

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32049
Docket No. MW-32509
97-3-95-3-408

The Third Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Soo Line Railroad Company**

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. J. D. Barragan, Jr. under date of September 15, 1993 for alleged failure to comply with instructions provided in April of 1993 and taking a leave of absence other than as prescribed by scheduled rules (System File C-94-93-A380-04/8-00150 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. J. D. Barragan, Jr. shall be reinstated to service with all rights, benefits and seniority unimpaired and he shall be compensated for all wage loss suffered (sic) beginning September 15, 1993 and continuing until he is returned to service."**

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.

Claimant J. Barragan held seniority as a Laborer with a June 6, 1990 service date, when the events leading to his termination occurred.

On September 15, 1993, the Carrier sent a letter to Claimant Barragan in which he was advised that he had "taken a leave of Absence other than as prescribed by Schedule Rules and have forfeited your seniority * *." By letter dated September 23, 1993 to the Carrier, General Chairman Mark S. Wimmer requested an unjust treatment Hearing on behalf of Claimant Barragan.

The unjust treatment Hearing was held on October 8, 1993. On October 19, 1993, the Carrier sent General Chairman Wimmer a letter in which it concluded that Claimant Barragan "took a Leave of Absence other than as prescribed by Schedule of Rules, and thus forfeited his seniority."

In early April 1993, Claimant Barragan tested positive for alcohol while taking a return to work physical. The Health Services Department instructed Claimant Barragan in April 1993 that an appointment for a "chemical evaluation" was arranged for him on April 12, 1993 so that he could return to work. However, Claimant Barragan failed to show up for the "chemical evaluation" or provide any medical information to the Carrier.

Claimant Barragan said that he did not take the April 12, 1993 evaluation because he "just didn't feel it was the right time." He added that it was "good" for him "to stay home" and attend meetings of Alcoholics Anonymous. Claimant Barragan acknowledged that he "took time off so I could get my head together."

By failing to undergo a chemical evaluation in April 1993, Claimant Barragan chose not to work for the Carrier between April 12 and August 27, 1993. Had Claimant Barragan tested negative during the April evaluation, there was available work for him to do during this period of time. Due to the shortage of Maintenance of Way employees between May and July of 1993, the Carrier was required to hire new employees. It is undisputed that between April 12, 1993 and August 27, 1993 Claimant Barragan did not request, nor was he granted a leave of absence by Carrier.

On August 27, 1993 Claimant Barragan said that he called Manager of Health Services Rochelle Burgess to find out what he needed to do in order to return to work. He went on to state that Ms. Burgess told him that she could not set up another appointment for an evaluation. Claimant Barragan added, in effect, that she told him she would pass on his request to the Medical Examiner so that he could decide "what he wants to do."

Claimant Barragan's account of his August 27 telephone discussion is at variance with the testimony of Ms. Burgess. In response to her inquiry about whether he "followed up" with the April evaluation, Claimant Barragan told her he had not done so. She said that he told her he did not feel an evaluation would be held "at this time." According to Ms. Burgess, the Claimant related that he has had many evaluations, that he has been an in-patient and out-patient many times, and he has been attending AA meetings. She said that he told her that he continued to drink, but he feels he has "it [his alcoholism problem] under control." By Ms. Burgess' account, Claimant told her that "he was not interested in another evaluation."

Contrary to Claimant Barragan's testimony that Ms. Burgess told him that she had to seek approval from the Medical Examiner to have him evaluated, she said that she has the authority to arrange an appointment for him to be evaluated. She offered to set up an appointment for Claimant Barragan but, as Ms. Burgess said, "he did not want it."

The Board is persuaded by the testimony presented by Ms. Burgess. While giving testimony at the unfair treatment Hearing, she consulted her notes during her August 27 telephone discussion with Claimant Barragan. Her notes confirmed that he told Ms. Burgess that he did not feel an evaluation would be helpful to him at the time.

Ms. Burgess' reference to her notes is in sharp contrast to Claimant Barragan's testimony that he had called the Union immediately after his telephone discussion with her. He said that his account of his discussion with Ms. Burgess was documented by the Union. However, no such documentation was presented during the unfair treatment Hearing.

Moreover, on September 10, 1993 Ms. Burgess sent a letter to Claimant Barragan, which, in relevant part, she stated "As of August 27, 1993, you have not complied with the request to have an evaluation done. You also told me that you did not

plan to have it done." Claimant Barragan said that soon after he received Ms. Burgess' September 10, letter, he contacted the Union. However, no evidence was presented at the unfair treatment Hearing that Claimant Barragan or the Union contacted Ms. Burgess or wrote to her in order to refute what she had written to him in her September 10, 1993 letter.

In accordance with Rule 17 (a) of the Agreement, an employee may be granted a leave of absence but in no case for a period longer than six months. The record establishes that Claimant Barragan did not request a leave of absence; nor was he granted such leave.

Rule 17 (e), in relevant part, provides that "an employee accepting a leave of absence other than as specified in preceding sections (a) * *" will forfeit seniority rights. The Rule is self executing. On his own initiative, Claimant Barragan went on a leave of absence other than as specified in Rule 17.

The burden of proof is on the Organization to prove that Claimant Barragan has been unjustly treated. Clearly, the Organization has failed to satisfy its burden.

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 10th day of June 1997.