

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31908
Docket No. MW-32245
96-3-95-3-42**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier improperly terminated the seniority of Mr. B. C. Rowlands on October 28, 1993 for absence in excess of fourteen (14) consecutive days without permission (System Docket MW-3165).

(2) As a consequence of the violation referred to in Part (1) above, the October 28, 1993 letter shall be removed from Mr. Rowlands' record and he shall be reinstated to service with all rights and seniority unimpaired."

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 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 were given due notice of hearing thereon.

This dispute arose when the Claimant, a mechanic at the Canton Maintenance of Way Shop, had requested and was granted a medical leave of absence to undergo drug and alcohol treatment from his personal physician. When the Carrier discovered that the Claimant was in fact incarcerated and receiving his rehabilitation at what the Carrier considered to be a court-referred detention center, it notified the Claimant that incarceration was not a valid excuse for absence, and therefore, he had forfeited his seniority rights. The Claimant was dismissed from the Carrier's service. The Organization appealed the Carrier's discipline but the appeal was denied.

This Board has thoroughly reviewed the record in this case and we must find that although the Carrier has terminated the Claimant's seniority pursuant to Rule 28(b) relating to unexcused absences of more than 14 days, this Board must find that the Carrier acted prematurely and the claim must be sustained in part.

The Carrier claims that the Claimant simply did not show up for work and, therefore, after 14 days, the Carrier had an automatic right to forfeit the Claimant's seniority under the self-executing principle set forth in Rule 28(b). The Carrier contends further that the Claimant was in a court-referred detention facility and incarceration is no excuse for not coming to work. The Carrier then believed that it had a right to exercise its authority under Rule 28(b) and terminate the Claimant when he had not shown up for work within 14 days.

The Organization contends that the Claimant was not incarcerated but had voluntarily checked himself into a rehabilitation center to deal with some illnesses from which he was suffering. The Organization argues that the Claimant, who had enjoyed 18 years of service for the Carrier, applied for and received a leave of absence for the physical ailment and, therefore, he could not have voluntarily forfeited his seniority rights pursuant to Rule 28(b). The Organization contends that the leave was "approved" and that the Carrier acknowledged that when it postponed a scheduled hearing until such time as the Claimant returned to active duty.

Although this Board recognizes the need for the Carrier to exercise its rights under 28(b) on numerous occasions because it is impossible for the Carrier to track down and hold a hearing relating to unexcused absences for "walkaways" and other employees to fail to come to work, there are occasions when it is important for a hearing to be held when the facts do not support the requirements of Rule 28(b). This is one of those cases.

Although the Organization contends that the Claimant was approved for a leave of absence, the record in this case does not show such approval. There is the recognition that the Claimant was off work and there was a postponement of a hearing, but there is nothing in this file before the Board which indicates that the Claimant had been approved to be on a leave of absence.

However, on the other hand, there is nothing in the file that supports the Carrier's position that the Claimant was in a court-referred detention facility and, therefore, was in a situation similar to being incarcerated. There are numerous statements from representatives of Oriana House, Inc. that state that the Claimant was in the treatment facility during the time that he was off work. There is also a statement that he may return to work without restriction. The Carrier was aware that the Claimant was in the facility receiving treatment at the time it terminated his employment. This is not a walkaway case; this is not a case where the utilization of Rule 28 which is entitled, "Absent without permission", is appropriate. As a matter of fact, Rule 28(b) begins by stating, "Except for sickness or disability, or under circumstances beyond his control. . ." If the Carrier has proof that the Claimant was incarcerated or being held in a court-referred detention situation, then that is the type of information that should be presented at a hearing. Similarly, if the Claimant has documentation to show that he was properly on a leave of absence, then that is the type of evidence that should be presented at a hearing.

This Board finds that the Carrier's forfeiture of the Claimant's seniority pursuant to Rule 28(b) was improper in light of the unusual facts in this case. The Board finds that the claim must be sustained in part and the Claimant's seniority reinstated. However, the Carrier still has a right to proceed against the Claimant pursuant to its disciplinary processes and hold a hearing to determine whether the Claimant was incarcerated in a rehabilitation center or whether, as the Organization states, he was merely off on a leave of absence receiving treatment for a physical disability.

As stated above, there is a definite reason for Rule 28(b). However, it cannot be imposed when there is some question as to whether the Claimant is properly off on disability as there was raised in this case. The claim is sustained in part. The Claimant's seniority shall be reinstated, but he shall receive no backpay and he shall not be immediately reinstated to employment on the job. The Carrier has a right to proceed pursuant to the disciplinary rules and hold a hearing to determine whether the Claimant

was properly off on disability or rather whether he was incarcerated pursuant to some court-referred detention program.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 4th day of March 1997.

**CARRIER MEMBERS' DISSENT
TO AWARD 31908 (Docket MW-32245)
(Referee Meyers)**

In the on-property handling, the following was made a matter of record:

"...Oriana House, Inc. is actually a court referred detention facility. The Claimant was detained in a correction facility, which does not constitute absence for circumstances beyond his control."

"You have contended that Mr. Rowlands was off for reasons beyond his control as he was receiving treatment in Oriana House. However, Oriana House is actually a court referred detention facility. Appellant was detained in a correction facility, which does not constitute absence for circumstances beyond his control. In this regard, we direct your attention to Third Division Award 25648 and Awards 31 and 192 of PLB 3514, which have supported the Carrier's position on this property."

There was no evidence ever presented on the property by the Organization to refute the foregoing. As such, it must be considered to be factual by this Board. It was and is the Carrier's position that one who is incarcerated is not absent "beyond his control".

Rule 28(b) was properly applied and the Carrier should not be required to again substantiate its case.


P. V. Varga


M. W. Fingerhut


M. C. Lesnik