

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22110
Docket Number MW-22179

Joseph A. Sickles, Referee

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

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

(1) The Carrier has been in continuous violation of the 'Agreement in withholding from service Trackman Clyde B. Maxwell on and for each date subsequent to June 10, 1974 (System File 134-764-631 Case No. 1062 Morw/C-89-T-76).

(2) The Carrier is in further violation of the Agreement and of the National Railway Labor Act when it refused to discuss in conference the above-described violation.

(3) The claimant shall be 'returned to service with all rights unimpaired and that he be paid for each work day beginning June 10, 1974, and continuing until he is reinstated to service."

OPINION OF BOARD: On March 5, 1974, the Claimant was shot in the abdomen during the course of a criminal attack against him. He was hospitalized from that date until March 28, 1974, and again between the dates of May 7 through May 16, 1974. His physician released him for work in June of 1974.

On June 10, 1974, Claimant reported for work, but he was advised that his employe relationship with the Company was terminated because of a 3½ month absence from his assigned position - without permission (Rule 39). It appears from the correspondence of record that "...at the time of his termination [Claimant] was paid for the two weeks vacation that he had earned in 1973."

In July of 1976, the instant claim was submitted. In its defense to this action - and with specific reference to its assertion that the Claimant did not dispute the matter in a timely fashion - the Carrier asserted (on the property) that the employe was specifically advised, on June 10, 1974, that he "...had been removed from service under the provisions of Rule 39..."

While it may be the case that an exception to the "abandonment of position" concept exists under Rule 39 if the absence from service "...is due to physical incapacity as evidenced by a release signed by a medical doctor.", that exception does not control this dispute.

Rule 39 seems to have certain "automatic" connotations, in that an employee "will be considered as having abandoned his position", and a written dismissal may not be necessary. But surely, an employee should have an opportunity to explain his absence because it is not inconceivable that an individual could be precluded - by matters beyond his control - from advising a Carrier of the reason for his absence, or other facts (medical or otherwise) might dictate that the job was not abandoned. Whether or not that opportunity must be in the form of an investigation need not be discussed here. The fact remains that this Claimant was placed on notice on June 10, 1974 that his employment relationship had been terminated (regardless of when, in point of time, he received his vacation pay). At that point, it was clearly required that the employee take steps to protect himself or to advise his representative of the situation. He did not do either in a timely manner, and thus, his claim here is barred.

We do not consider this matter to be in the nature of a "continuing violation", nor do we fault the Organization in this case. The record shows that the Organization was not made aware of the basis for the asserted claim in time to take effective measures.

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 no jurisdiction over the dispute involved herein; and

That the claim is barred.

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Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A. W. Pauls*
Executive Secretary

Dated at Chicago, Illinois, this **16th** day of **June 1978**.