood
that :

(1) **The** Agreement was violated when **Trackman** Fred Borders
was not allowed to return to work on December 30, 1974 (System File
134-233-611-Case No. 960 MoFW/SL-175-T-75).

(2) The Carrier shall now pay **Trackman** Fred Borders for
each day's work beginning December 30, 1974 and continuing **until** such
time that he is allowed to return to work.

OPINION OF BOARD: Claimant was absent from work due to illness *frw*
October 14, 1974 through December 29, 1974. During
that period of **time** Claimant entered the out-patient clinic of the
Missouri Pacific **Employees' Hospital** on four **occasions, namely**, October
16, **November** 27, December 9, and December 24, 1974. Claimant was pro-
vided with a "Release Certificate" from the hospital, stating that he
would be able to resume work on December 30, 1974. The Certificate
was initialled by the doctor who had been treating Claimant.

When Claimant reported for work on December 30, 1974 to
Section 508 at Venice, Illinois, he was told by his for- that he
could not work because he had been terminated for failing to follow
the provisions of Rule 39.

Rule 39 reads as follows:

"An employe who is absent from his **assigned**
position without permission for five **(5)** con-
secutive workdays, will be considered as having
abandoned **his** position and resigned from the
service, unless such absence **from** service is
due to physical incapacity as evidenced by a
release signed **by a** medical doctor."

According to the Carrier, **Claimant was** absent from work for
more than five days without permission, and **was** therefore considered
as having resigned from the service.

Claimant **argues** that the **last** clause in **Rule 39** conditions the rule for the protection of those who are absent on account of **"physical incapacity."**

The Board **finds** the language in **Rule 39** **unambiguous**. Thu., the last **clause** of the **rule which states**, "...unless such **absence** from service is due to physical incapacity as evidenced by a **release** signed by a medical doctor" **conditions** the previous part of the rule which says, "...will be considered as having **abandoned** his position and resigned from the service."

Therefore, **Rule 39** clearly indicates that if an **employee** is absent from his assigned position without permission for five (5) consecutive workdays, he will not be considered as having abandoned his position and resigned **from the service**, as long as his absence from service was due to physical incapacity as evidenced by a release signed by a medical doctor. (Emphasis added).

What does **"physical incapacity"** mean? It does not mean as indicated by the Carrier, **that the Claimant** must be able to demonstrate that he was so ill as not to be **able** to talk on the **telephone** nor write a letter to notify the Carrier. The "physical incapacity" here refers to the **employee's** lack of fitness or ability to do his regular, for **Rule 39** clearly reads in relevant part, "...unless such absence from **service** is due to physical incapacity...."

Also, notice the phrase, "...evidenced by a release signed by a medical doctor" (Emphasis added). This "release" does not necessarily mean, as the Carrier has implied, that it has to be a "hospital" release as opposed to an "out-patient clinic" release. The word "release" is not modified by any restrictive adjective. All that is required here is that the employee not **have been** able to do **his** regular job, and that he obtain a release signed by a **medical** doctor, presumably whose care he was under for the period of incapacitation.

The Board is not arguing here that it is a good practice to **per-**
mit an employee **NOT** to **notify** the Carrier within five **consecutive** working days about **his absence occasioned** by a physical disability **which is evidenced** by a **release signed** by a **medical** doctor upon his **return** (whenever that may be). All we are **•** saying here **is that Rule 39 as presently written**, does permit this.

The Board is not empowered to change, amend or alter any Agreement rule under the guise of interpretation. (**Awards** 20410, 8058, 7710, 7166, 6833, 6365, 5971, 5703, 5294, 4763).

A last point to be considered by the Board is the allegation by the Carrier that it never received a release signed by a medical doctor. While this **statement is** made in its submission, the Carrier clearly acknowledged **on** the property that it did indeed receive such a release. Such release is also reproduced **as** Employer' Exhibit "A". The Board therefore finds that under these **circumstances**, any doubt about receiving the release must be resolved **in** the Claimant's favor (Award 11656).

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; end

That the Agreement was violated.

A W A R D

Claim upheld in **its** entirety.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 09th day of April 1976.