

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42771
Docket No. MW-42962
17-3-NRAB-00003-150145**

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

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier terminated the seniority rights of Mr. T. Wilson by letter dated December 27, 2013 (System File D70700114/2013-157306).

(2) As a consequence of the violation referred to in Part (1) above, Claimant T. Wilson shall now be reinstated to service with all seniority rights unimpaired.”

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 all times relevant to this dispute, the Claimant was employed by the Carrier as a Welder in the Maintenance of Way Department. Because of an injury sustained by Claimant, he had not worked since July 18, 2011. It is unclear from the record whether this injury was on-duty or not. On July 2, 2013 Claimant was sent a notification that he was to provide the Carrier's Chief Medical Officer Information regarding his continued inability to work. This notice included a copy of the "Certificate of Ongoing Injury or Illness" to be completed by the Claimant's treating physician. The Claimant was advised that this form must be sent in within ten calendar days of his receipt of the letter, and that his failure to do so may subject him to possible disciplinary handling.

The Claimant was sent a second letter on August 19, 2013 informing him that no response to the earlier letter had been received. Another "Certificate of Ongoing Injury or Illness" was enclosed, and the Claimant was informed that his failure to submit the documentation would result in the immediate termination of his seniority.

By letter dated December 27, 2013, Division Engineer J. W. Fortune notified the Claimant that his failure to respond to the August 19, 2013 letter has resulted in his forfeiture of seniority in accordance with Rule 26(b) of the Agreement. The Organization filed a timely appeal of this decision. The claim was discussed in conference in February 2014, at which time the Carrier advised the Organization that the Claimant had never responded to the requests for medical information showing his inability to work. This was confirmed by letter dated April 10, 2014. With that letter, the Carrier also provided tracking information from the Postal Service showing that the August 19, 2013 letter was delivered and signed for by the Claimant the following day. Additionally, the Carrier provided similar tracking information showing that the July letter was delivered and signed for by the Claimant on July 5, 2013.

The Organization responded to the Carrier's letter on November 20, 2014, attaching a "Certification of Ongoing Injury or Illness" signed by the Claimant's physician on August 21, 2013, indicating that the Claimant had been under his care from July 14, 2011 to July 16, 2013. The form further stated that it was estimated that the Claimant could return to work without restriction on November 25, 2013.

Public Law Board No. 7104 between these parties, in Award No. 27, addressed Rule 26(b), which states, in pertinent part, as follows:

“Except for sickness or disability, or under circumstances beyond his control, an employee who is absent in excess of fourteen (14) consecutive days without notifying his supervisor or proper carrier official will forfeit all seniority under this Agreement. . . .”

The Board wrote:

“Rule 26(b) is clearly and unambiguously self-executing. However, by its explicit terms, it is also self-excusing when sickness, disability, or other circumstances beyond the control of the employee are established by the record. On the record before us, there is medical evidence to establish the excuse. Moreover, there is no conflicting medical evidence to create a dispute about the cause of claimant’s absence or the characteristics of his condition that explained his failure to notify the Carrier. Accordingly, the forfeiture of his seniority has not been properly justified and must be set aside.”

Similarly, Public Law Board No. 6564, also between these parties, addressed the Rule, holding:

“. . . Under Rule 26(b)’s explicit terms, an employee absent due to sickness or disability is not subject to forfeiture of seniority for failing to notify the Carrier regarding an absence in excess of fourteen days. The Board finds that the Carrier’s application of Rule 26(b) to Claimant in the instant case was therefore in error, and the Carrier’s termination of Claimant’s employment on the basis of an alleged violation of Rule 26(b) was improper. The Claimant should be reinstated.”

It is the finding of this Board that the Claimant’s inability to work was the result of disability. Accordingly, we hold that the forfeiture provisions of Rule 26(b) do not apply to him, and his termination was in violation of the terms of the Agreement. We will direct that the Claimant’s seniority be reinstated. Inasmuch as that is the only remedy requested by the claim, no additional relief is granted.

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 24th day of October 2017.