

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33448
Docket No. MW-34527
99-3-98-3-167**

The Third Division consisted of the regular members and in addition Referee John M. Livingood 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. W. Medley, by a letter dated May 16, 1996, for alleged failure to report for duty (System Docket MW-4385).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority and all other rights unimpaired and he shall be compensated for any wage loss suffered.”**

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, an employee of the Carrier with a seniority date of June 30, 1961, was advised by letter dated May 16, 1996, that due to his failure to return to duty the Claimant "forfeited all seniority" pursuant to Rule 28(b).

"Rule 28 - Absent Without Permission

(a) An employee unable to report for work for any reason must notify his supervisor as soon as possible.

(b) Except for sickness or disability, or under circumstances beyond his control, an employee who is absent in excess of fourteen (14) consecutive days without receiving permission from his supervisor will forfeit all seniority under this Agreement. The Employee and the General Chairman will be furnished a letter notifying them of such forfeiture of seniority. The employee or his representative may appeal from such action under Rule 27, Section 3."

The Claimant apparently suffered an injury on January 18, 1996 and was off work since January 19, 1996. On March 6, 1996, the Carrier's Senior Health Services Manager advised the Claimant that he was medically qualified to return to work, asserting that such was "based on a medical release" by a Conrail "fee for service physician," and on "a complete review" of his medical file by the Carrier's Medical Director; a MD-40 was attached and signed by the Conrail Medical Director. The Claimant provided his former Supervisor a note dated March 15, 1996, from his personal physician, stating that the Claimant was "still under treatment for back pain" and that the Claimant was "in pain & is still not able to work." On March 29, 1996, the Division Engineer advised the Claimant that he was qualified "to return to work full duty effective 3/29/96," the same day, stating that the Carrier's Medical Director did have access to the medical information provided by the Claimant's personal physician; a second MD-40 was attached and signed by the Carrier's Medical Director. On April 19, 1996, the Division Engineer sent another letter to the Claimant that was identical to the March 19, 1996, letter except for the letter's date. On May 16, 1996, the Division Engineer wrote the Claimant advising him that "based on Rule 28(b)" he had forfeited all his seniority because he had failed to report for duty.

The Organization asserts that the Carrier misapplied Rule 28 (b) in terminating the Claimant's seniority in that they "were completely aware of the reason he was

absent, i.e., that he had suffered a serious injury to his back while on-duty January 18, 1996 and the Claimant's physician had not yet released him," and that the Claimant's "disabling injury brought him within the rubric of the exception of Rule 28 (b)." Also, the Organization asserts that the Carrier's determination that the Claimant was medically qualified to return to work was made without the benefit of a physical examination or even consultation with the Claimant's treating physician. In support of its position, that the Carrier cannot require the Claimant to return to service until such time as his personal physician releases him for duty, the Organization cites on-property Third Division Awards 31534, 31954, and 32569. In support of its position that Rule 28(b) is intended for "walkaway" employees, and that the Carrier has misapplied the Rule to the Claimant whose status the Carrier was well aware of, the Organization again cites on-property Third Division Awards 31908 and 32567.

The Carrier evidently disputes the facts surrounding the injury, as well as the medical qualifications of the Claimant. In its Submission to this Board, the Carrier asserts for the first time that the "fee for service" physician whom released the claimant for duty did "examine" the Claimant. The Carrier asserts that it has the "sole, unfettered right to determine fitness for duty standards and to ascertain if an individual employee in fact possesses the requisite physical and mental ability to perform service. In support of its position, the Carrier offers two off-property awards, Third Division Awards 15367 and 25417, acknowledging that these and similar Awards concern instances where the Carrier disqualified an employee from performing services rather than determining that an employee was qualified to perform service contrary to the employee's personal physician.

The Carrier attempts to rebut the Organization's position by arguing that the Claimant had the responsibility to come forward with medical information that he believed would support his contention that he was disabled, and that information supplied on appeal was too late to be considered. Also, the Carrier attempts to distinguish Third Division Award 31908 asserting that in that case "the record was unclear" and in this case "there is no doubt that no exception to Rule 28 (b)" applied.

Beyond the arguments, certain facts are undisputed. The Claimant supplied documentation from his personal physician that he was under treatment for back pain and that he was unable to work, the Carrier's determination included neither consultation with the Claimant's treating physician nor a request for further

documentation, and the Carrier was fully aware of the Claimant's status during the period at issue.

After a careful review of the entire record, Board finds that the Carrier improperly terminated the Claimant's seniority under Rule 28 (b).

The Claimant shall have his seniority and all other rights reinstated unimpaired. If the Claimant was released by his personal physician to return to work, prior to his return to work pursuant to this Award, the Claimant will be compensated for such lost wages from the date of such release until he returns to work pursuant to this Award. If the Claimant is not released by his personal physician or otherwise fails to return to active service, there will be no monetary relief attached to this Award.

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 23rd day of August 1999.