

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25835
Docket Number MW-25415

Nicholas Duda, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Railroad Co. (St. Louis-San Francisco)

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

"(1) The Carrier violated the Agreement when it improperly closed the service record of Trackman D. Cock (System File B-2128/MWC 82-10-25).

(2) The Claimant shall be compensated for all wage loss suffered from May 28, 1982 through June 22, 1982."

OPINION OF BOARD: Claimant was hired on July 2, 1981. On April 16, 1982, he worked as a Trackman. He did not report and did not contact the Carrier until May 14, 1982. On that day, he called Ms. Carol Stuart, Clerk to the Assistant Superintendent of Roadway Maintenance. He told her that he had been off work due to a medical condition and wanted a leave of absence. After checking with the Assistant Superintendent, Ms. Stuart told Claimant that he would have to provide a doctor's statement before the leave would be granted.

A letter supporting a leave of absence for Claimant on medical reasons was sent by his doctor on May 20, 1982. The Carrier received it on May 24, 1982. Two days later, on May 26, the Carrier sent Claimant a letter notifying him:

"... in line with Article 10, Rule 87, your record is being closed account you failed to secure a properly approved leave of absence within the required thirty calendar days since your last day worked, which was April 16, 1982".

In response to the Organization's request, the Carrier notified Claimant that an investigation would be held on June 14, 1982, "to ascertain the facts and determine your responsibility in connection with your alleged failure to comply with Article 10, Rule 87 of the Agreement . . . for which your record was closed on May 28, 1982".

On June 21, 1982, after the investigation hearing, the Carrier agreed with the Organization to allow Claimant "to return to work Wednesday, June 23, 1982, with all rights intact, but, without pay for time lost May 28, 1982 through June 22, 1982". That Agreement was without prejudice to the Organization's Claim for time lost May 28, 1982 through June 22, 1982, the Claim to be decided in this Award. Determination of the Claims turns on whether the Carrier's termination of Claimant's seniority under Rule 87 effective May 28, 1982, was proper under the Labor Agreement. To support its challenge of the Carrier's decision, the Organization asserts a number of arguments. Those arguments fall into two categories.

First, the Organization claims that the Claimant should not be held to any requirements of Rule 87 because he did not know, and in a sense, was prevented from knowing the Rule. Rule 87 was agreed to by the parties and is contained within their written Agreement. At times in the past, the Carrier gave each newly-hired Employee a copy of the Agreement. There is no evidence that Claimant was given a copy when he was hired or later. On the contrary, the Carrier admits that since before Claimant was hired, distribution of the Agreement has been suspended due to a limited supply. There is no requirement shown that the Carrier is required to issue an Agreement to every new hire.

Rule 87 was part of the Agreement made by the Organization for and on behalf of all Employees, including Claimant. Normally an Employee is responsible to observe the provisions of the Agreement whether or not he has actual knowledge of the agreed-to provisions. However, these parties agreed by Rule 105 which provides:

"This Agreement shall be printed by the Carrier and any Employee covered by the Agreement shall be provided with a copy on request."

Claimant says that he requested an Agreement from some one but did not receive it. There was no substantial evidence that he had requested and been denied a copy from any Carrier representative. However, even if he had made such a request, his remedy for the Carrier's failure to honor such a request was to make a timely Claim.

The Second Claim made by the Organization is that several facts mitigate the violation and justify Claimant's reinstatement effective May 28, 1982.

Article 10, Rule 87, agreed by the parties reads as follows:

"(A) Written leave of absence, properly approved by Division Engineer or Superior Officer, is required in every instance of an Employee entitled to be working who is absent for 30 calendar days or more. No Employee will be granted a leave of absence for purpose of working elsewhere unless such leave of absence is agreed upon by the Carrier and Organization.

(B) Employees given leave of absence in writing by proper authority of the Carrier shall retain their seniority.

(C) Employees failing to return on or before the expiration of their leave of absence will lose their seniority rights, unless an extension is obtained."

It is an agreed fact that Claimant was absent for 30 calendar days or more without a written leave of absence. Therefore, under the bare language of Rule 87, Claimant did not enjoy the protection of Rule 87 "to retain" his seniority.

An absence of 30 calendar days without written leave may automatically cause a loss of seniority but there may be circumstances where the loss is revocable. In this regard, several Awards by Public Law Board Number 717 (Award No. 330 and Award No. 408), confirm that the investigation "is intended to offer the Employee an opportunity to show facts which would mitigate the violation and could cause his reinstatement". (Those Awards involved another Organization, but the Rule language is comparable and the Awards were cited by Carrier).

At the investigation the Organization presented various circumstances and facts. The Carrier did not consider those circumstances sufficient to warrant reinstatement until June 22, 1982. Therefore, the issue in this case is whether the Carrier's decision not to reinstate effective May 28, 1982, was arbitrary or unreasonable.

Rule 87 prohibits granting a leave "for purpose of working elsewhere unless such leave of absence is agreed upon by the Carrier and the Organization". Otherwise there is no express stipulation of acceptable reason. Satisfaction of the written leave requirement has two procedural steps:

1. Request by Claimant;
2. Execution of the written leave by the Carrier.

In performing their responsibilities in respect to leave of absence, both Claimant and Carrier are required to be reasonable and should perform their responsibilities so that the written leave is achieved within the 30 calendar day period. Here, Claimant did not request the leave until May 14, the 28th day. Adequate time remained to execute the written leave on a standard form. However, when the request was made, the Carrier's agent demanded written verification, a requirement not expressly made in Rule 87.

There is no Claim or showing that requiring verification of the reason was arbitrary or unreasonable. In relation to verification, the Carrier has a duty to make its requirement known so that an Employee has a reasonable opportunity to comply. If an Employee has actual or constructive knowledge of the verification requirement in advance of application for leave, he could be required to provide the verification within the 30 calendar days, even if his application is on the 28th day or later. Here there is no showing that Claimant knew of a verification requirement or that one even existed before he applied. Therefore, he was entitled to a reasonable time to provide the verification, even if the end of the 30 calendar day period was bridged.

There is a dispute as to the specific statement by Ms. Stuart concerning the medical verification. At the investigation she testified.

"I told him that he would have to get a letter from his doctor stating that, and send it to this office by the 16th of May.

This Board does not have adequate reason to find that the Investigating Officer erred by accepting Ms. Stuart's version of the discussion, rather than that of Claimant. To the Carrier, Ms. Stuart's statement constituted notice to Claimant that "time was of the essence" so that the verification had to be received no later than May 16, 1982. Actually, Ms. Stuart's communication had a lesser sense of urgency because she said to "send it to this office by the 16th of May", (underline supplied), implying that receipt after May 16 would be acceptable.

Under the best of circumstances, normal mail would have required at least two days, exclusive of any intervening weekend, as evidenced by the fact that the Carrier's letter dated May 26 did not arrive until May 28. A weekend did occur on May 15 and 16, 1982. Thus, even if the verification had been requested and "sent" on May 14, the Carrier could not realistically expect receipt by normal mail until after the 30-day calendar period ended on Sunday, May 16.

The Notice given here was not reasonable under the circumstances. As already noted, the 15th and 16th were a Saturday and Sunday. It is a matter of common knowledge that contacting a person's physician and obtaining such a letter on a weekend, although not impossible, would be a matter of considerable effort and luck. However, there is no showing that the Carrier had any reasonable basis for requiring such extraordinary action. Realistically, the doctor's letter could not have been sent until May 17, 1982, at the earliest. The letter was actually sent on May 28, less than a week after Ms. Stuart's request and three days after the earliest realistic possibility. Six days to get such a letter from a medical practitioner is not an inordinate amount of time. The extra few days did not prejudice the Carrier who already had notice that the leave procedure was being implemented. Claimant was entitled to a reasonable time under the circumstances to get the medical verification six days was not unreasonable. Claimant acted reasonably prompt.

The Carrier relied heavily on three Awards involving Rule 87. None of those cases is on all fours with, or even comparable to the instant case. In Award Number 22121, the Claimant did not report for work or communicate with the Carrier until 56 days after his last day worked and 26 days after the 30 calendar day period. In this case Claimant requested the leave of absence during the 30 calendar day period. Furthermore, in that case, the Employee did not explain the long absence or the long delay in getting medical verification. Here the Claimant acted promptly to get the medical verification and explained the slight delay. Finally there was a significant fact different in that Claimant had:

"Previously been removed from service because of his absence for more than 30 days without an approved leave of absence... This earlier incident should have caused Claimant to be well aware of the requirements of Rule 87 and his obligation to comply with them. Carrier is justified, also, in invoking this history to justify the degree of penalty applied in reaction to the incident infraction.

The Carrier also relied on Award 22494. In that case, the Claimant returned to service with a "light duty" slip, but was not permitted to work because no such employment was available. Thereafter, Carrier "closed his record" on account of being off over 30 days without a leave. According to the decision: "The record contains some assertions regarding a request for a leave of absence, but there is not a sufficient showing to satisfy Claimant's burden on proof". In the instant case, the Carrier concedes that Claimant requested a leave of absence from Ms. Stuart during the 30 calendar days.

The last case relied upon by the Carrier, Award Number 24996, does not have comparable facts. In that case Claimant had requested and been approved for a 30-day medical leave of absence. Subsequently he requested and received an extension for another two months. The extension expired and another five weeks passed before the Employee contacted his Carrier to make an untimely request for leave.

Under the circumstances in this case, Claimant should have been reinstated and Carrier's failure to execute the written leave of absence on receipt of the medical verification sent May 20, 1982, was arbitrary and unreasonable. Therefore, the Claimant is entitled to payment for time lost, if any, from May 28, 1982 through June 22, 1982. The case record does not show whether or when Claimant was released medically and permitted to return to work. Nor does the record show what days he would have worked in that period. However, that information is available to Carrier. Claimant should be made whole for the time he was able but not permitted to work in the period May 28 through June 22, 1982.

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.

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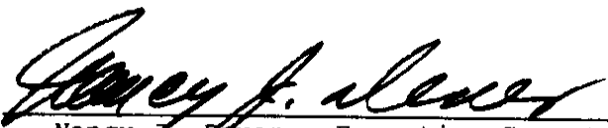
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Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Lever - Executive Secretary

Dated at Chicago, Illinois this 13th day of January 1985.

