

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26393
Docket Number MW-26727

Edwin H. Benn, Referee

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

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

1. The Carrier violated the Agreement when it improperly closed the service record of Trackman H. V. Miller (System File B-2230/EMWC 84-9-24).

2. The claimant shall be reinstated and restored to his position as trackman with seniority and all other rights as such unimpaired and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Claimant, an employee since July 7, 1982, was employed as a Trackman on Gang 303 and was stationed at McBride, Missouri. Claimant's supervisors were Assistant Superintendent R. P. Wiese, Roadmaster R. D. McCafferty and District Gang Foreman R. J. Stokes.

After completion of his tour of duty on February 7, 1984, Claimant was involved in an automobile accident and sustained injuries to his neck. On February 8, 1984, Claimant called Stokes and informed Stokes that he had to see a doctor as a result of the accident. Stokes told Claimant that he would have to take the matter up with McCafferty who was not immediately available. According to Stokes, he advised Claimant to check into obtaining a leave of absence. On the evening of February 8, 1984, Claimant spoke to McCafferty. Claimant told McCafferty that as a result of the accident, his doctor informed him that he would be unable to work for approximately two or three weeks.

On February 18, 1984, after speaking with his Local Chairman, Claimant asserts that he wrote Wiese as follows:

"R. P. Wiese,

I'm writing you a leave of absence for the 8th of Feb. 1984 [sic]. Letting you know I'm off cause of car accident.

2-18-84
Hurcell Miller"

Claimant testified that at that time, he also forwarded a doctor's statement to the Carrier verifying his injuries along with the leave of absence request. On February 22, 1984, the Carrier prepared a form for Claimant to be examined by a Carrier physician.

During the week of March 5, 1984, McCafferty spoke to the Organization's Local Chairman about Claimant's failure to obtain a leave of absence. The Local Chairman informed McCafferty that Claimant was instructed to request the leave of absence. Claimant was then advised by his Local Chairman that Wiese did not receive Claimant's request for a leave of absence. On March 8, 1984, the General Chairman wrote the Carrier requesting the issuance of a leave of absence for Claimant. The Carrier received the General Chairman's letter on March 12, 1984. Claimant asserts that he wrote another letter to Wiese on March 11, 1984, explaining that he previously sent a letter requesting a leave of absence. Therefore, Claimant's request for a leave of absence was not received by the Carrier within 30 days of Claimant's last day of work (February 7, 1984). On March 13, 1984, the Carrier's physician approved Claimant's return to work. However, the Carrier did not permit Claimant to return to service.

After Investigation held on April 3, 1984, the Carrier took the position that the requests for leave of absence were made outside of the time limits specified in Rule 87. The Carrier then considered Claimant's record closed.

Rule 87 provides, in pertinent part:

"(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."

Carrier's Rule, Notice No. 10 dated January 1, 1984, provides:

"Written leave of absence properly approved is required of any employee entitled to be working who is absent 30 days or more."

District Gang Foreman Stokes and Claimant testified that Notice No. 10 was not posted at the McBride Depot.

Here, there is no question that Claimant's obligation was to conform to Rule 87 and obtain the leave of absence. Third Division Awards 25669, 22494, 22121; Public Law Board No. 37, Award No. 36. It is also clear that Claimant did not receive the required leave of absence. Further, it is undisputed that Claimant's request for a leave of absence was not received by

the Carrier until after the 30 day period expired. That request was received by the Carrier on the 34th day after Claimant's last day of work. Under ordinary circumstances we would conclude that Claimant's record was properly closed. However, there is more present in this case. First, the Carrier was well aware of Claimant's situation. Claimant immediately notified the Carrier of the accident and told Stokes and McCafferty that he would be out for a period of time. The Carrier further prepared a form dated February 22, 1984, for the Claimant to be examined by a Carrier physician thereby evidencing its clear knowledge of Claimant's situation. Second, although the Carrier asserts that it did not receive the requests for a leave of absence in a timely fashion, there is no evidence to dispute Claimant's contention that he sent a letter requesting a leave and did so well in advance of the expiration of the 30 day period. Cf. Third Division Award 25699, supra, where although the employee prepared the request in a timely fashion, he admitted not mailing that request. Further, there is no evidence of a practice of the parties wherein notices or correspondence are sent by other than the ordinary mail as opposed to Certified or Registered Mail. In analogous situations, we have held that the parties have a right to rely on the regularity of the mail and where a party, such as Claimant herein, produces a letter as proof of compliance, we have accepted the same as sufficient proof. See Third Division Awards 24528, 24232, 10490. Claimant has produced a copy of his February 18, 1984, letter to the Carrier requesting the leave of absence. We are not holding that all an employee need do in the future to avoid the seniority forfeiture provisions due to an untimely leave request is to subsequently produce a copy of a letter and claim that it was lost in the mail. In this case there was independent verification of Claimant's alleged mailing of the February 18, 1984 letter, i.e., the Organization's attempts to secure for Claimant the leave of absence immediately upon learning that Wiese did not receive Claimant's original request.

Therefore, under the totality of the circumstances presented, including the fact that the request was received shortly after the expiration of the 30 day period (cf. Third Division Award 22121, supra, where the employee did not communicate with the Carrier for 56 days after the accident therein), we are of the opinion that neither Claimant nor the Carrier can be totally faulted. Our reading of the Carrier's Submissions satisfies us that but for the fact that it did not actually receive Claimant's February 18, 1984, letter, Claimant would have been granted the requested leave. On the other hand, Claimant should have taken steps beyond those taken to assure that his request was timely received by the Carrier. Claiming ignorance of the procedure or the requirements of Rule 87 cannot shelter Claimant from his obligation to make a timely request and assure its receipt in order to protect his position. Merely because Notice No. 10 may not have been posted at the McBride Depot does not exonerate Claimant from the requirement of obtaining a leave of absence in a timely fashion since the provisions of that Notice are essentially the same as Rule 87 of the Agreement, which Claimant should have been well aware of. By the same token, the Carrier cannot rely upon the provisions of Notice No. 10 in and of itself to justify the actions taken in light of the fact that the record does not demonstrate the posting of the Notice or that Claimant was otherwise apprised of its contents. Thus, under the circumstances presented in this case, we shall require that Claimant be returned to service with seniority unimpaired, but without compensation for time lost.

In light of our disposition of the Claim, it is therefore unnecessary to address the Organization's disparate treatment argument.

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

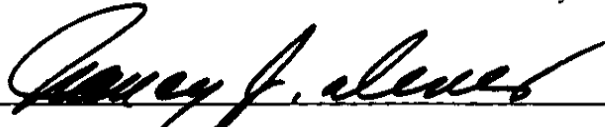
That the Carrier's action was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: _____


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of July 1987.