

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Terminal Railroad Association of St. Louis

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

(1) The Carrier violated the Agreement when it terminated the seniority of Track Laborer S. M. Sumling on August 22, 1988 for alleged '... failure to return to the Carrier's service within seven (7) calendar days after being so notified on August 13, 1988....' (System File 1988-4 T.R.R.A./-013-293-15).

(2) The Claimant shall be reinstated with seniority, benefits and all other rights unimpaired and he shall be reimbursed for all wage loss suffered as a result of his unwarranted termination from service."

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.

The Claimant entered Carrier's service on June 21, 1977, as a track laborer. At the time this dispute arose, Claimant was on furlough. By letter dated August 12, 1988, Claimant was notified to report for work in accordance with the provisions of Rule 16 of the Agreement which reads as follows:

"RULE 16 - RETAINING SENIORITY

When an employee laid off in force reduction desires to retain his seniority rights, unless displacing a junior employee, he must notify supervisor in charge, with copy to general chairman, of his current address. If recalled to service and subsequently furloughed the employee shall be responsible for notifying the supervisor of any change in address. When forces are increased, the employee will be notified at last address of record and will return to service within seven (7) days thereafter. Failure to return within seven (7) days, unless prevented by sickness or other unavoidable reason, will result in loss of all seniority rights. The seniority of employees resuming service in accordance with the foregoing will be cumulative during the period of absence."

Claimant received his recall to service notice on August 13, 1988. By subsequent letter dated August 22, 1988, Claimant was notified that his seniority had been terminated " -- account of your failure to return to the Carrier's service within seven (7) calendar days after being so notified on August 13, 1988, ---." This dispute has been handled in the usual manner on the property, and, failing to reach a satisfactory resolution thereon, has come to this Board for final adjudication.

The Organization advances several arguments in support of their contentions. They argue that Claimant, on August 19, 1988, attempted to contact the Carrier to advise them of his inability to return to work before the expiration of seven (7) days. They also contend that Claimant was medically excused from performing any work until August 23, 1988, and that documentary evidence to this effect has been presented to the Carrier. They further argue that their request for a hearing under the provisions of Paragraph (g) of Rule 24-DISCIPLINE AND GRIEVANCES was improperly denied.

The Carrier, on the other hand, contends that there is no record or recollection by anyone in Carrier's employ relative to Claimant's alleged attempt to contact the Carrier on August 19, 1988. Carrier further argues that Rule 16 is clear and self-executing; therefore, no hearing was required or justified under the terms and conditions of Discipline Rule 24. Carrier also questions the timeliness and credibility of the Organization's presentation of a physician's report relative to Claimant's inability to return to service until August 23, 1988.

We have reviewed all of the material which has been presented and have considered all of the respective arguments which have been advanced by the parties. It is our conclusion that the Carrier's position is more persuasive and must prevail.

Rule 16 is a self-executing rule which requires only the action of proper notification to the employee to return to service. Once that notification is properly given and received, the burden of convincing action is on

the employee to either return to work within the prescribed time limit or to show by conclusive evidence that he is "... prevented by sickness or other unavoidable reason,..." from returning to service within the specified time.

In this case, there is no conclusive evidence to support the Organization's contentions relative to Claimant's alleged telephone call on August 19. As for the physician's statement - which is dated September 22, 1988 - and which was presented to the Carrier for the first time at a conference on February 3, 1989, it is, to say the least, unusual evidence which, if correct, would have served a much more effective argument if presented at the time of Claimant's termination or at least during the early on-property handling of the grievance. While the Board may properly accept any evidence which is part of the on-property handling of a claim or grievance, the timeliness of this particular piece of evidence is suspect and, in the Board's opinion, not persuasive.

As for the necessity or propriety of conducting a Rule 24 hearing, this Board is in agreement with the position expressed in Award 65 of P.L.B. 1760. Termination under Rule 16 is not discipline. It is rather the application of a clear, self-executing rule which was negotiated by the parties. No further action is required to apply its self-executing provisions.

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 7th day of August 1990.