

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41094
Docket No. MS-41500
11-3-NRAB-00003-110035**

The Third Division consisted of the regular members and in addition Referee Martin Fingerhut when award was rendered.

PARTIES TO DISPUTE: (Jay N. Bell
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“In 2007, during the month of June, I was scheduled to report to Alabama for work. Due to an unfortunate decision on my end, I was unable to report and called my supervisor, which is not stipulated in my contract, to let him know that I would not be in. I later contacted my EAP, Terreance Glamp, in the allotted time for him to take me out of service. The reason for my absence was due to a relapse. I was under the care of Cornerstone of Recovery for drug and alcohol abuse. I entered into the program August 2006 and in 2007 my EAP and staff at Cornerstone allowed for me to return to work while still under their care and supervision. Due to my relapse, Cornerstone released me against medical advice (AMA); however, with the recommendation of my EAP, I returned back to Cornerstone in August 2007. During this time is when I found out that Mr. Glamp did not take me out of service and my job had been compromised. Mr. Glamp took it upon himself to change the contract without notice to me. Since 2007 I have been working with my union representative Jim Knight trying to get someone to hear my case, which has not been done to date. Mr. Glamp also told my union representative and myself that he would tell the truth about what happened; however, he failed to do so when asked. The question is Rule 26(b): Except for sickness. Drug and alcohol addiction is a sickness. Like I said earlier, I was still in the care of Cornerstone of Recovery while working. I have been in the program since 2004 and have always called my EAP to take me out of service; this is what my contract dictates that I do and Mr. Glamp has always done until now.

I feel that I should be allowed to return to work with my seniority along with back pay. I am also willing to take weekly drug screens for however long the company feels necessary. I would like to add that since August 23, 2007 I have been clean and sober and a born again Christian. I hope to show others that they too can beat addiction."

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.

On August 9, 2007, the Carrier sent a letter to the Petitioner notifying him that his seniority had been forfeited in accordance with Rule 26 of the Agreement between the Carrier and the Brotherhood of Maintenance of Way Employees (BMWE). The Carrier asserted that the Petitioner had failed to report for duty beginning June 28, 2007. Rule 26(b) of the Agreement, in pertinent part, provides:

"Except for sickness or disability, or 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 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 letter concluded with the name and address of the Carrier's highest designated Labor Relations Officer. A copy of the letter was sent to the Organization.

Before we can turn to a consideration of the merits of the dispute, the Board must consider two procedural issues raised by the Carrier. Should the Board agree with either

one of the Carrier's arguments, it would have no option but to dismiss the claim without reaching the merits. In this case, we find that both of the Carrier's procedural arguments have validity.

As noted above, the Carrier's letter of dismissal is dated August 9, 2007. The initial appeal is dated May 11, 2008, obviously well after the 30-day appeal limitation set forth in Rule 26(b). BMW's appeal letter stated that the Carrier may have been "unaware of the [the Petitioner's] involvement in the [Carrier's EAP] Program and may have written him off the books due to lack of protecting his assigned position." The Carrier responded, in pertinent part:

"In the letter, there is no explanation as to the reason for the delay in filing a claim in protest of the Carrier's actions. Although you state the Carrier was unaware of the employee's involvement with the EAP program, it is the employee's duty to inform his employer (i.e., the Engineering Department) of his need to be absent."

The Carrier's position is clearly supported by Rule 26(b) and prior Awards considering similar Rules. See, for example, Third Division Award 39876. The claim must be dismissed as untimely.

The Carrier further argues that the Petitioner violated the time limits of the Agreement by untimely submitting his claim to the Board. The Carrier points to Rule 24(c) of the applicable Agreement which, in pertinent part, recites:

"A claim or grievance denied. . . will be considered closed unless within nine (9) months from the date of decision of the carrier's Highest Designated Labor Relations Officer proceedings are instituted before the National Railroad Adjustment Board. . . ."

The Carrier's highest designated Officer denied the claim on August 26, 2009. A 30-day extension was granted on June 2, 2010. The Petitioner's Notice of Intent was received by the Board on October 14, 2010, i.e., more than nine months after the final denial including the 30-day extension. For this reason, as well, the claim must be dismissed. As noted in Third Division Award 37083:

". . . Board precedents are clear that the Board strictly applies time limits for filing appeals. The Board's procedures must be respected."

Finally, had the Board been able to reach the merits of the dispute, a dismissal on the merits would have resulted.

Rule 26(b) is an automatic forfeiture Rule that comes into play when an employee fails to protect his assignment for 14 consecutive days without notifying his supervisor. By Agreement, the only excuses that can be used in an effort to justify failure to notify his supervisor that he would be absent are “sickness or disability, or circumstances beyond his control.” The Board has long held in numerous Awards construing similar provisions that the enumerated excuses pertain only to justify a failure to notify supervision that the employee was not coming to work and not to the reasons he was unable to work.

In this case, even assuming, arguendo, that the Petitioner had a legitimate reason for not working, there is nothing in the record to justify not informing his supervisor that he could not come to work. His failure to notify his supervisor is the underpinning of the Rule and the Petitioner’s failure to do so automatically resulted in the forfeiture of his seniority. Thus, a denial Award would result even if the procedural requirements had been met.

For all the foregoing reasons, the claim must be dismissed.

AWARD

Claim dismissed.

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 18th day of October 2011.