

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21061

Docket Number MW-21348

James C. McBrearty, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(Illinois Central Gulf Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when Trackman Fred Borders was not allowed to return to work on December 30, 1974 (System File 134-233-611-Case No. 960 MofW/SL-175-T-75).

(2) The Carrier shall now pay Trackman Fred Borders for each day's work beginning December 30, 1974 and continuing until such time that he is allowed to return to work.

OPINION OF BOARD: Claimant was absent from work due to illness from October 14, 1974 through December 29, 1974. During that period of time Claimant entered the out-patient clinic of the Missouri Pacific Employees' Hospital on four occasions, namely, October 16, November 27, December 9, and December 24, 1974. Claimant was provided with a "Release Certificate" from the hospital, stating that he would be able to resume work on December 30, 1974. The Certificate was initialled by the doctor who had been treating Claimant.

When Claimant reported for work on December 30, 1974 to Section 508 at Venice, Illinois, he was told by his foreman that he could not work because he had been terminated for failing to follow the provisions of Rule 39.

Rule 39 reads as follows:

"An employe who is absent from his assigned position without permission for five (5) consecutive workdays, will be considered as having abandoned his position and resigned from the service, unless such absence from service is due to physical incapacity as evidenced by a release signed by a medical doctor."

According to the Carrier, Claimant was absent from work for more than five days without permission, and was therefore considered as having resigned from the service.

Claimant argues that the last clause in Rule 39 conditions the rule for the protection of those who are absent on account of "physical incapacity."

The Board finds the language in Rule 39 unambiguous. Thus, the last clause of the rule which states, "...unless such absence from service is due to physical incapacity as evidenced by a release signed by a medical doctor" conditions the previous part of the rule which says, "...will be considered as having abandoned his position and resigned from the service."

Therefore, Rule 39 clearly indicates that if an employee is absent from his assigned position without permission for five (5) consecutive workdays, he will not be considered as having abandoned his position and resigned from the service, as long as his absence from service was due to physical incapacity as evidenced by a release signed by a medical doctor. (Emphasis added).

What does "physical incapacity" mean? It does not mean as indicated by the Carrier, that the Claimant must be able to demonstrate that he was so ill as not to be able to talk on the telephone nor write a letter to notify the Carrier. The "physical incapacity" here refers to the employee's lack of fitness or ability to do his regular job, for Rule 39 clearly reads in relevant part, "...unless such absence from service is due to physical incapacity...."

Also, notice the phrase, "...evidenced by a release signed by a medical doctor" (Emphasis added). This "release" does not necessarily mean, as the Carrier has implied, that it has to be a "hospital" release as opposed to an "out-patient clinic" release. The word "release" is not modified by any restrictive adjective. All that is required here is that the employee not have been able to do his regular job, and that he obtain a release signed by a medical doctor, presumably whose care he was under for the period of incapacitation.

The Board is not arguing here that it is a good practice to permit an employee not to notify the Carrier within five consecutive working days about his absence occasioned by a physical disability which is evidenced by a release signed by a medical doctor upon his return (whenever that may be). All we are saying here is that Rule 39 as presently written, does permit this.

The Board is not empowered to change, amend or alter any Agreement rule under the guise of interpretation. (Awards 20410, 8058, 7718, 7166, 6833, 6365, 5971, 5703, 5294, 4763).

A last point to be considered by the Board is the allegation by the Carrier that it never received a release signed by a medical doctor. While this statement is made in its submission, the Carrier clearly acknowledged on the property that it did indeed receive such a release. Such release is also reproduced as Employees' Exhibit "A". The Board therefore finds that under these circumstances, any doubt about receiving the release must be resolved in the Claimant's favor (Award 11656).

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim upheld in its entirety.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A.W. Pauls  
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April 1976.