

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31243
Docket No. MW-30328
95-3-92-3-33

The Third Division consisted of the regular members and in addition Referee Robert T. Simmelkjaer when the Award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

- "(1) The dismissal of Machine Operator C.S. Bragalone for alleged failure to return to service and protect his employment was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (Carrier's File 013.31-420).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for any 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 employee within the meaning of the Railway Labor Act as approved on June 21, 1934.

This Division of the Adjustment Board has jurisdiction of the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The record established that prior to the instant dispute, Claimant sustained a personal injury in July, 1988 which required that he absent himself from work while he was under the care of a medical doctor. Following his examination by the Carrier's physician on May 2, 1990 who found him capable of returning to work with no restrictions, Claimant received the Carrier's certified letter dated June 25, 1990 instructing him to report to duty within ten (10) days.

The Claimant did not comply with these instructions and subsequently by Carrier letter dated July 12, 1990, he was advised that "... you have forfeited your employment relationship with the Company effective immediately."

The Organization contends that there is no provision in the parties' Agreement which permits the forfeit of employment for failure to comply with instructions. In contrast to Carrier's position, the Organization argues that the Rule 13 disciplinary procedures are applicable, requiring the Carrier to conduct a fair and impartial hearing to ascertain whether grounds for Claimant's dismissal existed.

In addition, the Organization contests the Carrier's contention that Claimant was released without restriction on May 2, 1990 by the Carrier's physician with evidence that Claimant's physician released him for only light duty service on June 22, 1990.

Upon thorough review of the record, the Board is persuaded that the instant matter does not involve discipline as contemplated by the parties but rather, is a case where Claimant, by his own volition, forfeited his seniority rights and thus his employment with the Carrier. The evidence clearly indicates that Claimant while on leave of absence for an on-the-job injury was examined by a Carrier physician, found fit to return to work, and informed by certified mail of the Carrier's determination. However, rather than respond within the prescribed time frame, Claimant did nothing to protect his seniority rights.

Under the foregoing circumstances, there is no basis for a Rule 13-2 Investigation. Claimant's nonfeasance has not caused him to be disciplined under Rule 13, but instead subjected to him to Rule 3-3 which is self-enforcing. Specifically, Rule 3-3(b) inter alia, provides that once notified his leave has been terminated an employee forfeits his seniority rights after ten (10) days unless granted another leave of absence or is eligible for an exception under, in this case, Rule 3-3(b) (2). Relevant in this regard is Third Division Award 28139 where the Board held:

"... Rule 48 (k) and similar Rules are self-invoking and not disciplinary in nature."

Similarly applicable is Third Division Award 27777 which states:

"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."

Although there was conflicting medical documentation concerning Claimant's fitness to return to work, Claimant's inaction did not contribute to the solution of his problem. Given the options at his disposal to inform the Carrier of his alleged inability to resume full duty, Claimant acted at his peril when he failed to respond to Carrier's letter in any manner. Consideration of whether the respective medical evaluations of Claimant's condition satisfied the Rule 3-3(b) (2) provision of "his release to return to work from illness or injury" is precluded by Claimant's failure to comply with the requirement of Rule 5-4 that, barring extenuating circumstances, such failure to report places the employee "out of service." It is also beyond the scope of the Board's appellate jurisdiction to resolve conflicts in evidence provided the Carrier's decision was based on substantial evidence.

The instant case can be distinguished from Third Division Award 25682 involving the same parties where persistent efforts by the Claimant to report his medical condition to the Carrier were of no avail. The Board's decision to restore that Claimant's seniority rights cannot be equated with the instant case where, at no time after receiving the Carrier's letter did Claimant request a leave of absence or allege he could not report for service.

Based on the foregoing evidentiary record, the Board can neither find any violation of the Agreement by the Carrier nor any grounds to mitigate Claimant's loss of seniority through his own inaction.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of November 1995.