

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24744
Docket Number MW-24985

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation (former
(Penn Central Transportation Company

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

(1) The Carrier violated the Agreement when it improperly dismissed Trackman J. E. Dent for alleged "failure to comply with Rule 3-D-1 of the Agreement" (System Docket 542).

(2) The claimant shall be returned to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: On a date prior to October 4, 1979, claimant was informed by the carrier that his position as trackman was to be abolished effective October 5, 1979. At the same time he was advised that he had 10 days to exercise his seniority and place himself in another position. The Agreement Rules referred to in this situation are Rules 3-D-1(b) and 3-D-1 (d) as follows:

"(b) An employe laid off as the result of reduction of force, desiring to retain his seniority, must within ten days from the date laid off, file his name and address, in writing, with the Supervisor of Structures, Supervisor of Track, or other corresponding officer, under whom last employed. The employe will prepare three copies of such notice, retaining one copy and filing two copies with the officer referred to. One copy of such notice will be forwarded by the Management to the District Chairman.

(d) An employe who fails to comply with the provisions of paragraphs (b) and (c) of this rule will forfeit his seniority and his name will be removed from the seniority roster."

When claimant failed to comply with the requirements set forth in the above rules carrier concluded he had forfeited his seniority. Thus, the following letter was addressed to claimant on October 16, 1979, by R. P. Miller, Supervisor of Track.

"On October 1, 1979 or earlier, you were informed that your position as Trackman had been abolished and that you had 10 days in order to exercise your seniority and place yourself in another position. The abolishment became effective with the close of the tour of duty on the 5th of October. On October 4th you were involved in an incident with a fellow employe on company property, resulting in what you allege to be an injury to yourself. You were given medical attention following this incident and the Physician at the Emergency Room could find nothing wrong with you that would keep you from returning to work immediately. You went home that day and have not returned to work since.

"On the 9th of October you were examined by Dr. Vincent D. Cuddy, the Physician of your own choice, and from our discussions with his office, he feels also that there is no reason why you cannot return to work. You have also informed this office that you have gone to see a third Physician on or before October 12th, but as of the date of this letter, we have seen no medical evidence for your absence.

Since you have failed to show cause as to why you are absent, and since you have failed to exercise your seniority in the proper amount of time, we are concluding that you have exhausted your seniority rights on the M of W roster. ***"

Claimant challenges applicability of the rules quoted above because of particular circumstances in his case. Thus, on October 4, the last day claimant worked, he scuffled with another employee and sustained an injury which required medical attention. He was examined by the company doctor at the Rochester Medical Center, given aspirin and told he could return to work immediately. The doctor's report showed claimant suffered a mild contusion on the left side of his neck. Instead, of returning to work, claimant took the rest of the day off and did not return to work thereafter. Additionally, claimant took no action to advise carrier of his condition or why he failed to exercise his seniority following abolishment of his job.

Carrier checked with Dr. Cuddy, claimant's own physician who reported as follows:

"On the 9th of October you were examined by Dr. Vincent D. Cuddy, the physician of your choice, and from our discussion with his office, he feels that there is no reason why you cannot return to work."

Claimant consulted with still a third physician, a Doctor Domazo, who issued a statement dated October 29, 1979, that claimant could return to work. Claimant reported for duty on October 29, for the first time since October 4, and presented the statement from Dr. Domazo. He was refused by R. P. Miller, Track Supervisor. Claimant then got his Organization representative Hildebrand, and together they reported to Division Engineer Steinbacher. He also refused and sustained the position stated by Mr. Miller in his letter of October 16, quoted above. With respect to Dr. Domazo's statement it should be noted it does not indicate he treated claimant; it states only that claimant was able to return to work as of October 29. It gives no indication whatever as to whether he might have been able to return to work prior to that date. Lacking information as to whether Dr. Domazo had treated claimant during the period in question renders the statement of little value in resolving the controversy.

In challenging the carrier's determination, the Organization cites another part of Rule 3-D which applies to employees returning to work following sickness or disability ie., Rule 3-D-5 as follows:

"3-D-5. Returning to duty after leave of absence, sickness, etc.--
Exercise of seniority. An employe returning to duty after leave of absence, vacation, sickness, disability or suspension, shall within five days, after reporting as ready for duty, return to his former position or exercise seniority to any position advertised during his absence.

If during the time an employe is off duty account leave of absence, vacation, sickness, disability or suspension, his former position is abolished or filled by a senior employe in the exercise of seniority, he may exercise seniority as outlined in Rule 3-D-1.

Employes displaced from their regular positions by the return of an employe from leave of absence, vacation, sickness, disability or suspension, shall exercise seniority as outlined in Rule 3-D-1."

Thus, the dispute resolves itself into a question of whether claimant was obligated to exercise his seniority within 10 days because his job was abolished or whether his claimed disability entitled him to wait until his return from such disability before being required to exercise his seniority.

His injury of October 4, was mild by the company doctor's diagnosis and he was cleared to return to work immediately. On the basis of such a finding it cannot be determined that claimant was disabled, insofar as the rules are concerned. His decision to take the rest of the day off and his failure to contact any authoritative carrier representative as to his job status until October 29 cannot be accepted as valid reasons to set aside the rules cited by carrier in concluding he had forfeited his seniority. Not only did the company doctor clear claimant for returning to work on October 4, but Dr. Cuddy, who examined claimant on October 9 also indicated there was no reason he could not return to work. In view of these findings, one by the company doctor and the other by claimant's own physician, it is difficult to accept as valid claimant's contention of being disabled. Also noted is Mr. Miller's letter of October 16, to claimant wherein it was stated:

"You have also informed this office that you have gone to see a third Physician on or before October 12th, but as of the date of this letter, we have seen no medical evidence for your absence."

The record confirms that claimant ignored requirements of the Parties' Agreement in taking action to protect his seniority rights as required by Rules 3-D-1 (b) and (d). Moreover, company doctor's clearance for his immediate return to work on October 4 obligated him to either return or at least contact proper company officials with an explanation. He simply took off and presented no medical statement at all or any other explanation until October 29. He continued to ignore the seniority rules and now seeks applicability of Rule 3-D-5. The record does not support his claim of disability and, since the provisions of Rules 3-D (b) and (d) are self executing, the carrier was obligated to proceed in recognizing claimant had forfeited his seniority.

Why claimant was indifferently silent during the period October 4 to 29 is not explained. In the circumstances it can only be determined that he was neglectful in taking action to protect his seniority standing and carrier took the required course of action in determining he had forfeited his seniority.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 30th day of March, 1984

