

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32567
Docket No. MS-33481
98-3-96-3-730

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

(John Torman

PARTIES TO DISPUTE: (

(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"System Docket MW-3877 (John Torman). The rule in question is rule 21A. The carrier refused to allow me to return to work. I request to be allowed to return to work under rule 22, be compensated for all lost time and have my seniority reinstated."

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 June 21, 1934.

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

Parties to said dispute were given due notice of hearing thereon.

Original claim in this case, as outlined in the Statement of Claim, was filed by the Organization on behalf of Mr. John Torman in November 1994 with the Carrier's Division Engineer at the Mount Laurel Corporate Center, Mount Laurel, New Jersey. The claim was conferenced in the proper manner on property up to and including the highest Carrier officer designated to hear such. Subsequently the claim was docketed before the National Railroad Adjustment Board for final adjudication.

There are a number of procedural objections raised in this case which will be dismissed by the Board for lack of sufficient evidence. This case will be disposed of on merits.

The Claimant to this case, John Torman, hired on with Conrail in July 1975 as a Trackman and was promoted to Assistant Foreman in December 1980. He was on furlough from December 1988 through April 1989. On April 3, 1989 he was assigned to Trackman position and last worked on April 17, 1989. On April 24, 1989, upon advise of Conrail's EAP Officer, Claimant was admitted on emergency basis to a mental health Institute at Fort Washington, Pennsylvania. Diagnosis was "unipolar depression." According to information provided to the Board by the Claimant the following happened after that date. On May 25, 1989 he was admitted to the Northampton County Mental Health Unit in Eaton, Pennsylvania, with diagnosis of "major depression." He was under treatment at that facility until February 1990. At that time he was advised that he could resume employment. In February 1990 the Claimant reported to his Conrail work unit but was advised that his work unit was on furlough until April 1990 and that he should report at that later time. According to the Claimant, at that time he also requested to be reclassified as medically fit for duty but Conrail refused to provide him with medical forms to fill out in order to return to work under medically fit status. Conrail's position was that the Claimant had lost his seniority in April 1989 when he absented himself in excess of 14 days without notifying his Supervisor.

The situation of the Claimant basically languished until November 1994 when the Organization filed a claim on his behalf. The claim was processed to the point where it is now before this Board.

The position of the Claimant is as follows. Given the circumstances the Claimant argues that he was not in violation of the 14 day requirement under Rule 28(b) since he was mentally incompetent to have notified his Supervisor in either April or May of 1989 of his medical condition. According to the Claimant, the Carrier knew what his situation was. He had sought mental health assistance upon receiving such counsel from the Carrier's own EAP Officer. Thus, according to the Claimant, Conrail had a record of his condition which would have served as reasonable proxy for application of Rule 28(b) provisions. Further proof of Conrail's knowledge of his situation, according to the Claimant, is verified by payment of medical expenses through the Carrier's insurance carrier for the period the Claimant was out of work in 1989 through 1990. Lastly,

Conrail's own seniority roster continued to list the Claimant, up through 1994, under the prolonged sickness/disabled designation. Throughout the whole time the Claimant was attempting to exercise seniority, from 1990 to 1994, he was carried on the seniority roster.

When the Claimant last attempted to exercise his seniority, on May 10, 1994, as far as can be determined from the record, he was refused this right on grounds that he had been out of pocket for "... approximately one year. . . ." according to the Carrier. It is not clear from the record why the Claimant told supervision, at that time, that he had been released to go back to work approximately a year before, by his doctor. Maybe he had a relapse in 1993. That is not clear. In either case the Claimant thereafter contacted his union representative in the first part of June 1994 and the latter filed a claim and made request for company medical forms. The forms were refused on the local level and the union representative was referred to labor relations. The latter ultimately denied the claim submitted by the union on grounds that the Claimant had violated the 14 day requirement of Rule 28(b) way back in 1989. Labor relations also stated, in processing the claim, that the Claimant had also violated Rule 5(a) which states that employees returning from sickness shall return to former position within five days.

The hallmark of this case is probably best stated by the Division Engineer's Office Manager who was contacted by the union representative in November of 1994 when the claim was first filed. That Office Manager states in an intra-office electronic mail message, hard copy of which is part of the record, the following among other things: "... As information, I cannot locate any Rule 28 letters (sent either to the Claimant or by the Claimant). But be advised this situation (occurred) prior to the consolidation of Divisions and even though I have the personnel files here, I cannot be sure that I have everything. . . ."

As can best be determined, given the record on this case, the following happened. There was no work available for the Claimant when he tried to exercise seniority in April 1990. When he tried to exercise seniority thereafter he was consistently refused the right to do so because of continuing assumptions held by local management that the Claimant had violated Rule 28(b). Thus the Claimant was never given proper medical forms to fill out to take himself off status of prolonged illness. After what this Board believes were a reasonable number of efforts to exercise seniority, the Claimant simply got discouraged for a period of time, again apparently became somewhat ill in 1993 and

1994, maybe or maybe not because of his continuing state of unemployment, but did attempt to exercise his seniority once again in May 1994. The latter, which led to his contacting his union representative for assistance, led to the sequence of events which ultimately put this case before the Board.

If the Claimant made a mistake, and the Board believes he did, it was not having contacted his union representative immediately in April 1990 in order to have gotten proper assistance in attempting to implement what he believed was his right, at that time, to exercise seniority. The record suggests that the Claimant was assiduous, however, in continuing his attempts, off and on, to exercise what he believed was his rights to return to work after his illness. But mistakes by the Claimant were at least equaled by those of the Carrier. The Carrier's own files, had they been kept in an orderly manner, would have shown that the Claimant's reason for being out of work, stating in April 1989, was related to mental health and that application of the 14 day requirement under Rule 28 had been met. At least the requirement of that Rule had been met de jure, if not de facto. A check of Carrier's records would have shown exactly what was going on. The EAP Officer had information on the Claimant which should have been part of his file. Insurance was being paid which should have been part of the Claimant's file. The Claimant was kept on the seniority roster under title of prolonged illness. This too should have been part of his file. Some reorganizing was being done by Conrail in the Division where the Claimant had worked. Although understandable, if not excusable, this apparently led to some record-keeping confusion on the part of the Carrier which obviously has a bearing on this case.

The Claimant is a long-term employee of the Carrier with seniority date going back to 1975. There is nothing in the record to suggest that he was not a good employee prior to his bouts with depression in 1989. Although the Board will conclude that the Claimant may have made some logistical mistakes when attempting to exercise seniority when he tried to go back to work in the spring of 1990, the Board concurrently also concludes that any mistakes which the Claimant made were matched by those of the Carrier whose records on this employee, for whatever reasons, were either not available and/or not understood by supervision when the Claimant made good faith efforts to exercise his seniority to return to work.

Given the full record before it the Board is in no position to provide relief of the type requested in the Statement of Claim. But the Board does believe that this Claimant should be given the chance to show to the Carrier, once again, that he is a worthwhile

employee. The Board will provide the Claimant with that chance. The Claimant shall be returned to work with the following provisos. He shall show medical clearance from a reputable Physician. He shall make contact with the Carrier's EAP Counselor and continue to meet with such Counselor, on periodic basis according to a schedule outlined by such Counselor, as long as the latter deems it necessary. The Claimant shall not receive backpay for any time held out of service, but he shall be returned to service with seniority unimpaired. No other relief requested in the Statement of Claim shall be provided.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of April 1998.