

The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

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

(1) The Carrier violated the Agreement when it revoked the seniority of Mr. T. Riley under Rule 2(j) and refused to allow him to return to work beginning March 2, 1987 (Carrier's File 870227).

(2) As a consequence of the aforesaid violation, Mr. T. Riley shall be allowed pay:

'... for eight (8) hours each work day, including any holidays falling therein and any overtime accruing to junior employee, beginning March 2, 1987, continuing until he is permitted to return to work on System Rail Gang 6807.'

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Following an on-duty injury, a spider bite, Claimant was absent from work beginning on December 10, 1986. Although he was not covered by a formal leave of absence, the Carrier was under the impression that he was still under a doctor's care and incapacitated until it learned through a February 5, 1987, newspaper article that he had been arrested. Consequently, Claimant was sent a letter on February 9, 1987, directing him to report back to work within seven days of receipt. He was advised that his failure to report or to advise in writing would result in the forfeiture of his seniority in accordance with Rule 2(j), which reads as follows:

"A furloughed employee is one who is unable to hold a regular assignment in any classification. Employees who are furloughed will be called back to service in the order of their seniority. To be eligible for recall to service under this rule the furloughed employee must file his name and address in writing with the appropriate division officer with copy to the local chairman within ten (10) days after being furloughed, and failing to file name and address will forfeit his seniority. Failure to return to service within seven (7) calendar days after recall for a regular assignment, except in cases of physical disability when extension of time will be granted as provided in paragraph (f) of this rule after being notified (by mail or telegram at last address on file) will forfeit seniority in the class for which called. Extension of seniority rights under this rule will expire unless returned to active service within two (2) years after last furloughed."

Claimant received this letter on February 12, 1987, and responded with a letter stating that he was still under his doctor's care and would not be released until February 21. He further stated that he would bring his doctor's excuse when he reported back to work on March 1, 1987. The Carrier did not permit Claimant to return to service, maintaining that his name had been removed from the seniority roster.

The Organization contends first that the Carrier acted improperly because Claimant was under a doctor's care and should not have been required to return to service until released. The evidence, however, fails to show that Claimant was precluded from working due to a medical condition for the entire period of his absence.

Secondly, the Organization points out that the Rule under which Claimant was dismissed is only applicable to furloughed employees, which does not include Claimant.


We agree with the Organization that the Carrier was misguided in applying Rule 2 (j) to Claimant because he was not furloughed at the time. However, the Carrier would have been justified in taking action against Claimant under other Rules. Because of these unusual circumstances, we will direct that the Claimant be reinstated to service without loss of seniority, but without pay for time lost.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of October 1989.