

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37602
Docket No. MW-37351
05-3-02-3-376**

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(BNSF Railway Company (former Burlington
(Northern Railroad Compnay)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it removed Mr. S. J. Araujo from the seniority roster and closed out his record as of May 1, 1997 (System File C-97-R030-1/MWA 97-8-21AX BNR).**
- (2) As a consequence of the violation referred to in Part (1), Mr. S. J. Araujo shall now ‘ . . . have his seniority restored and be paid for all lost wages incurred.’”**

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 established seniority as a Sectionman on May 23, 1978 and subsequently was promoted and established seniority as a Track Foreman and Assistant Track Foreman on May 15, 1991. The Claimant additionally established seniority as a Group 3 Machine Operator on July 15, 1992.

On April 16, 1997, pursuant to Rule 9 of the Agreement, the Claimant was sent a recall letter, via certified mail, return receipt requested, instructing him to report to the position of Relief Track Inspector at Denver, Colorado. The Claimant's wife, Mary Araujo, signed for the certified letter on April 18, 1997, the record shows. The parties do not disagree that, according to Rule 9, the Claimant had ten calendar days from the date of his receipt of the certified letter to report for the assignment. The relevant portion of Rule 9 is set forth, as follows:

"RULE 9. RETENTION OF SENIORITY BY LAID OFF EMPLOYES

When an employe laid off by reason of force reduction desires to retain his seniority rights, he must within ten (10) calendar days of date so affected file his name and address in writing on the form supplied for that purpose. . . . When new positions of more than thirty (30) calendar days' duration are established, or when vacancies of more than thirty (30) calendar days' duration occur, employes who have complied with this rule will be called back to service in the order of their seniority. Failure to file his name and address or failure to return to service within ten (10) calendar days, unless prevented by sickness, or unless satisfactory reason is given for not doing so, will result in loss of all seniority rights. . . .

NOTE: 1. Employees called back to service in accordance with provisions of Rule 9 must report at starting time of shift to which called within ten (10) calendar days."

The Carrier's decision to terminate the Claimant's seniority by reason of his failure to report for the Relief Track Inspector position within the ten-day period specified above was largely based on the statement provided by Roadmaster G. M. Shymanski, quoted in its entirety, as shown below:

“Topic; Claim of S. J. Araujo 0874 6,25,97

After I recalled Mr. Araujo the first communication I received from him was a voice mail message after his ten days were up requesting four weeks vacation. He did not mention any medical problems at that time. When I talked to the call desk, they told me that Mr. Araujo had given several different excuses as to why he would not report for work. I then called Mr. Araujo and informed him that his request for vacation was denied and he was expected to be at work. At that time for the first time he informed me that he was having problems with depression.

Because Mr. Araujo did not make an honest attempt to contact and explane (sic) to me his circumstances I called the bid desk and informed them that Mr. Araujo had failed to protect his assignment.

Sincerely,

**Gene M. Shymanski
Roadmaster Denver Co.”**

In his June 16, 1997 claim, submitted on the Claimant’s behalf to the Manager Maintenance Support, the General Chairman requested reinstatement of the Claimant’s seniority and payment for all lost wages and benefits. According to the Organization, the Claimant contacted the Roadmaster to inform him “that he did not feel qualified to handle this assignment.” The Organization averred that the Claimant needed the vacation time in order to schedule an appointment with his personal physician “to evaluate his medical reasons for not filling the assignment.”

The Organization maintains that a May 5, 1997 letter from P. L. Thompson, MD, to Roadmaster Shymanski, corroborated the Claimant’s assertion that he could not perform the duties associated with the Relief Track Inspector position to which he was recalled, and that pursuant to the “medical exception” provision within Rule 9, the Claimant was unable to cover the assignment “for satisfactory reason of illness.” Indeed, the Organization points out that, according to that letter,

the Claimant had been recently diagnosed as a diabetic and was "controlling his diabetes with much difficulty."

Additionally, the Organization states that, according to Dr. Thompson, when he examined the Claimant on May 2, 1997, the Claimant was upset and depressed regarding being required to work as a Track Inspector or Foreman. The Organization furthermore points to that portion of Dr. Thompson's letter, which states:

"... He said that he had bid for these jobs previously, but because of the responsibilities of them he no longer wishes to take this responsibility and when he takes the responsibility it creates a great deal of anxiety and depression and makes it more difficult for him to control his diabetes. Mr. Araujo feels that the job of track inspector and foreman are too stressful for him and I agree. I respectfully request that he be allowed to step down and remain as a track laborer."

The Manager Maintenance Support denied the claim by letter dated July 7, 1997. The reasons for the claim denial essentially were drawn from Roadmaster Shymanski's statement, quoted above. The Manager's response emphasized that (1) after having been recalled to the position of Relief Track Inspector, the Claimant contacted the Roadmaster after his ten days had passed; (2) the Claimant's request was for four weeks of vacation with no mention of any medical problems; (3) the Call Desk had informed Roadmaster Shymanski that the Claimant "had given the Call Desk various excuses why he would not report to the . . . position," and (4) the Claimant did not mention having problems with depression until after Shymanski had told him his vacation request was denied and he was "expected to report." (Emphasis added)

The Organization emphasized in its August 21, 1997 letter of appeal that, from its review of Dr. Thompson's letter, the Claimant's medical condition was such that he "should not be put into a position with the responsibilities such as a Track Inspector so that he would be better able to cope with his medical condition." In its subsequent appeal, the Organization further stressed that Dr. Thompson's written diagnosis substantiated the Claimant's inability to perform the duties of Relief

Track Inspector "for reason of sickness." It essentially thus argued that, given the appropriate documentation of the Claimant's sickness, his ensuing loss of seniority was not justified by the terms of Rule 9.

Unable to reach a mutual resolution of this claim during the on-property handling of this matter, the dispute was listed for hearing before the Board. We carefully reviewed the entire record before us, as well as the precedent Awards submitted by the parties in support of their respective positions. We hold for the foregoing reasons that the claim must be denied.

The Board initially notes that there is nothing in the record which establishes that the Claimant was recalled in error to the position of Relief Track Inspector. We observe that the documentary evidence confirmed that the April 16, 1997 recall letter was sent to the Claimant's correct address of record and, on April 18, 1997, was accepted by his wife, as evidenced by her signature on the certified mail receipt. Thus, we find that, pursuant to Rule 9, the Claimant's recall was proper, and he had a duty to respond to the recall within ten calendar days of his receipt of the recall notice.

The June 25, 1997 statement from Roadmaster Shymanski is probative evidence of the Claimant's failure to report for the assignment within ten days, or alternatively, to contact him to discuss his supposed "medical reason" for not reporting, again, prior to the expiration of the ten-day period. As the Carrier pointed out, Rule 9 is a "self-executing" Rule which, as the Board held in on-property Third Division Award 29516, "... triggers the forfeiture of seniority rights as a result of an employee's failure to act within the requisite time period." See also Case 25 of Public Law Board No. 4381, involving these parties, in which the Board held:

"The ten-day provision of Rule 9 is self-actuating. This Board finds no mitigating circumstance which should serve to stay the self-executing language of Rule 9. The Organization has not convincingly established that the Carrier has been inconsistent in the application of the time limit requirements of Rule 9, or that the 'clarity' of that rule has been diminished by the Carrier's past actions."

Returning to the content of Roadmaster's Shymanski's statement, we find no reason to doubt its veracity especially given the lack of any specific rebuttal from the Claimant. Contrary to the Organization's contention, we find no evidence that Shymanski's statement was motivated by "self interest," or that Shymanski had an "axe to grind" against this specific Claimant. This case stems from the Claimant's failure to comply with the clear requirements of Rule 9. As the Board held in Case 25, supra, given the Claimant's length of service in the Maintenance of Way craft, the Claimant "knew or should have known of the Rule 9 procedure, including the time restrictions."

With regard to whether mitigating circumstances existed that somehow prevented the Claimant from arranging a doctor's appointment in a timely manner, the Board finds that the record is devoid of any evidence showing that, for reasons beyond the Claimant's control, he was unable to secure an appointment until after the ten-day deadline. Moreover, without undertaking any findings as to whether the Claimant would have been entitled to a medical leave of absence if he had requested one prior to or during the recall period, there simply is no evidence that the Claimant ever made any such leave-of-absence request, as the Carrier pointed out. We further find no probative evidence that the ten-day period was too little time for the Claimant to have obtained an appointment with his physician.

Again, there is no evidence that the Claimant tried to schedule a timely appointment, but could not do so, for reason beyond his control. Moreover, there is no evidence that the Claimant even sought permission to extend the reporting deadline in order to obtain the necessary documentation so as to substantiate his claim of "medical unfitness" for duty. As previously noted, the record makes plain that (1) the Claimant was not seen by Dr. Thompson until May 2, 1997, and (2) the Claimant did not raise any medical issue with the Roadmaster until after Shymanski had informed him that his vacation request was being denied.

We agree, therefore, that given the line of precedent cited by the Carrier, and the clear language of Rule 9, it was not obligated to accept the Claimant's "after the fact statement" in the form of Dr. Thompson's letter "disqualifying" the Claimant. The Board is convinced that, even if we were to concede that the Claimant could not have performed the duties for medical reasons, the manner in

which the Claimant sought to obtain a medical excuse was not consistent with the requirements of the process, we hold.

The Board also considered the Organization's contention that, by stating that "claimant should have been at work," the Roadmaster essentially "was willing to waive the ten-day deadline." We find from the record that such argument does not seem to have been advanced during the parties' on-property handling of this matter. Thus, at this juncture, the Board has no authority to address what now appears to be a speculative, new argument raised after the Organization's filing of its Notice of Intent to file a Submission before the Board.

We thus conclude that the Claimant's failure to report within the ten-day period specified in Rule 9 was firmly established in the record. There is insufficient evidence to prove that, at the time of the recall, he was "prevented by sickness" from reporting, we stress. Moreover, as noted above, the Claimant's failure to timely furnish a satisfactory reason for not reporting was also proven. The Carrier's decision to proceed with the administrative termination of the Claimant's seniority was justified under these facts, we rule. There simply is no evidence that the Carrier's application of Rule 9 as regards this particular Claimant was arbitrary, capricious or unfair, we hold.

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 22nd day of September 2005.