

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24744

Docket Number MW-24985

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employes**
(Consolidated Rail Corporation (former
(Penn Central Transportation Company

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

(1) The Carrier violated the Agreement when it improperly dismissed **Trackman** J. E. Dent for alleged "failure to comply with Rule 3-D-1 of the Agreement" (System **Docket** 542).

(2) The claimant shall be returned to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: On a date prior to October 4, 1979, claimant was informed by the carrier that **his** position as **trackman** was to be abolished effective October 5, 1979. At the **same time** he was advised that he had 10 days to exercise his seniority and place himself in another position. The Agreement Rules referred to in this situation are Rules **3-D-1(b)** and 3-D-1 (**d**) as follows:

"(**b**) An employe laid off as the result of reduction of force, desiring to retain his seniority, must within ten days from the date laid off, file his name and address, **in** writing, with the Supervisor of Structures, Supervisor of Track, or other corresponding officer, under whom last employed. The employe will prepare three copies of such notice, retaining one copy and filing two **copies** with the officer referred to. One copy of such **notice** will be **forewarded** by the Management to the District Chairman.

(**d**) An employe who fails to comply with the provisions of paragraphs (**b**) and (**c**) of this rule will forfeit his seniority and his name will be removed from the seniority roster."

When claimant failed to comply with the requirements set forth in the above rules carrier concluded he had forfeited his seniority. Thus, the following letter was addressed to claimant on October 16, 1979, by R. P. Miller, **Supervisor** of Track.

"On October 1, 1979 or earlier, you were informed that your position as **Trackman** had been abolished and that you had 10 days in order to exercise your seniority and place yourself in another position. The **abolishment** became effective with the close of the tour of duty on the 5th of October. On October **4th** you were involved in **an** incident with a fellow employe on company property, resulting in what you allege to be an injury to yourself. You were given medical attention following this incident and **the** Physician at the Emergency Room could find nothing wrong with you that would keep you from returning to work immediately. You went home that day and have not returned to work since.

"On the 9th of **October** you were examined by Dr. Vincent D. Cuddy, the Physician of **your** own choice, and from our discussions with his office, he feels also that there is no reason why you cannot return to work. You have also **informed** this office that you have gone to see a third Physician on or before October **12th**, but as of the date of this letter, we have seen no medical evidence **for** your **absence**.

Since you have failed to show cause as to why you are absent, and since you have failed to exercise your seniority in the proper amount of time, we are concluding that you have exhausted your seniority rights on the **M of W** roster. ****

Claimant challenges applicability of the rules quoted above because of particular circumstances in his case. Thus, on October 4, the last day claimant worked, he scuffled with another employee and sustained an injury which required medical attention. He **was** examined by the company doctor at **the** Rochester Medical Center, given aspirin and told he could return to work immediately. The doctor's report showed claimant suffered a mild contusion **OR** the left side of his neck. Instead, of returning **to** work, claimant took the rest of the day off **and** did not return to **work** thereafter. Additionally, claimant took **no** action to advise carrier of his condition or why he failed to exercise his seniority following abolishment of his job.

Carrier checked with Dr. Cuddy, claimant's own physician **who** reported as follows:

"On the 9th of **October** you were examined by Dr. Vincent D. Cuddy, **the** physician of your choice, and from **our** discussion with his office, he feels that **there** is **no** reason why you cannot return to work."

Claimant consulted with still a third physician, a **Doctor Domazo**, who issued a statement dated October 29, 1979, that claimant could **return** to work. Claimant reported for duty on October 29, for the first time since **October 4**, and presented the statement from Dr. **Domazo**. He was refused by R. P. Miller, Track Supervisor. Claimant then got his Organization representative **Hildebrand**, and together **they** reported to Division **Engineer** Steinbacher. He also refused and sustained the position stated by Mr. Miller in his letter of October 16, quoted above. With respect to Dr. **Domazo's** statement it should be noted it does not indicate he treated claimant; it states only that claimant was able to return to work as of October 29. It gives no indication whatever as to whether he might **have** been able to return to work prior to that date. Lacking information as to whether Dr. **Domazo** had treated claimant during the period in question renders the statement of little value in resolving the controversy.

In challenging the carrier's determination, the Organization cites another part of Rule 3-D which applies to employees returning to work following sickness or disability ie., Rule 3-D-5 as follows:

"3-D-5. Returning to duty after leave of absence, sickness, etc.-- Exercise of seniority. An employe returning to duty after leave of absence, vacation, sickness, disability or suspension, shall within five days, after reporting as ready for duty, return to his former position or exercise seniority to any position advertised during his absence.

If during the time an employe is off duty account leave of absence, vacation, sickness, disability or suspension, his former **position** is abolished or filled by a senior employe in the exercise of seniority, he may exercise seniority as outlined in Rule 3-D-1.

Employees displaced from their regular positions by the return of an employe from leave of absence, vacation, sickness, disability or suspension, shall exercise seniority as outlined in Rule 3-D-1."

Thus, the dispute resolves itself into a question of whether claimant was obligated to exercise his seniority within 10 days because his job was abolished or whether his claimed disability entitled him to wait until his return from such disability before being required to exercise his seniority.

His injury of October 4, was mild by the company doctor's diagnosis and he was cleared to return to work immediately. On the basis of such a finding it cannot be determined that claimant was disabled. insofar as the rules are concerned. **His** decision to take the rest of the day off and his failure to contact **any authoritative** carrier representative as to his job status until October 29 cannot be accepted as valid reasons to set aside the rules cited by carrier in concluding he had forfeited his seniority. Not only **did** the company doctor clear claimant for returning to work on October 4, but Dr. Cuddy, who examined claimant on October 9 also indicated there was no reason he could not return to work. In view of these findings, one by the company doctor and the other by claimant's own physician, it is difficult to accept as valid claimant's contention of being disabled. Also noted is **Mr. Miller's** letter of October 16, to claimant wherein it was stated:

"You have also informed this office that you have gone to see a third Physician on or before **October 12th**, but as of **the** date of this letter, **we** have seen no medical evidence for your **absence.**"

The record **confirms** that claimant ignored requirements of the Parties' Agreement in taking action to protect his seniority rights as required by Rules 3-D-1 **(b)** and **(d)**. Moreover, company doctor's clearance for his immediate return to work on October 4 obligated him to either return **or** at least contact proper company officials with an explanation. He simply took off and presented no medical statement at all **or** any other explanation until October 29. He continued to ignore the seniority rules and now seeks applicability of Rule 3-E-5. The record does not **support** his claim of disability and, since the provisions of Rules 3-D **(b)** and **(d)** are self executing, the carrier was obligated to proceed in recognizing claimant had forfeited his seniority.

Why claimant was indifferently silent during the period October 4 to 29 is not explained. In the circumstances it can only be determined that he was neglectful in taking action to protect his seniority standing and carrier took the required **course** of action in determining **he** had forfeited his seniority.

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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 30th day of March, 1984

