

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33573
Docket No. MW-33460
99-3-96-3-977**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Seaboard System
(Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The discipline (5 day suspension) imposed upon Mr. R. Burns for alleged violation of Rule 17(b), in connection with being absent without permission on October 2, 1995 was arbitrary, capricious and on the basis of unproven charges. [System File A-BURNS/12(95-1312) SSY]**
- 2. As a consequence of the violation referred to in Part (1) above, the Claimant's record shall be cleared of the charges leveled against him 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 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.

The Claimant established seniority as a Trackman and was assigned and working as such on Force 6F04 headquartered at Sumter, South Carolina, under the supervision of Foreman L. Alexander when the incident giving rise to this dispute occurred. Force 6F04 worked four ten hour days starting at 7:00 A.M., with assigned rest days of Friday, Saturday and Sunday.

As background, on Wednesday, September 27 and Thursday, September 28, 1995, Roadmaster Thomas transported the Claimant to a physician's office in connection with "problems" the Claimant was having that resulted from an on-duty injury he had sustained in 1994. There is no dispute that subsequent to the Claimant's examination, the physician instructed the Claimant to "use a heating pad and get some exercise."

On Sunday evening, October 1, 1995, the Claimant, who does not have a telephone at his residence, called fellow employee M. Allard with whom he carpooled, and stated that he did not feel well and would not be going to work the following day. On Monday, October 2, prior to starting time, co-worker Adams, who also shares a ride with the Claimant, notified Foreman Alexander that the Claimant would not be at work. That morning Allard, whom Claimant had contacted the previous evening, also informed Roadmaster Thomas that the Claimant would not be at work.

On Tuesday morning, October 3, 1995, the Claimant telephoned Roadmaster Thomas and informed him that he was "still stiff" and could not make it to work. At that time, the Claimant requested and was granted permission to be marked off on vacation for the remainder of the week. Following his vacation, the Claimant returned to work.

On October 10, 1995, Roadmaster Thomas notified the Claimant that:

"Monday, October 2, 1995, you were absent without permission. You are therefore charged with violation of Rule 17-B of the agreement between the Seaboard System Railroad and its Maintenance of Way Employees. The hearing will be 9:00 a.m., Thursday, October 19, 1995, in the office of the Division Engineer, 100 Oakland Avenue, Florence, South Carolina."

The Hearing was held as scheduled, following which the Claimant was suspended for five days for violation of Rule 17(B) of the Agreement.

The Organization protested the discipline maintaining that the Claimant, who had sustained an on-duty injury, was merely following the attending physician's instructions, thereby rendering his absence "clearly excusable." For his part, the Claimant asserts that in addition to being instructed to "use a heating pad and get some exercise," the physician also told him, in Roadmaster Thomas' presence, to "go to work if you feel like it, but if you don't feel well, don't go." According to the Claimant, he had a "clear understanding" that if he was not feeling well enough to protect his assignment on the following Monday, October 2, that he would be "released" from work.

Further, the Claimant maintains that in addition to contacting co-worker Allard and asking him to tell Roadmaster Thomas that he would not be in on October 2, he attempted, unsuccessfully, to contact the Roadmaster on the afternoon of October 2. And, on Tuesday, October 3, the Claimant telephoned Roadmaster Thomas from his sister's home to personally inform him that he was "still stiff" and could not make it to work. The Claimant then went on to request vacation for the remainder of the week.

Rule 17-B of the Agreement states that:

"An employee desiring to be absent from service must obtain permission from his foreman or the proper officer. In case an employee is unavoidably kept from work he must be able to furnish proof of his inability to notify his foreman or proper officer."

The Carrier asserts that Roadmaster Thomas did not hear the attending physician instruct the Claimant to "go to work if you feel like it, but if you don't feel well, don't go." Therefore, according to the Carrier, the Claimant failed to get his supervisor's permission to be off on October 2, 1995, and therefore, clearly violated Rule 17-B of the Agreement. In support of its position, the Carrier points to numerous Board decisions that address the basic principle that the Carrier "cannot be expected to allow employees in its service to work if and when they want."

However, in these particular circumstances, we find that the Claimant did, indeed make a reasonable effort to inform the Carrier that he was not able to work. While the Claimant's method of reporting his absence might seem lacking, it should be noted that

he did not have immediate access to a telephone. Further, and in that connection, the Claimant believed that Roadmaster Thomas, who was in the same room with him when he received instructions from the attending physician, heard the physician tell him to "go to work if you feel like it, but if you don't feel well, don't go." Additionally, on Sunday, October 1, the Claimant asked co-worker Allard to inform the Roadmaster that he would not be at work on the following day. Allard did as he was requested, as did another co-worker, Adams, who apprised Foreman Allen of the same. Finally, according to the Claimant's unrefuted testimony, he attempted to contact the Roadmaster, unsuccessfully, on the afternoon of October 2, and personally spoke to Roadmaster Thomas on October 3 to obtain permission to observe his vacation for the remainder of the week; permission which we note was granted.

Based on the record evidence and the Claimant's heretofore unblemished record, the claim is sustained.

AWARD

Claim sustained.

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 20th day of October 1999.