

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36214
Docket No. MW-36449
02-3-00-3-722

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it removed Mr. J. L. Hollingworth from all seniority rosters effective August 17, 1999 without a formal investigation under the provisions of Rule 12 (System File MW-99-310/1207011 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant Hollingworth shall now be reinstated to service with all seniority rights restored and he shall ‘... be credited for Railroad Retirement, vacation, and hospitalization, all holidays and any all hours at the claimant’s respective straight time rate of pay, and any and all hours at the claimant’s respective overtime rate of pay acquired on his previous job assignment beginning on August 17, 1999 through and including on a continuous basis until this matter is resolved ***”

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.

On July 23, 1999 the Claimant was sent a certified letter advising him that he had been absent without proper authority since June 3, 1999 and that, pursuant to the parties' June 27, 1981 Memorandum of Agreement, he was considered to have resigned and voluntarily removed his name from the seniority roster. The Claimant was further advised to show good cause within seven days of receipt of the letter why his employment should not be terminated.

According to the Carrier, the Claimant did not respond to the letter within the appropriate amount of time, nor did he provide good cause for his absence, and, accordingly, the Claimant's employment was severed effective August 17, 1999.

Appendix F-1 to the parties' June 27, 1981 Memorandum of Agreement provides as follows:

- "1) Employees who are continuously absent without authority from their position for a period of thirty (30) or more calendar days may be treated as having resigned and their names removed from the seniority roster.
- 2) Before the employee is considered as having resigned and his name removed from the roster, the employee will be notified at his last known address by Certified Mail – Return Receipt Requested that failure to return to service or show cause within seven (7) calendar days of receipt of the letter will be treated as a voluntary resignation and his name removed from the seniority roster. A letter mailed to the last address of record with MoPac will be considered delivered. A copy of such letter will be sent to the General Chairman.
- 3) If the employee should respond to such letter within the time limit specified, MoPac shall have the option of allowing the employee to return to service for good cause shown or citing him for formal

investigation under the provisions of Rule 12 of the basic agreement.

- 4) If the employee does not respond within the time frame specified, he will be considered as having resigned and his name removed from the roster. . . .”

The Organization contends that the Claimant’s removal was not justified, for several reasons. First, it argues that the Claimant attempted within the 30-day period, albeit without success, to contact the Carrier to provide notification that he was having some personal problems that necessitated his being off work. Second, the Organization takes the position that the Claimant timely complied with the Carrier’s instructions to provide good reasons for his absence once he received the show cause letter. Any delay in this matter, the Organization asserts, can be attributed to the fact that the Carrier’s letter to show cause was sent to the wrong address. Third, the Organization maintains that the Carrier never attempted to contact the Claimant to determine his whereabouts and it failed to hold an investigative Hearing before dismissing the Claimant. All these factors, in the Organization’s view, compel the conclusion that the Claimant should be returned to service.

The Carrier rejects the Organization’s contentions and argues that this case involves the straightforward application of Appendix F-1 to the June 27, 1981 Memorandum of Agreement. The Carrier argues that the Claimant was absent without proper authority for more than 30 days and, under those circumstances, no Investigation was required. The Claimant forfeited his seniority rights and employment with the Carrier as of August 10, 1999 because he did not return to service or show cause why he should be returned to service. The Carrier maintains that it is entitled to apply the Agreement as it is written and equitable arguments advanced by the Claimant should not be considered.

The Board carefully considered the record in its entirety. We note at the outset that the Organization, as the moving party in this dispute, has the burden of providing substantial evidence to support its claim. Based on our review, we are unable to conclude that the Organization met that evidentiary burden.

This is a case where the record contains a fundamental conflict in the evidence as to several critical elements of the Organization’s claim. The contention that the

Claimant attempted to absent himself with proper authority, for example, was predicated upon the Claimant's statement that he telephoned and paged two supervisors "continuously for three or four days and a few times thereafter." That assertion, however, was directly refuted by the Carrier on the property by the two supervisors to whom the Claimant was assigned during the relevant time period. Both supervisors stated that they did not receive a page, a telephone call or a voice mail message from the Claimant notifying them of his whereabouts.

By the same token, the Claimant merely asserted that he wrote a letter to the Carrier dated August 4, 1999 immediately after receipt of the show cause letter, setting forth the reasons for his absence. It is noted that the August 4, 1999 letter does not specify where it was mailed or even if it was mailed. In any event, that statement was also specifically countered by the Carrier supervisor, who insisted that no letter was received.

Absent some form of corroborative evidence, we cannot say that the Claimant's assertions should carry any more weight than the Carrier's counter assertions. The Board, as an appellate body, has no means of resolving factual conflicts of this nature. Faced with similar irreconcilable factual disputes in other cases, the Board has consistently denied or dismissed such claims. See Third Division Awards 21436, 25833, 26224 and 28401, among others.

The Organization's remaining arguments are similarly flawed. During handling on the property, the Organization contended that the Claimant did not live at the address to which the show cause letter was mailed. That argument is a red herring. The evidence shows that the letter was mailed to the Claimant's last address of record. The Carrier cannot be faulted for misaddressing the letter when it was the Claimant's responsibility to provide timely notification of a change in address.

More importantly, though, the Rule required the Claimant to show cause within seven days of receipt of the Carrier's letter. Regardless of any delay between the issuance of the show cause letter and its receipt, the Claimant had the same amount of response time afforded to every employee under the Rule once he took receipt of the letter on August 3. As we have noted above, the evidence does not support the conclusion that he responded in a timely manner.

Finally, the Organization's attempt to shift responsibility to the Carrier to track down the Claimant is misplaced. It is the Claimant who had the responsibility to show up for work or receive authority for his prolonged absence. Unfortunately for the Claimant, the record does not establish that he was authorized to be absent and no substantial evidence has been presented that he timely communicated with the Carrier to justify his absence. Under the circumstances, the Carrier had the right to terminate the Claimant's seniority under the self-executing provisions of the above-cited Rule. The Board has consistently held that such Rules are not disciplinary in nature and preclude the necessity of a formal Investigation. See Third Division Awards 29886 and 28483. We recognize that there have been a few limited exceptions to that general Rule, cited by the Organization, but they involve special circumstances not present here. Because the record supports the action taken by the Carrier, we must rule to deny the claim.

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 24th day of September 2002.