

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37816
Docket No. MW-38163
06-3-04-3-82**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(National Railroad Passenger Corporation (Amtrak) –
(Northeast Corridor

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal (seniority termination) of Mr. T. Peterson under letter dated December 31, 2002 in connection with his leave of absence and alleged failure to follow instructions contained in a March 31, 2001 letter was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (System File NEC-BMWE-SD-4271 AMT).**
- (2) The claim referenced in Part (1) above, as appealed by Vice Chairman K. Hussey on March 31, 2003 to Manager R. Denzel shall be allowed because Mr. Denzel failed to answer the claim and appeal.**
- (3) As a consequence of the violation referred to in Part (1) above, Mr. T. Peterson shall now be restored ' . . . to service with all seniority rights unimpaired and compensate claimant for all lost hours from December 24, 2002 until such time as claimant is restored 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.

This claim involves the self-invoking termination provisions of Rule 21-A, Absent Without Permission, and 18(f) Reduction In Force-Retaining Rank on Roster, as well as the procedural provisions of Rule 64(b) concerning the failure of the Carrier to timely disallow a claim.

The record reflects that the Claimant, a Trackman since April 1997, was absent from May 2000 to June 2001 for medical reasons. In February and March 2001 the Carrier contacted the Claimant by mail requesting that he furnish medical documentation to support his absence, and, after receipt of what it deemed to be insufficient documentation, it scheduled a return-to-work physical. The Claimant returned to service in June 2001 and worked until his position was abolished on November 21, 2001. The Claimant's failure to exercise seniority resulted in his voluntary furlough.

By letter dated June 24, 2002 the Claimant was notified that he was required to file furlough papers and that his failure to do so would subject him to termination. Copies of the necessary forms and instructions to return them by July 8, 2002 were included. The Claimant refused delivery of this letter. By letter dated July 11, 2002 the Claimant was informed that his failure to comply with these instructions resulted in his being considered as having resigned. After three attempts at delivery of this letter, it was returned as unclaimed.

On December 24, 2002 the Claimant sent a handwritten note to his manager indicating that he was informed by the Organization that he had been terminated for a Rules violation, but that neither had received notice of such action. The Claimant requested clarification of the situation. By letter dated December 31, 2002 the Carrier responded to the Claimant concerning the reasons for his termination under Rule 21-A, setting forth facts from a prior file relating to the events occurring prior to his return to work in June 2001.

By letter dated March 31, 2003 the Organization outlines various discussions and includes correspondence exchanged in an effort to clear up the confusion caused by reference to a termination date prior to when the Claimant actually returned to work in June 2001, asserts that the December 31, 2002 termination was in error, and requests that the situation be corrected by returning the Claimant to service with seniority rights unimpaired and compensation. Therein the Organization notes that it was advised that the Claimant's file was being turned over to the Law Department due to the Claimant being represented by an attorney.

The next correspondence on the property is a claim and appeal filed by the Organization dated June 19, 2003 requesting a conference regarding the Claimant's improper termination under Rule 21-A. In this letter the Organization refers to its March 31, 2003 correspondence as an appeal in accordance with Rule 74 of the Agreement, and notes that the Carrier's failure to timely answer it requires that it be allowed.

The Carrier's denial dated August 12, 2003 reviews the Claimant's work and absence history, stating that the Claimant was absent from November 21, 2001 on without filing the required furlough papers or medical documentation sufficient to justify his absence, despite having been instructed to do so and refusing such instructions on two separate occasions, and that he was properly considered as having resigned under Rules 18(f) and 21-A. The Carrier notes that the Claimant's first attempt to contact it concerning his extended absence was in December 2002, after more than one year of absence, and after learning of the termination of his insurance coverage, despite the Claimant's knowledge of his responsibilities to keep the Carrier advised of his status. The Carrier's denial asserts that the Organization's March 31, 2003 letter did not constitute a valid appeal under the Agreement, and contends that it cannot be financially liable for its failure to recall the Claimant under the provisions of Rule 18(f).

The Organization initially argues that this claim is payable as presented because the Carrier failed to timely respond to it in writing as required by Rule 64(b) citing Third Division Awards 17085, 20900, 21755, 27640, 28403, 30596, 30974 and 36047. It asserts that the merits of the claim should not be considered in light of this procedural defect, relying on Third Division Awards 22682, 22710 and 23265. With respect to the merits, the Organization contends that the Carrier knew that the Claimant was receiving medical assistance throughout the period involved as a result of ongoing discussions between the parties in 2002 concerning outstanding issues caused by the adverse treatment the Claimant received from the Engineering Department, a fact not

rebutted by the Carrier. The Organization avers that only after the Carrier's position set forth in its December 31, 2002 letter concerning the reasons for termination were proven wrong did it raise a new defense premised on Rule 18(f) which must fail because the Carrier waited more than seven months after the Claimant's furlough to question his compliance with that Rule.

The Carrier admits that there was substantial confusion in the handling of this case, but contends that the Claimant was properly considered as having resigned in July 2002 under the self-executing provisions of Rule 21-A, citing Third Division Awards 36535, 26931, 27228, 27777, 28261, and 28308. It notes that the Claimant, by his own actions, forfeited any and all rights to employment and compensation under the Agreement by not filing the required furlough papers or accepting delivery of instructions concerning his continued employment. The Carrier states that under the Agreement, a Rule 21-A resignation may only be overturned if the employee presents evidence of incapacitation, which is absent in this case and which forecloses appeal under Rule 74. The Carrier asserts that a valid Rule 64 claim could not be presented on the Claimant's behalf in March 2003 because he was no longer an employee, and notes that the March 31, 2003 letter just took issue with the Carrier's December explanation to the Claimant of his reasons for termination, and was not a claim filed under either Rule 64 or 74, so it did not require a response within 60 days, citing Third Division Awards 24255, 24836, and 27495.

A careful review of the record convinces the Board that the Organization's procedural argument must fail. There is no doubt that there is confusion concerning both the communicated cause for the Claimant's termination as well as what the Carrier may have known from ongoing discussions concerning the Claimant's condition. The Organization argued that such discussions occurred in 2002 and were related to allegations of unfair treatment, referring itself to its March 31, 2003 letter as an appeal under Rule 74. However, the record mainly contains reference to communications in 2003 after the issuance of the Carrier's December 31, 2002 letter explaining the cause of the Claimant's termination under Rule 21-A. Because the Organization did not clearly file a claim under Rule 64 until arguably June 19, 2003, the Carrier's failure to respond to its letter of March 31, 2003 within 60 days under Rule 64(b) is not fatal to its case as it was when claims were clearly filed under Rule 64 in the cases relied upon by the Organization.

With respect to the merits, the Board is of the opinion that it was the Carrier's December 31, 2002 letter setting forth the reasons for the Claimant's termination that created the initial confusion in this case, and that such reasons for invoking Rule 21-A

were erroneous. It was not the Claimant's failure to follow instructions in the March 31, 2001 letter that was the basis for considering him as having resigned because the Claimant returned to work thereafter from June to November 2001. His status as an employee was not in question at that time. It was only after the Organization pointed out the fallacy of the Carrier's position that it put forward the Claimant's failure to comply with Rule 18(f) as the basis for the invocation of Rule 21-A. The seven month hiatus in applying a Rule meant to give the Carrier information within ten days is suspect.

However, the facts surrounding the Claimant's failure to comply with the requirements of filing his furlough papers appear to be undisputed, as is his failure to accept delivery of the letters demanding compliance with Rule 18(f) or risk being considered as having resigned. That Rule makes clear that the Carrier cannot be held financially liable for failing to recall the Claimant during a time period when he has not notified the Carrier of his interest in recall. Under all of the circumstances of this case, the Board concludes that the Carrier violated the Agreement by terminating the Claimant's seniority for the reasons cited in its December 31, 2002 letter. In the absence of the submission of medical evidence that the Claimant was fit to return-to-work at any time during the claim period, or that he filed the appropriate furlough papers, no monetary remedy is deemed appropriate. The Claimant shall be placed back on the roster and his seniority and furlough status restored.

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 21st day of June 2006.