

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39286
Docket No. SG-39145
08-3-NRAB-00003-050606
(05-3-606)

The Third Division consisted of the regular members and in addition Referee Joyce M. Klein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of D. W. Berndt, for compensation for all time lost with his benefits and seniority restored and that he be returned to his previous position, account Carrier violated the current Signalmen’s Agreement, particularly Rule 62, when it failed to return the Claimant to service after a hearing held on October 15, 2004, under the provisions of Rule 62D. Carrier’s File No. 1410534. General Chairman’s File No. N 62 497. BRS File Case No. 13225-UP.”

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 suffered an on-duty injury on April 20, 2004, was taken for medical attention and had a full duty release. Thereafter, the Claimant submitted a request for a leave of absence on June 7, 2004.

After consultation with the Carrier's Health Services Department, a letter dated June 25, 2004 was sent to the Claimant seeking updated medical information. On June 28, another letter was sent advising that a doctor's appointment had been scheduled for him. The Claimant provided some medical information as required by the initial letter, but he did not attend the doctor's appointment. After a review of that information by the Health Services Department, on July 14, 2004, the Claimant was asked to provide a copy of an MRI of his brain dated April 24, 2004 and the July physician's office notes from his doctor. This letter also indicated that his failure to provide this information by July 30, 2004 "may result in disciplinary action for failure to comply with instructions." By letter dated July 21, the Claimant was advised of another doctor's appointment that had been scheduled for him. That letter provided, "this is my second notice that you are instructed to attend and cooperate in the following examination." The Claimant did not reply to either letter and did not attend the doctor's appointment. By letter dated August 9, the Claimant was again asked for additional information including physicians' notes for June, July, and August and MRI reports, diagnostic reports and therapy reports. This letter also indicated that failure to provide the information might result in disciplinary action. By letter dated August 10, the Claimant was again instructed to attend a medical appointment that had been scheduled for him. This letter provided "you have failed to comply with instructions as of this date. If you fail to attend this appointment, you will be considered insubordinate and appropriate action will be taken under the Railroad's UPGRADE Policy." The Claimant did not reply to either letter and did not attend the doctor's appointment.

By letter dated September 28, 2004 the Carrier recounted each of the previous requests for medical information and medical conditions examinations that had been scheduled for the Claimant. The letter provided that the Claimant "failed to provide any of the requested information and failed to attend any of the scheduled examination appointments." The letter advised that the Claimant would

be considered absent without authority. The Claimant was provided until October 8, 2004 to either provide the requested medical information or Rule 62(d) which provides as follows, would apply:

“Employees absenting themselves from their assignments for five (5) consecutive working days without proper authority will be considered as voluntarily forfeiting their seniority rights and employment relationship. Such employees may make request for a hearing relative to their forfeiture of seniority to show justifiable reason as to why proper authority was not obtained. Said request for hearing must be made within ten (10) calendar days from the date of removal from service.”

The Claimant did not provide the requested information but did appear for duty with a doctor’s note dated October 4, 2004 that provided “may return to work without restrictions.” By letter dated October 6, the Claimant’s attorney provided some medical records to the Carrier and indicated that the Claimant would supply the rest when he received them.

The Carrier asserts that it had no choice but to terminate the Claimant because he voluntarily forfeited his seniority when he was absent without authority and did not provide the necessary documentation to the Carrier. The Carrier points out that the Claimant’s supervisor sent six separate letters seeking medical documentation and scheduling appointments with a physician. The Carrier emphasizes that the Claimant did not provide the requested medical documentation, did not attend the doctor’s appointments, and did not contact his supervisor to provide an explanation or request that an appointment be rescheduled. Pursuant to Rule 62(d) the Claimant was provided a Hearing to show a justifiable reason for his absence without proper authority and when he was unable to do so, was terminated. The Carrier emphasizes that Rule 62(d) is self-executing and once an employee is absent from work for five days without proper authority, the employee automatically forfeits their seniority rights and employment relationship.

The Organization maintains that the Claimant was on a medical leave of absence and was under a doctor’s care and was thus not absent without authority.

The Organization asserts that the Carrier was well aware of the Claimant's illness. It argues that the Carrier never identified the five consecutive working days on which the Claimant was absent without authority rendering the charges vague. The Organization maintains that the Claimant did provide the Carrier with adequate medical information to extend his medical leave of absence. It maintains that the Claimant provided the Carrier with sufficient documentation to justify a leave of absence until he was released to return to work.

In this case, the Claimant suffered an on-the-job injury after which he was on an unofficial leave. On June 7, 2004, the Claimant applied for a leave of absence and the Carrier's Health Services Department sought medical documentation as well as an examination by a physician selected by the Carrier. Despite three requests for medical documentation on June 25, July 14, and August 9, 2004, the Claimant did not respond to the Carrier's requests. Similarly, the Carrier set up appointments with its physician and notified the Claimant of those appointments on June 28, July 21, and August 10, 2004, but the Claimant did not attend any of those appointments. Indeed, the Claimant did not provide requested medical information until after receipt of the September 28, 2004 letter advising that the Carrier considered him to be absent without authority pursuant to Rule 62(d). The Claimant failed to explain or provide a valid reason for his failure to provide the medical documentation or to attend any of the three scheduled doctor's appointments. The Claimant was not on a valid medical leave of absence because he never attended the medical appointments or provided the Carrier with the documentation necessary for the Carrier to verify his medical condition. It is not unreasonable for the Carrier to seek documentation in support of a request for a medical leave of absence. Nor is it unreasonable for the Carrier to make a determination as to the Claimant's medical status and his ability to safely perform his job duties. The Claimant forfeited his seniority and employment status not because he was injured and on medical leave, but because he failed to respond to the Carrier's repeated attempts to ascertain his medical status. Accordingly, the claim is denied.

Form 1
Page 5

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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 21st day of July 2008.

Labor Members Dissent
Third Division Award 39286
Docket No. SG – 39145
Referee: Joyce M. Klein

For reasons hereinafter set forth the undersigned dissent from Award 39286 and conclusions of the majority as therein stated under the head of "Findings" which conclusions are, for the record erroneous.

As noted in the Findings the Majority stated that the Claimant was not on a medical leave of absence, and the Carrier was unaware of the reasons why Claimant was absent. It is obvious that the majority failed to review the entire record. The fact is that following an injury Carrier's own officers personally transported the Claimant to the hospital. The Carrier was well aware of Claimant's reasons for being absent; in fact the Claimant was initially removed from service at the discretion of the Carrier.

The Carrier had been timely notified by Claimant personal Physician that he was under his doctors care and was unable to return to work until he was released. At that juncture the Carrier authorized the Claimant's medical leave of absence due to the fact that the Claimant received sickness benefits from the Railroad Retirement Board, which does not provide sickness benefits to employees until the Carrier approves medical leave. For the Carrier to now claim that Claimant was not granted a medical leave of absence is ludicrous.

Notwithstanding, Agreement Rule 62 – Leave of Absence, precludes the Carrier from refusing to grant a leave of absence in cases of sickness. **"Employees will be granted leaves of absence in writing when they can be spared without interference to the service, but not to exceed six months within any twelve month period, except in cases of sickness..."** (Emphasis added)

Carrier's only plausible argument was that the Claimant should be required to subject himself to a back to work physical. The Organization does not reject that position, however, his doctor did not release the Claimant and therefore, a back to work physical was premature and unwarranted. The Organization has taken exception to Carriers attempt to harass the Claimant to schedule appointments with its medical department. There is absolutely nothing in the Agreement that would require the Claimant to subject himself to this obligation.

The facts of record clearly indicate that during Claimants leave he provided substantial medical information that was available to him at the time. However, the Carrier continually required that additional information be provided by October 8, 2004. In a letter dated October 6, 2004 Claimant's attorney provided some medical records and

indicated that the Claimant would supply the rest when he received them. A short two days later the Carrier charged the Claimant with failure to protect his assignment for a period of five (5) consecutive days and therefore voluntarily forfeited his seniority rights.

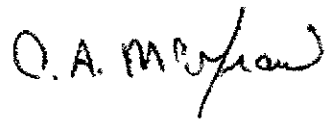
The fact is that the Claimant did not fail to protect his assignment because he was on medical leave of absence and was unable to work. The five (5) day stipulation does not apply to medical leaves of absence. The Organization questioned Carrier's contention that the Claimant was absent without authority for five days. In response the Carrier simply advised the Organization to "pick five days."

Notwithstanding the foregoing, the Organization during the on-the-property handling noted that the controlling issue involved the principle of sanctioned medical leave of absence. The Claimant was removed from service by the Carrier due to an on the job injury, thereafter, the Carrier advised the Railroad Retirement Board that he was medically restricted from performing service. The Carrier acknowledged that the Claimant had provided some medical information, however, asserted that it was not sufficient. The Claimant's attorney advised that the Claimant would supply additional information upon receiving it from his doctors. This offer was rejected by the Carrier and argued that the Claimant voluntarily forfeited his seniority.

The aforesaid "Findings" and award are arbitrary. The Carrier with approval of the majority has undertaken an invasion of employee rights to seek medical attention without retaliation. Such action does violence to the valuable rights acquired by contract with Carrier's employees.

The Award and Findings should be ignored in future cases.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "C.A. McGraw". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

C.A. McGraw, Labor Member