

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36170
Docket No. MW-35767
02-3-99-3-751**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company (Western Lines))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to notify Mr. James A. Herrington, Jr., that his seniority and employment relationship were being terminated under Appendix R (Carrier's File 1145325 SPW).
- (2) As a consequence of the violations referred to in Part (1) above, Mr. James A. Herrington, Jr., shall be ‘ . . . reinstated to his respective assigned position, that his seniority and all other contractual rights be restored unimpaired, that he be compensated net wage loss suffered, which shall be sixty (60) days retroactive from the date of this claim.’”

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.

The claim herein challenges the termination of the Claimant's seniority and employment relationship pursuant to Appendix R of the Agreement. Appendix R reads, in pertinent part, as follows:

"In connection with the application of Rule 45 of the current agreement, this will confirm our understanding reached in conference today that to terminate the employment of an employee who is absent from duty without authority, the Company shall address such employee in writing at his last known address, by Registered or Certified Mail, return receipt requested, notifying him that his seniority and employment have been terminated due to his being absent without proper authority and that he may within 30 days, if he so desires, request that he be given an investigation under Rule 45 of the current agreement."

The basic facts leading to the claim began in early 1997. The Claimant had some 19 years of service with the Carrier at that time. He lived in a house in Sacramento, California. Although the details of his marriage are not clear from the record, he apparently married a woman residing in Alabama. The Claimant left the Carrier's service to provide care to his wife in Alabama.

The Claimant maintains he applied for and received approval for a leave of absence under the Family Medical Leave Act ("FMLA"). The initial claim also asserts that the Claimant informed Ms. Holm in the Carrier's Human Resources Operations Department of his new address in Alabama. The Claimant apparently rented out his house in Sacramento before relocating to Alabama.

On May 13, 1997, the Carrier addressed the following letter to the Claimant at his Sacramento address:

"As outlined in letter to you dated April 24, 1997, from Ms. Judith A. Holm of Human Resources Operations, you were to return to work on April 28, 1997, after being absent for 12 weeks under the terms of the Family Medical Leave Act. Our records indicate however that you failed to return to work on April 28, 1997, and since that date you have been continuously absent without proper authority through and including this date.

Pursuant to Appendix R of the Agreement between the Carrier and the Brotherhood of Maintenance of Way Employees [sic] you are hereby notified that your seniority and employment have been terminated due to your failure to protect your employment. However, pursuant to Appendix R you may request an investigation under Rule 45 of the Current Agreement within thirty (30) calendar days from receipt of this letter."

The Carrier's letter was sent certified mail with return receipt requested. A copy was also sent to the General Chairman at the time.

The Claimant remained in Alabama until the last week of April 1998 when he returned to Sacramento. During that approximately one-year period of time, the record contains no evidence that the Claimant made contact with the Carrier to extend his leave of absence or for any other purpose whatsoever. The instant claim was filed on May 22, 1998 after he learned of the termination of his former seniority and employment. He did not request an Investigation per Rule 45. Instead, it is undisputed that the instant claim was filed pursuant to Rule 44.

Although the parties' Submissions raise a number of procedural and substantive contentions, the pivotal merits issue is whether the Claimant properly notified the Carrier of his Alabama address. Appendix R requires only that the termination letter be addressed to the last known address.

The Claimant and the Organization contend the foregoing letter was sent to the wrong address in California instead of the correct address in Alabama. In its denials on the property, the Carrier asserted that the Claimant never notified it of a change of address. Thus, the Claimant and the Organization were tasked with the burden of proof to establish that the Carrier was properly notified.

The record contains a statement signed by the Claimant dated September 7, 1999. It reads in relevant part as follows:

"In January 1997, I requested and received a leave of absence from my employer, Union Pacific Railroad. The leave was obtained through proper channels, and as far as I knew, U.P. had my new address in Alabama on record since the papers granting my leave came to that address.

My wife was very ill at the time, and I did not give a lot of thought as to whether my future employment with U.P. was to hinge on someone not having my proper address."

After careful review of this solitary piece of evidence, we are compelled to find that it does not satisfy the burden of proof. First, by its very terms, it does not explicitly state that the Claimant notified the Carrier of his Alabama address at any time; it actually suggests the contrary. Second, although it says his leave papers came to the Alabama address, the leave papers were never produced on the record to show that the Carrier knew of that address. Third, there are at least two ways the papers could have arrived in Alabama without the Claimant having provided the Carrier proper notice of that address: He could have filed a forwarding address with the U.S. Postal Service that would have redirected his mail for a period of time until it expired or the renters of his Sacramento house may have temporarily taken it upon themselves to forward his mail until they tired of the task and discontinued doing so. Finally, if, indeed the leave papers arrived in Alabama as the Claimant says, it is undisputed in the record that they would have notified the Claimant that his FMLA leave expired in April 1997 and he was

expected to return to work on April 28, 1997. Yet it is clear that the Claimant did not seek to extend his leave or take any other action to preserve his employment for nearly one year after his leave ended.

In the overall, the facts of this record appear to be more consistent with the unrefuted assertion contained in the Carrier's July 16, 1998 reply to the initial claim, which was to the effect that the Claimant intended to permanently leave the Carrier's service and seek other employment in a different part of the country.

Accordingly, the record herein does not establish a violation of the Agreement as alleged.

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 20th day of August 2002.