

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 28626
Docket No. MW-29194
90-3-90-3-60

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 Employees
(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 Mr. F. L. Gregg effective July 28, 1988 (System File NEC-BMWE-SD-2351).

(2) As a consequence of the aforesaid violation, Mr. F. L. Gregg shall be reinstated to service 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 employee or employees involved in this dispute are respectively carrier and employees 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 record in this case reveals that Claimant was properly notified by letter dated June 29, 1988, sent via certified mail, to return to duty from furlough. The recall letter outlined in detail exactly how, when and where the Claimant was to effect his return to active service. The recall letter concluded with the admonition that "Failure on your part to respond to this recall may subject you to loss of seniority under the terms of Rule No. 21." There is no contention relative to Claimant's proper and timely receipt of this recall to service letter.

Rule 21 of the negotiated Rules Agreement, in pertinent part, reads as follows:

"Rule 21 - Returning From Furlough

* * * * *

An employee who fails to return to service within ten (10) days from date notification of recall has been mailed to his last recorded address for a position or vacancy of thirty (30) days or more duration in the work zone selected or from which furloughed as designated in paragraph 1 above will forfeit all seniority under this Agreement. Forfeiture of seniority under this Rule will not apply:

(1) When an employee, within thirty (30) days from date of notification of recall, furnishes evidence satisfactory to the officer signatory to notification that failure to respond within ten (10) days was due to conditions beyond his control. Such evidence will be made available to the representative.

* * * * *

The record as developed during the on-property handling of this case and as presented to this Board reveals that Claimant did not respond to the recall letter of June 29, 1988, within the stipulated ten (10) day period. He was subsequently informed by letter dated July 28, 1988 that:

"On July 20, 1988, you contacted this office and advised you could not return as directed. * * *

Therefore, in accordance with the self-invoking provisions of Rule 21 of the current Agreement, you have forfeited your seniority and, in effect, terminated yourself from the service of this Company."

The Claimant's termination was progressed on his behalf by the representative Organization through the on-property grievance procedures, and, failing to reach a satisfactory resolution thereon, has come to this Board for final adjudication.

Both parties to this dispute have presented vigorous arguments in support of their positions citing a plethora of Awards which, they say, support their respective arguments and contentions. We have read, studied and considered all of the arguments and Awards.

While this Board recognizes and realizes the importance, reasonableness and self-executing character of the time limitations as set forth in Rule 21, we are struck by certain aspects of this particular case which prevents this case from being blanketed by the "stare decisis" mantle of the many other Awards which have been cited herein. In short, each case of this nature must be decided on its own particular merits or lack thereof.

In Rule 21 on this property, the 10-day limitation to respond to recall is qualified by an exception which allows the recalled employee thirty (30) days "from date of notification" to furnish evidence to support a reason for not returning to service within the aforementioned 10-day period.

In this case, there is evidence to support the contention that Claimant did contact Carrier within the 30-day period of exception. There is also evidence to suggest that there was a medical reason given within the 30-day exception period for Claimant's failure to return to service. To be sure, these pieces of evidence are challenged by Carrier both as to their content and timeliness of receipt. However, the fact remains that these pieces of evidence do exist and were properly included in the case record during the on-property handling of this dispute. From the record of this case, it is apparent that this is not the usual cut-and-dried situation involving a clear cut violation of Rule 21 and the attendant loss of seniority requirement.

Even though Carrier might be correct within the strict language of Rule 21 of the Agreement in regard to its position, the position is hyper-technical and is not within the spirit of the Agreement Rule in the context of the facts as they exist in this particular case.

Under the totality of the circumstances presented and based upon the narrow facts in this particular case, and further, without hereby establishing a precedent for future use in deciding a case under Rule 21, or similar type rules, we are of the opinion that neither Claimant nor Carrier can be totally faulted for the events which have occurred and hereby conclude that Claimant should be reinstated to the Seniority Roster with seniority rights unimpaired. Claimant himself must bear some of the responsibility for this situation, and, therefore, there will be no compensation due him under this Award. His return to service, if, in fact, his seniority standing warrants return to active service, will be subject to his ability to successfully complete whatever return-to-service examinations are required by Carrier for employees of this craft and class.

A W A R D

Claimant sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 17th day of December 1990.