Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30758
Docket No. MW-31127
95-3-93-3-7

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when the award was rendered.

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

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

(1) The Agreement was violated when the Carrier improperly terminated he seniority and closed the service record of Mr. L. Byrd on September 24, 1991 (Carrier's File 920134 MPR).

(2) As a consequence of the violation referred to in Part (1) above, Mr. L. Byrd shall have his seniority ' . . . restored on all rosters that he held seniority, and that he be allowed all wage loss suffered, retroactive back 60 days to continue, until such time that the discrepancies is [sic] corrected.'"

FINDINGS:

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

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

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

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

Claimant was employed as a Trackman. He was assigned to a System Rail Gang which operates at different locations. On June 26, 1991, Claimant was granted a medical leave of absence for in-hospital treatment, retroactive to May 30th. He continued in outpatient therapy thereafter. In connection with Claimant's

outpatient therapy, he was advised by his counsellor that he should relocate from Arkansas, his address of record with the Carrier. Claimant moved to Chicago. Insofar as the record indicates, he did not leave a forwarding address with the Post Office.

The record is in conflict whether Claimant properly notified the Carrier of his new address. He stated that he did, by letter and telephone; the Carrier denies it. The Carrier's records do not reflect receipt of any notice of change of address prior to September 17th; and there is no confirmation submitted by the Organization to support Claimant's assertion that he gave written notice (e.g., certified mail receipts) when he relocated at any earlier time. Claimant received no confirmation or reply to his alleged notice.

Claimant was advised by his treating physician that he was released to return to work July 22, 1991. Claimant's medical leave was to expire approximately July 31, 1994. He did not request an extension or report for service at that time. According to the Carrier, he advised the Carrier on August 1st that he would not be able to return to work until August 3, 1991 due to his Father's illness. He was granted family leave until that date; however, he did not report for service, contact the Carrier to advise them of his status or request further or other leave.

On September 4, 1991, 30 days following August 3rd, the Carrier sent Claimant a letter notifying him to submit medical verification of a disability to justify his absence from duty after August 3, 1991. The letter was sent to Claimant's Arkansas address. He did not receive the letter and did not, therefore, respond to it.

Claimant stated that he contacted the Carrier in August, indicating by telephone voice communications and messages with the Company's computer system that he was ready to return to service and asked for instructions where to report. Telephone records submitted by Claimant confirm calls to the Carrier's offices at Wynne, Arkansas (where his Gang was headquartered) and Omaha, Nebraska, (where his personnel records were kept) on August 23, 24 and 30, 1991. According to his statements, he was advised that he would be called with notice of the time and place he should return to service. Claimant denied that he was advised of the Carrier's determination that he was AWOL, that he had been displaced, or that the time was running on his termination.

The Carrier did not submit evidence to refute Claimant's statements; however, it pointed out that the telephone calls were made at a time when Claimant's Gang was off and that none of the numbers called or people he talked to were proper officials to change his address, request permission for further absence or obtain instructions to await notice from the Carrier where and when

to report.

In the absence of response to its September 4th letter, the Carrier terminated Claimant's seniority as of September 24, 1991.

Claimant received no instructions from the Carrier following his conversations. Claimant did not contact the Carrier again until November 5, 1991, at which time he was informed that his seniority had been terminated.

The applicable Agreement provides, at Rule 5, Sec. (d), that:

> "Employes who are granted formal leaves . . . and who do not report on or before the first work day following the termination of their leave of absence will lose their seniority except in case the employe furnishes satisfactory evidence that he was unavoidably delayed."

A Memorandum of Agreement dated January 27, 1981 provides, in part, that employees who are continuously absent without authority for a period of 30 or more calendar days may be treated as having resigned and their names removed from the seniority roster. It also provides that, before the employee is deemed to have resigned and his seniority terminated,

> "the employee will be notified at his last known address by certified mail . . . that failure to return to service or show cause . . . will be treated as a voluntary resignation . . . . A letter mailed to the last address of record with [the Carrier] will be considered delivered.
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> * * *
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> If the employee does not respond within the time specified, he will be considered as having resigned and his name removed from the seniority roster."

By a claim filed November 26, 1991, the Organization protested the Carrier's action as unjust treatment. The Carrier denied the claim, but did not, in its initial response, raise the issue of untimeliness, although it did so later. The claim was progressed in the usual manner without resolution.

The Carrier argues that Claimant's absence was without leave on and after August 3, 1991. It contends that it sent to his address of record a September 4th notice to show cause for his absence or lose his seniority, to which he was obligated to respond within seven days or lose his seniority, but the letter was returned by the Post Office with the indication that Claimant had moved and left no forwarding address. The Carrier points out that

Claimant was authorized to return to work July 22nd, his leave of absence expired thereafter, and Claimant failed to report, as he had indicated he would, on August 3rd. It points out that Claimant has offered no explanation for his failure to do so. The Carrier asserts that it was entitled, under Rule 5 (d) of the Agreement and the January 31, 1981 Memorandum of Agreement, both of which it asserts have been determined to be "self-executing," to remove Claimant from the seniority roster.

The Carrier argues that the Organization's November 26, 1991 claim was untimely, since it was filed more than 60 days from September 5th (the certification date for its notice to Claimant) and more than 60 days following the date he was removed from the roster (September 24th) and was, therefore, untimely under Rule 12 of the Agreement (which requires claims to be filed "within 60 days from the date of the occurrence on which the claim . . . is based.") It asserts that the date for filing a claim based on a single action (as distinct from liability flowing from an action) is not "continuing" so as to escape the 60 day requirement.

The Carrier urges that the claim be dismissed as untimely or, if not deemed untimely, than denied on the merits.

The Organization argues that Claimant was advised by the Carrier to wait to be instructed where and when to report, that he waited, in good faith, to hear from the Carrier, and did not learn that he had been terminated until November 5, 1991. It asserts that the Board has held that the time limits for filing a claim do not begin until the employee is aware of the violation. It asserts, therefore, that the claim was not untimely. The Organization also asserts that the Carrier did not challenge the timeliness of the claim in its initial response, thereby waiving its right to do so.

The Organization argues that the Carrier was obligated to provide accurate information to its employees, but failed to do so, thereby depriving Claimant of information where and when to report to his Gang. Indeed, it asserts that Claimant made all reasonable attempts to obtain the information and was advised that he would be contacted.

The Organization argues, in addition, that Claimant notified the Carrier of his change of address, but that the Carrier failed to acknowledge the change or to use the new address in contacting him.

The Organization urges that the claim be sustained.

Employees are required to protect their assignments and to keep their employers advised as to their current addresses in order to ensure the employer's ability to communicate with them. The

employer is entitled to rely on the information the employee provides. Failure of an employee to protect his assignment can be the subject of discipline or, when that failure exceeds 30 days and after notice in the required manner, of termination of seniority as a voluntary quit. An employee cannot use lack of notice as a defense to such termination when the employee has failed to furnish a current address.

In the instant case, Claimant moved to Chicago sometime during his medical leave of absence. There is substantial evidence that he failed to furnish the Carrier with his new address at that time or submit a forwarding address to the Post Office. Indeed, based on information submitted by the Carrier, he did not do so until the 17th of September. There is insufficient evidence that Claimant advised anyone in proper authority at the Carrier of his new address prior to that time. Thus, communications from the Carrier prior to that time were made to the latest address Claimant had furnished.

Claimant was obligated to return to service by August 3rd. He did not do so. The reasons are unexplained except for a conclusory and unsupported assertion that he was sick. The Board is persuaded that the Carrier was entitled to treat him as AWOL after August 3rd and, pursuant to the January 27, 1981 Memorandum of Agreement, to terminate his seniority after notice to him. The record indicates that notice was given in accordance with the Memorandum of Agreement on or before September 5th, that the time for response passed, and that the Carrier properly terminated Claimant's seniority. The Board so holds.

The action, which the Board has held to be self-executing after completion of the notice and response period, was complete seven days from September 5th - prior to Claimant's September 17th notice of change of address. See, e.g., Third Division Awards 24681 and 28638. The Board is not persuaded that the Carrier was obligated to rescind the termination even if it received Claimant's notice prior to its September 24th execution. The Board notes, in this regard, that there is no indication that Claimant exercised reasonable diligence in protecting his job, even in the face of what he stated he understood as the Carrier's instruction: insofar as the record indicates, he did not contact the Carrier from August 30th until November 5th - a period of nine weeks.

With respect to the timeliness of the claim, the Board is not persuaded that the Carrier's failure to raise the issue at its first opportunity precludes it from doing so later in the processing of the claim on the property. The Board notes that the language of the Rule at issue in this proceeding appears to date the running of the 60 day period from the incident, not from notice. Prior Board cases cited by the Parties are not dispositive: except as noted, those cited by the Carrier address

whether this type of claim is "continuing" and those cited by the Organization to not make clear the language of the Rule on which the claims rely. Only Second Division Award 11962 addresses a similar rule and issue. It concluded that the parties therein were bound by the language of the negotiated rule, which dated claims from the date of occurrence, rather than notice.

While the Board believes that the more reasonable interpretation of the Rule would include an implied exception for cases where the employee does not receive, and reasonably could not have received, notice of the incident, it is not necessary to the disposition of the dispute to interpret that aspect of the Rule. Even if the time for filing the claim is deemed to be when Claimant reasonably had notice of the pending action, the Board is persuaded that the date of notice to Claimant dates either from shortly after September 5th, when he would have received the Carrier's letter - if he had properly apprised the Carrier of his current address or when he would have contacted the Carrier at some earlier date between August 3rd and November 5th, as he would have done if he had acted diligently. Claimant's failures in this regard, rather than any delay on the part of the Organization, renders the claim untimely, but requires the analysis of the merits of the dispute set forth above in order to ascertain Claimant's breach.

AWARD

Claim dismissed.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of February 1995.