

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26052
Docket Number SG-26082

Peter R. Meyers, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Chesapeake and Ohio Railroad Company when:

(a) The Carrier violated the Signalmen's Agreement, as amended, particularly, Rule 33, when on or about March 2, 1983 Signal Maintainer J. A. Johnson, III reported to his Supervisor and was not allowed to return to service.

(b) The Carrier should now be required to return Mr. J. A. Johnson, III to service and make him whole for all wages and benefits lost, including seniority rights unimpaired, all vacation rights, pay premiums for C&O Hospital Association dues and Travelers Insurance, and pension benefits including Unemployment Insurance."

OPINION OF BOARD: Claimant was employed as a Signal Maintainer by the Carrier. On July 11, 1980, Claimant sustained an off-duty injury. As a result of the injury, Claimant was found to be unable to return to active duty. On March 2, 1983, Claimant contacted his Supervisor and indicated his intent to return to work. Carrier denied Claimant's request to return to work. The Organization thereafter filed a Claim on Claimant's behalf, challenging Carrier's denial.

The Organization contends that Carrier's refusal to permit Claimant's return to service violated Rule 45(a) of the current Agreement, which states in part:

"Employees sick or injured will not be required to secure leaves of absence to protect their seniority rights provided they return to service as soon as they are able to resume duty, but employees absent account sickness or injury will not be permitted to engage in other employment without leave of absence.

The Organization asserts that Claimant was properly absent from duty because of his off-duty injury. Carrier's doctor informed Claimant to return to service when he was physically able to perform his duties; Claimant relayed these

instructions to his Supervisor when he attempted to return to work in March, 1983. The Organization points out that the Carrier properly recognized Claimant's absence and maintained his seniority pursuant to Rule 45(a); Claimant's name was on the January, 1983 Seniority Roster.

The Organization contends that the Carrier denied Claimant's request to return to service on the sole ground that his Supervisor asserted that Claimant allegedly indicated he had worked elsewhere during his medical leave; this was only assumption and speculation. The Organization maintains that in a sworn Affidavit, Claimant denied working elsewhere; Carrier has not produced any evidence that Claimant in fact worked elsewhere. The Organization contends that the Carrier has been unable to justify its arbitrary termination of Claimant's seniority rights.

The Organization further contends that Claimant was not required to keep the Carrier informed about his physical condition. Instead, Claimant was instructed only to return to work when he was physically able to perform his duties. Claimant followed these instructions, yet the Carrier refused his return to service. The Organization therefore argues that Carrier's refusal was arbitrary and in violation of the Agreement. The Organization contends Claimant should be returned to service, and made whole for all wages and employment benefits lost as a result of Carrier's action.

The Carrier contends that Rule 45(a) clearly established that to retain seniority while absent from duties because of sickness or injury, employees must return to work as soon as they are able and must not engage in any outside employment. The Carrier asserts that in his March, 1983 discussion with his Supervisor, Claimant stated that he had been working for another company while on leave. Claimant's later retraction establishes only that the evidence is in conflict. Moreover, the Carrier contends that the Organization has not sustained its burden of proving that any of the Claimant's employment rights were violated. The Carrier therefore argues that under Rule 45, Claimant's seniority must be terminated.

The Carrier further argues that the claimed remedy is excessive. The Carrier maintains that the remedy for wrongful termination of seniority should be no greater than compensation for lost wages. The Carrier finally asserts that the Claim is without merit and should be denied in its entirety.

In rebuttal, the Organization points out that Carrier is the moving party because it refused Claimant's return to work and terminated his seniority. As the moving party, Carrier must support its position with competent evidence. The Organization asserts that Carrier has not done so. The Organization further contends that the Claim is not excessive; Claimant is seeking only what he would have had if Carrier had approved his return to service.

On rebuttal, the Carrier asserts that Claimant voluntarily admitted to his Supervisor that he had engaged in outside employment while absent from service. Moreover, Claimant never offered to document what he did while out of service or what medical attention he had received during that period. The Carrier contends that the evidence establishes that Claimant violated Rule 45 when he failed to return to service as soon as he was able to do so, and when he engaged in outside employment without obtaining a leave of absence. Carrier's action was based on Claimant's voluntary admission that he had engaged in outside employment.

The Carrier further argues in rebuttal that Carrier's doctor never instructed Claimant that he should not return to service until he was physically able or relieved Claimant of his responsibility to keep Carrier informed about his condition and status. The Carrier also contends that the only reason Claimant's name remained on the Seniority Roster until March 2, 1983, is because Carrier believed Claimant was off duty due to an injury; this situation changed when Claimant informed his Supervisor that he had engaged in outside employment while off duty.

In addition, the Carrier reasserts that the Organization has the burden of establishing whether or not Claimant engaged in outside employment; the Organization easily could have resolved this issue, but chose not to, by submitting Claimant's tax records for the period.

This Board has reviewed all of the evidence in this case, and it finds that the Claimant was properly absent from work since July 11, 1980, as a result of an off-duty injury. This Board also finds that the Claimant was instructed by the Carrier to return to work when he was physically capable of performing his duties. The Carrier recognized that the Claimant was off as a result of the injury by keeping the Claimant on the Seniority Roster. The Claimant was not given any instructions to report on his condition on a regular basis, but he was merely told to return when he was capable of performing work.

The Claimant, some 6 1/2 months following March 2, 1983, denied making the statement that he had been "working for a company doing underwater work" and the record includes a sworn affidavit by the Claimant stating that he had not worked since his 1980 off duty injury. The Carrier has presented no evidence of the Claimant working during that period other than his alleged statement which he now denies.

The Carrier relied on Rule 45(a), which states:

"Employes sick or injured will not be required to secure leaves of absence to protect their seniority rights provided they return to service as soon as they are able to

resume duty, but employees absent account sickness or injury will not be permitted to engage in other employment without leave of absence".

The Carrier, believing that the Claimant had worked while being off on injury, terminated the Claimant's seniority for engaging in outside employment.

The Carrier contends that the Claimant could have brought in his tax records to prove that he did not work during the two and one-half years that he was off as a result of the injury. However, since the Carrier relied on the self-executing Rule 45, this Board finds that it was up to the Carrier to substantiate its case for terminating the Claimant's seniority. This Board finds that the Carrier has not adequately done that, and therefore the termination of seniority must be overturned. There is not sufficient evidence in the record to support the Carrier's action of terminating the Claimant's seniority.

As this Board stated in Case No. 22497:

"In the railroad industry, an employee's seniority right has always been considered a valuable right which may not be terminated by a Carrier on the basis of speculation, supposition, or assumption. Based on the entire record, the Board finds that the Carrier improperly concluded that the Claimant had forfeited her seniority".

This Board finds that the Carrier violated the Claimant's rights by terminating his seniority, and we will award that Claimant's seniority be restored unimpaired. Claimant was off duty account an off duty injury for approximately 27 months. Claimant presented no evidence of any kind to show that he was physically qualified to return to work in March of 1983. Since, he did not, this Board cannot award any compensation.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois this 11th day of June 1986.