

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33153
Docket No. MW-33464
99-3-96-3-991**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly terminated the seniority of Mr. J. Piskura, by letter dated October 5, 1995, for alleged failure to report to a position to which he was allegedly assigned as an automatic bidder (System Docket MW-4121).**
- (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 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 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.

At the time of this dispute, Trackman J. Piskura, Claimant, had been employed by Carrier for approximately 23 years. Mr. Piskura held a Casual Driver position through June 12, 1995 at which time Carrier abolished his position and he reverted to furlough status. On August 3, 1995, after his BMW representative notified Carrier that Claimant was disabled, Carrier sent Mr. Piskura an MD-25 medical evaluation form to clarify his medical status. Carrier sent the evaluation form certified mail, together with instructions to complete and return it. However, after several delivery attempts on various dates to Claimant's last listed address, those certified letters remained unclaimed.

A few weeks later, Carrier sent Claimant another notification, by certified letter dated August 29, 1995, that he was recalled from furlough to cover a Casual Driver position. There is no dispute that the recall letter stated that Claimant had ten days to report for duty and that failure to do so would result in forfeiture of his seniority rights. Again, after several attempted but unsuccessful deliveries that letter also remained unclaimed.

Finally, on October 5, 1995, Carrier sent Claimant notice that his seniority was terminated, via certified mail, as follows:

"On August 29, 1995, you were awarded a Casual Driver Position at Elizabeth, NJ as an automatic bidder.

You were notified of this award via Certified Mail Z-794-797-538. This was mailed to your last known address. However, envelope was returned undelivered and as of this writing, you have failed to report to this position or substantiate the reason for your absence.

Therefore, based on Rule 4, Section 3 of the current Agreement, you have forfeited all seniority under this Agreement."

On October 25, 1995, the Organization submitted a claim on behalf of Mr. Piskura contending that:

“As was previously discussed, Mr. Piskura was not in a furlough status but was off on sickness. The Carrier was fully aware of this fact in that I had personally spoken with Mr. Klinkbeil about him being disabled sick and also in order to have received his sickness benefits from the RRB the Carrier was contacted and confirmed his eligibility due to sickness.

The denial of his return from sickness and the citing of him after he had attempted to return was improper and he should now be returned to service and make whole for all losses sustained.”

Carrier denied the claim premised upon:

“This refers to your letter dated October 25, 1995, and to our November 9, 1995 claims conference during which we discussed the claim submitted on behalf of J. Piskura (029819).

Contrary to your contention, the Carrier properly applied Rule 4, Section 3 of the BMW Collective Bargaining Agreement when it terminated the Claimant’s seniority. By a certified letter dated August 29, 1995, the Claimant was notified that, as an automatic bidder, he had been awarded a Casual Driver position at Elizabeth, NJ. That letter was sent to the Claimant’s address of record, however the Claimant never picked it up. It was returned to the Carrier unclaimed and the Claimant never gave the Carrier any reason as to why he could not report for the awarded position.

Having never responded to the above letter of recall, the Claimant was sent a second certified letter dated October 5, 1995, which he received, notifying him that pursuant to Rule 4, Section 3 of the BMW Agreement, he had forfeited all seniority under the BMW Agreement. Subsequent to that date, via fax, the Manager-Labor Relations was sent a doctor’s note bearing the name of Pavonia Medical Associates, P.A.. That note was dated September 20, 1995 and basically stated that the Claimant was limited to performing ‘light duty, the lifting of less than 20 lbs.,’ and was restricted from driving.”

Carrier's belated motion to dismiss the claim for procedural irregularity in the initial filing is denied. Failure to raise and perfect such a procedural objection at the earliest stages of grievance handling must be deemed a waiver. See Third Division Awards 10438, 11570, 12516. However, Carrier cannot be faulted for its conscientious efforts to ascertain Claimant's medical disability status and Mr. Piskura was clearly derelict in failing to respond to the letters of inquiry and complete and file the requisite medical evaluation forms. His own lack of care and cooperation in that regard set the scene for his exposure to the drastic consequences of his subsequent failure to take delivery of the certified letter containing his recall notice and to make a timely response to that letter.

However, given that Claimant's defects in communication were apparently innocent and not willful and taking into consideration his 23 years of prior service, we conclude that this is an appropriate case for rescission of the "self-executing" termination provisions of Rule 4. In that regard, the following observations from Third Division Award 31535 is appropriate:

"We recognize that Rule [4] is self-executing. In the past, however, when faced with a claimant who had not followed through to the extent that he should have but who also had not completely abandoned his job, this Board has recognized that confusion in communications contributing to the claimant's predicament can mitigate against the harshness resulting from a literal application of self-executing rules calling for forfeiture of seniority. See, e.g., Third Division Awards 28877, and 29483. In those cases, the Board restored the claimant to service with seniority unimpaired, but without compensation for time lost We find that a similar result is appropriate in the instant case."

AWARD

Claim sustained in accordance with the Findings.

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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 25th day of March 1999.

**Carrier Members' Dissent
to Award 33153 (Docket MW-33464)
(Referee Eischen)**

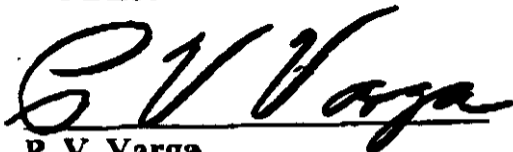
At page 4 of this Award the Majority notes:

“...Mr. Piskura was clearly derelict in failing to respond to letters of inquiry and complete and file the requisite medical evaluation forms.”

Under Rule 4 Section 3, Claimant's admitted failure requires that, “he will forfeit all seniority under this Agreement.” The language is clear. See Third Division Awards 24722, 25155, 31210, 31364 that have applied this language correctly on this railroad.

Award 31535, on which this Majority relies involved a different railroad and subscribes to an unwarranted “confusion” of what the Parties themselves and what this Board, in the vast majority of decisions, has concluded, - clear language is not to be compromised.

We Dissent


P. V. Varga


M. W. Fingerhut


M. C. Lesnik