

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Terminal Railroad Association of St. Louis

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

(1) The Carrier violated the Agreement when it improperly closed the service record of B&B Mechanic R. S. Bess (System File 1987-1 T.R.R.A./013-293-15).

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

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.

From the extensive correspondence of this Claim we conclude that Claimant had been injured and was under treatment. By letter dated February 7, 1986, Claimant's physician released him "to light duty for two weeks then his regular work." As no light duty work existed, Claimant followed instructions and obtained a letter stating same.

By letter of March 25, 1986, Claimant was recalled and ordered to report to work as a B&B Mechanic on March 31st. That letter stated in part:

"...If you cannot for some reason report to work, please advise this office 451-8431, promptly.

Rule 16... provides for furloughed employees to return to service within seven days, unless prevented by sickness or unavoidable cause, in order to retain seniority."

From the probative evidence it stands unrefuted that Claimant's next contact with the Carrier was on April 6, 1986, when Claimant submitted a new physician's statement attesting to his inability to work.

It is the Carrier's position that the Claimant had already forfeited his seniority before his submission of additional documentation on April 6, 1986. The Carrier argues that Claimant lost his seniority under Rule 16 when he failed to respond to the above recall and/or return from furlough.

It is the position of the Organization that the Carrier was fully aware that the Claimant was off work with an injury. The Organization points to the letter from B&B Supervisor Morton of March 5, 1986, indicating that no light duty work was available and requiring that any return to work must have a "release from his Doctor without any restrictions." The Organization argues that Claimant was not properly informed by the recall letter that further information was necessary.

The central issue of this dispute is whether Carrier acted improperly when they removed Claimant's seniority rights. This Board concludes that all correspondence relating to further physicals, court orders and the like are not germane. Rule 16 holds that Claimant must return within seven (7) days unless "prevented by sickness or other unavoidable reasons." Claimant was correctly and duly notified by the Carrier of his rights. Carrier clearly requested on March 25, 1986, that Claimant promptly respond to the phone number listed if there were any problems. We find not one scintilla of probative evidence that Claimant made any attempt whatsoever to contact Carrier. Had he done so, this issue would likely have been resolved.

The Rule language allows reasonable parties acting in reasonable ways if prevented by illness or some other unavoidable cause to maintain their seniority while failing to return from furlough. We do not find the Claimant's actions reasonable. They are unexplained in this record. There exists no evidence or acceptable justification for Claimant's failure to respond to the recall notice by phone or otherwise to make his arguments and/or medical condition known. Proof of his inability to return rests with the Claimant. Certainly, if there were in the record a reasonable finding to explain Claimant's inability to respond to the recall letter protecting his seniority, this Board might reach other conclusions. If Claimant felt Mr. Morton's letter was controlling, then he should have immediately questioned the recall letter. Carrier records indicate that Claimant had already received a full return to work after light duty restriction was removed. Claimant delayed in responding and said delay without more substantive proof of necessity can not be used as proof that Claimant met his Agreement requirements.

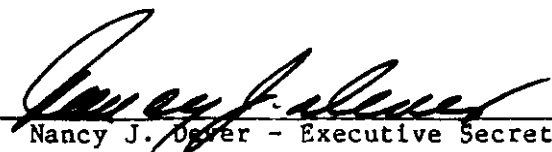
Claimant was recalled under the Agreement in a proper manner. Carrier's records indicated Claimant was medically capable of returning to duty. Claimant failed to act in a timely manner. Rule 16 is self executing and Claimant's loss of seniority under the conditions of the instant case was not violative of the Agreement (Second Division Award 11687; Third Division Awards 22327, 24638, 25889).

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Oser - Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1991.