

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 36988  
Docket No. MS-37646  
04-3-02-3-779**

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

**PARTIES TO DISPUTE:** (Jerald Tyus  
(CSX Transportation, Inc.

**STATEMENT OF CLAIM:**

"This is to serve notice, as required by the Uniform Rules of Procedure of the National Railroad Adjustment Board effective May 16, 1994, of my, J. Tyus ID # 519736, intention to file an Ex Parte Submission within 75 days covering an unadjusted dispute between me, J. Tyus 519736, and C.S.X. Transportation involving the following:

I, J. Tyus ID # 519736, am disputing my termination from C. S. X. Transportation dated December 20, 2001. I am disputing the termination based on the following rules as implemented between C. S. X. Transportation and the Brotherhood of Maintenance of Way Employees:

- 1) Rule 25A  
Except as provided in Section 2 of this Rule, employees shall not be suspended nor dismissed from service without a fair and impartial hearing nor will an unfavorable mark be placed upon their discipline record without written notice thereof.
- 2) Rule 26B  
Except for sickness or disability or under circumstances beyond his control, an employee who is absent in excess of fourteen (14) consecutive days without notifying his supervisor

or proper carrier official will forfeit all seniority under this Agreement.

3) Rule 4 Section 3

In part

An employee not in service will be subject to return to work from furlough in seniority order in any class to a fixed ahead guaranteed position in which he holds seniority not requiring a change in residence. If he fails to return to service within ten (10) days from date notified by certified mail to his last recorded address for a position or vacancy of thirty days or more duration [sic].

4) Rule 3 Section 3 C, H

C) In part each furloughed employee shall have the ability to submit application for any advertised position.

H) Except as otherwise provided in this Agreement, it is understood that an employee shall be assigned duties associated with the job class he was assigned by bulletin award.

5) Rule 38A

The parties to this Agreement pledge to comply with Federal and State Laws dealing with nondiscrimination toward any employee. This obligation to not discriminate in employment includes, but is not limited to, placement, transfer, demotion, rate of pay or other forms of compensation, selection for training, lay-off and termination.

6) All disputes should be resolved in a timely manner.

The remedy sought in this dispute is to be returned to service with C. S. X. Transportation with full seniority and full compensation for time missed on gang 5XT5, which I was awarded A-B operator position, starting January 21, 2002 to present."

**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 Claimant argues that the Carrier violated the Agreement when it terminated his employment by notice dated December 20, 2001, without advising him of the date, time, and location of a formal Investigation. He maintains that his employee rights were further violated when he was awarded Position 5XT5 (B Operator) via bulletin and was, thereafter, denied his right to assume the duties of that position.

The Claimant makes the additional charge that because the Carrier waited two years to advise him that he had forfeited his seniority, he is the victim of employment discrimination.

The Carrier points out that on October 31, 1999, without giving any indication that he would be absent – the Claimant failed to report for duty as a Trackman on Force 6NBC. Thereafter, he remained absent from duty; he had no contact with the Carrier and failed to provide evidence of personal illness or circumstances beyond his control.

On December 20, 2001, the Carrier advised the Claimant that because he had been absent from duty in excess of 14 consecutive days without notifying his supervisor, he had forfeited all seniority pursuant to Rule 26 of the Agreement between the Carrier and the Brotherhood of Maintenance of Way Employees.

Rule 26 reads, in pertinent part, as follows:

**“(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 notifying his supervisor or proper carrier official will forfeit all seniority under this Agreement. The employee will be notified by certified mail, return receipt requested, with copy to the General Chairman advising them of such forfeiture of seniority. The employee or his representative may appeal from such action to the carrier’s Highest Designated Labor Relations Officer within thirty (30) days under Rule 25, Section 3.”**

The Carrier is adamant in its position that it behaved reasonably and entirely within the boundaries of Rule 26. It argued that although the time in advising the Claimant of the loss of his seniority was lengthy, it had no adverse affect on his employee rights.

Throughout this dispute, the Claimant was unable to properly make the distinction between disciplinary termination and loss of seniority. The former requires a formal Investigation, advice of the date and place of such formal Investigation, as well as the nature of the charges. Loss of seniority, on the other hand, may be affected without a formal Investigation, resulting from the application of Rule 26.

Labor Agreements are negotiated by Labor Representatives and Management Officials. Knowledge of the on-property Agreement is imputed to both parties. The Claimant should have been aware of the significance of Rule 26. His failure to contact his employer for more than two years with information as to his whereabouts, and his failure to offer a plausible explanation as to why he had remained out of touch for such an extended period of time (such explanation could include illness, disability or reasons beyond his control) constituted a voluntary breach of contract and requires the conclusion that the Claimant terminated his own employment. Stated differently, the Claimant simply failed to justify his two-year unexplained absence. The exceptions in Rule 26 have not been met under the facts and circumstances present in this case.

The Claimant further complained that the Carrier, somehow, behaved discriminatorily and was in violation of the Agreement when it waited more than two years to inform him that his name had been removed from the seniority roster as a result of the self-executing provisions of Rule 26. The Board is satisfied that the onus for keeping in touch is more on the employee than on the Carrier.

In an on-property appeal, the Brotherhood of Maintenance of Way Employees argued that because the Claimant had been administratively awarded a job (though he never assumed the duties thereof) Rule 26 was inapplicable. The Board is not persuaded by that argument and views the assignment as a simple administrative error. In any event, the very nature of the self-executing Rule means that the notification/confirmation of termination of seniority follows the actual loss of seniority. The fact that notification/confirmation may, sometimes, be delayed does not suspend the effective date of self-termination to coincide with the notification date. The date of self-termination is triggered by Rule 26 and remains in full legal effect unless overturned on appeal.

**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 12th day of May 2004.