

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31536
Docket No. MW-31885
96-3-94-3-188**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin 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 Agreement was violated when the Carrier improperly failed and refused to allow Mr. R. L. Marcelous to return to service following his medical leave beginning November 16, 1992 and continuing (Carrier's File 930186 MPR).

2. As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated with seniority, vacation and all other rights unimpaired and he shall be compensated for all wage loss suffered."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all of the 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 involved herein.

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

On December 23, 1991, Carrier wrote to Claimant, advising him that he had been absent without authority since October 21, 1991, and that pursuant to a January 28, 1981, Memorandum of Agreement, he was considered to have voluntarily forfeited his seniority. The letter further advised Claimant to show good cause within seven days of his receipt why his employment should not be terminated. Claimant did not respond until August 1992 when he sought to return to his position. Carrier refused to allow Claimant to return to his position. This claim followed on January 15, 1993.

The January 28, 1981, Memorandum of Agreement provides:

“(1) Employees who are continuously absent without authority from their positions for a period of thirty (30) or more calendar days may be treated as having resigned and their names removed from the seniority roster.

(2) Before the employee is considered as having resigned and his name removed from the roster, the employee will be notified at his last known address by certified mail - return receipt requested that failure to return to service or show cause within seven (7) calendar days of receipt of the letter will be treated as a voluntary resignation and his name removed from the seniority roster.

A letter mailed to the last address of record with MoPac will be considered delivered. A copy of this letter will be sent to the General Chairman.

(3) If the employee should respond to such letter within the time specified, MoPac shall have the option of allowing the employee to return to service for good cause shown or citing him for formal investigation of the provisions of Rule 12 of the basic agreement.

(4) 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.”

Carrier contends that the claim should be dismissed because it was not filed in a timely manner. The Organization responds that the claim was filed in a timely manner because the time for filing a claim runs from the date on which the Claimant becomes aware that he has a claim.

On the merits, the Organization contends that Claimant was not absent without authority. Rather, according to the Organization, Claimant was on a medical leave of absence, receiving treatment for substance abuse. Furthermore, the Organization observes, the December 23, 1991, letter was addressed to Claimant at Carrier's depot at Baytown, Texas, and signed for by Carrier's depot clerk. The Organization maintains that it is obvious that Claimant's address was different from the one to which Carrier sent the letter.

Carrier maintains that the January 28, 1981, Memorandum of Agreement is self-executing and that Claimant was properly terminated. Carrier contends that Claimant never received a proper medical leave of absence. It further argues that it complied with the Memorandum of Agreement by mailing the December 23, 1991, notice to Claimant's last address of record.

The Board has reviewed the record carefully. Because we find that the claim must be denied on its merits, we see no need to address Carrier's procedural objection.

The record does not support the Organization's position that Claimant was on a medical leave of absence. Claimant's own written statement indicates that Claimant asked his supervisor for a leave of absence so he could seek substance abuse treatment. Claimant's written statement further states that the supervisor advised Claimant that he could not grant the request and advised Claimant to consult the EAP counsellor. According to Claimant's statement, the EAP counsellor advised Claimant to receive out-patient treatment but Claimant decided to obtain in-patient treatment. There is no evidence, however, that, following his supervisor's denial of the leave of absence request, Claimant sought a leave of absence from any other Carrier official. There also is no evidence that Carrier ever granted Claimant a leave of absence.

Furthermore, the record does not substantiate the Organization's position concerning the December 23, 1991, letter. During handling on the property, Carrier maintained that the letter was mailed to Claimant's last address on record. Carrier also provided documentation that Claimant did not update his address until September 10, 1992. The Organization merely asserted that it was obvious that Carrier sent the letter to the wrong address. However, the Organization provided no evidence to refute Carrier's representations concerning the address it had on file and its documentation of the date of Claimant's change of address. There is nothing in the record to indicate

that Claimant had given Carrier any address other than the one to which the December 23, 1991, letter was sent. The Organization's assertions cannot substitute for evidence that Carrier misaddressed the letter.

Thus, the Organization's position is not supported by the facts developed during handling on the property. Accordingly, the claim must be denied.

AWARD

Claim denied.

ORDER

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 25th day of July 1996.