

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(National Railroad Passenger Corporation (Amtrak) -
(Northeast Corridor

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

(1) The Agreement was violated when the Carrier terminated the seniority of Trackman H. Walls on January 2, 1985 (System File NEC-BMWE-SD-1233).

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

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

This is a contract interpretation case involving a dispute in the meaning and application of Rule 22. There is no dispute that Claimant suffered an on-the-job injury on July 12, 1984, or that he reported to the Division Engineer's office on December 27, 1984, to schedule a return to duty physical which was thereafter denied on grounds that he had been terminated as per Rule 22 effective November 1, 1984.

The Organization contends that Rule 22 does not provide for termination. The Rule provides mechanisms for the employee returning from sick leave to return to his prior position or exercise seniority. It is the position of the Organization that nothing in the Rule provides for forfeiture of seniority and as that is the applicable Rule, Carrier violated the Agreement when it terminated the Claimant.

The Carrier argues that Claimant had taken and passed a return-to-duty physical on October 17, 1984, and that under Rule 22, the Claimant was thereby required to return from his medical leave. Since Claimant's position of Trackman on Gang A-372 at Odenton had been filled by a senior employee while he was on medical leave, he could not return to that position. Therefore, the Carrier argues that under Rule 18, Claimant had ten (10) days to choose either a furlough or to displace a junior employee. Claimant did nothing and, therefore, forfeited his seniority. The Carrier denies any Agreement violation.

After a careful review of Rule 22, Rule 18 and the on-property record as presented by the parties, we find for the Carrier. Claimant took a return-to-work physical on October 17, 1984. There is no evidence of record that Claimant was unaware that the medical examiner had approved his return to duty, or that Claimant disputed his physical ability to return to work. In the facts and circumstances of this case wherein his position had been filled, Rule 22 clearly directed the Claimant to act as per the language of Rule 18.

The Board's review of the probative evidence presented on the property provides no record by which to conclude that Claimant acted to protect his seniority. There is no probative evidence of a medical dispute, or of any correspondence between the Claimant and the Carrier between October 17, 1984, when he was cleared to return and December 27, 1984, when he showed up for the physical. Rules 18 and 22 are clearly written and do not allow this Board to reach any conclusion other than Claimant's failure to return in a timely manner activated Rule 18 which states in part that an "...employee who fails to comply...will forfeit his seniority..." The Board finds no exceptions in the language of the Rule. Claimant's termination was self-invoked when he failed to act.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 2nd day of March 1989.