

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRDDIVISION

Award Number **22159**
Docket **Number** CL-22192

Abraham Weiss, Referee

PARTIES TO DISPUTE:

(Brotherhood of Railway, Airline and
(Steamship Clerks, Freight **Handlers**,
(**Express** and Station **Employees**
(
(Illinois Central Gulf Railroad

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood
GL-8429, that:

"(a) Carrier violated the **Agreement** when **it** wrongfully discharged J. W. Hastings from the service of the Carrier for failure to comply with Rule 13, Paragraph **(f)** of the Schedule of Wages and **Rules**.

(b) Carrier now be required to reinstate Claimant J. W. Bastings to the service of the Carrier, with pay for all **time** lost and all rights unimpaired **commencing** April 7, 1975.

(c) Joint check of payroll records is requested by **Employees** to ascertain amount due Claimant."

OPINION OF BOARD: Claimant's seniority was **terminated** on April 4, 1975, for failure to report **for** duty at the expiration of his sick leave of absence, **granted** for the period March 1 to April 1, 1975. Carrier's action was based on **the** provision of Rule 13(f):

"**Employees will** forfeit their seniority rights and be considered as **having resigned** from the service if **they** fail to report for duty at **the** expiration of leave of absence (or vacation), except when failure to report is the result of an unavoidable delay."

Petitioner, **in** appealing Carrier's action, denied that Rule 13(f) was applicable, but argued that Claimant, under **Rule 14**, has five (5) working days **following** a leave to return to work.

Rule 14 (**Return** from Leave of Absence) provides in Section
(a) (1):

"An employee returning from leave of absence or vacation **may** return to **the** position to which he holds bulletin rights (provided it has not **been** abolished or senior employee has **not** exercised displacement rights thereon), or he **may**, upon return, or within five working days thereafter, exercise displacement rights to any position bulletined during **his** absence (except **those** positions bulletined as a result of his leave of absence)."

Claimant submitted a doctor's certificate dated April 7, 1975, **which states** that claimant was under his professional care since February 11, 1975.

Petitioner argues **that claimant could not** have **returned** to work at the expiration of his leave of absence on April 1, 1975 because **his** doctor did not release him for duty until April 7, 1975, since claimant was not able to see **the** doctor until **that** date. Rule 13(f), the basis for carrier's action, provides that unavoidable delays will be an exception to **the** reporting rule, Petitioner adds, and states that the question to be resolved by **this** Board is whether **Rule** 13 provides for exceptions to be **granted in** a case such as before us.

Petitioner also argues **that** Carrier's action in terminating claimant's **seniority** constituted discipline, which **under** Rule 22 of **the** Agreement, requires an investigation prior to discipline or discharge. Carrier, on the other hand, contests this line of reasoning and maintains that **this** issue is not one of discipline but rather a case of seniority forfeiture under **Rule** 13(f).

Carrier argues its case as follows:

1. The Carrier had no word from claimant for three days **following** the expiration of his leave, **which** was for a fixed period **ending** April 1, 1975.

2. There is no **evidence in** the record, other than a mere assertion, that **claimant** could not see his doctor until April 7, so as to qualify under the "unavoidable delay" exception of Rule 13(f).
3. The Doctor's certificate of April 7 **does** not constitute proof or evidence that there was, in fact, unavoidable delay nor that **claimant** could not have returned to work, as far as his medical condition was **concerned**, on or before April 1, the expiration date of his leave; or that he was sick and unable to work between April 1 and April 7.
4. Although the doctor's April 7 **certificate** stated that claimant was **under** the doctor's professional care since **February** 11, 1975, claimant was at work several days **in** February subsequent to February 11. There is no evidence of any consultations by **claimant** and his doctor during his **authorized leave** from **March** 1 to April 1, nor during the period from April 1 to April 7.
5. Rule 14, on which Petitioner relies, does not relieve claimant of the requirement to report for duty by the expiration of his fixed leave of absence.

Arguments were raised by both parties as to **the** requirements for **obtaining** a doctor's release prior to returning from medical leave of absence. Petitioner, in appealing the claim on the property, asserts that the **Carrier would not have permitted claimant to go on duty "until he had secured a /medical/ discharge certificate."** Carrier's response is that **while** a doctor's release is uniformly required for a **return** from medical leave only for **absence** in excess of 30 days (or a calendar **month**, as in this case), a doctor's release is not automatically required, and in practice is seldom required, for a medical leave of **shorter duration**. Carrier also raised a procedural question; namely, that **reinstatement of claimant with no loss in seniority would adversely affect the seniority of other employees, junior to the claimant. Hence, Carrier insists, these junior employees should be given notice of the instant proceedings and an opportunity to be heard.** Suffice it to say that the **request** for a third party hearing was granted by this **Board**, that such a hearing was scheduled, and that no third party witnesses appeared.

Both parties also raised questions **concerning** the **admissibility** of statements or exhibits not presented **during** the handling of the dispute on the property and hold that **these** are not properly before this Board. We shall ignore the contested statements or exhibits in **our consideration.**

We now turn to the merits of the issue before us. It seems clear to us that **Rule 13(f)** applies to the facts of this case; that Petitioner did not supply clear and **convincing** evidence either that **claimant** was unable to report for **work** at the end of his authorized leave of absence because of continued physical disability or that he had requested an extension of his leave of absence, or that he was **unavoidably** detained in reporting. As we read **Rule 13(f)**, only under these conditions could claimant avoid forfeiting his seniority, however, unfortunate the results might be for his **employment** status. "Unavoidable delay" is the only exception recognized in the Rule; the language is clear **and unambiguous.** Failure to submit probative evidence that the delay in reporting for duty on the requisite date was unavoidable, causes employees to "forfeit their seniority and be considered as **having resigned** from the service" under the clear and express terms of the rule. Petitioner supplied no **reason for** claimant's 7 day delay in reporting on April 1, other **than** the bare assertion that claimant could not see his doctor until April 7. Such a stat-t **is not** evidence **and** is not supported by fact. Mere assertions do not sustain a claim.

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

That the Agreement was not violated.

Award **Number 22159**
Docket Number CL-22192

Page 5

A W A R D

Claim denied.

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

ATTEST:

A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this **31st** day of **July 1978**.