

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD No. 7163**

Brotherhood of Maintenance of Way	)		
Employees Division, IBT Rail Conference	)		
	)		
vs.	)	Case No.	111
	)	Award No.	111
	)		
CSX Transportation, Inc.	)		

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The seniority termination of Mr. R. Henry, Jr. by Carrier letter dated September 26, 2006 was unjust and in violation of the Agreement (System File B11129410/2010-070203).
2. As a consequence of the violation referred to in Part 1 above, Mr. R. Henry, Jr. shall now have the seniority termination removed from his record and he shall be reinstated to service with all of his seniority and other rights fully restored and he shall be compensated for any wage loss suffered following the unjust seniority termination and the subsequent result of not being allowed to return to work.”

[BMWE Submission at 1]

Findings:

Public Law Board No. 7163, upon the whole record and all the evidence, finds that (1) the parties to this dispute are Carrier and Employees within the meaning of the Railway Labor Act as amended, (2) the Board has jurisdiction over this dispute, and (3) the parties to the dispute were accorded due notice of the hearing and participated in this proceeding.

In the Board's view this claim presented for adjudication is best understood by a recitation of chronological events.

In late August 2005 Hurricane Katrina arrived on the Gulf Coast; its effect on property and families is well-chronicled. CSXT employees, such as Claimant, lost homes and endured health and safety issues for their families while reconstructing their lives. Claimant's circumstances encompassed his health, caring for his mother and finding family housing.

In early September 2005 Claimant met with his supervisor and “requested leave until I could find some direction and get my family and home life set.” Claimant asserts that the supervisor approved his request for leave. In this regard, the Carrier authorized thirty (30) days of paid leave for employees such as Claimant to deal with the aftermath of Hurricane Katrina. The record is not clear whether Claimant’s assertion that the supervisor approved his request for leave in early September 2005 was covered by this 30-day paid leave.

On November 30, 2005 the Carrier issued to Claimant the following letter:

Our records show that you have failed to report for duty on your position as Vehicle Operator on Force 5M08 beginning on October 3, 2005, and continuing for over fourteen days in violation of [Rule 26-Absent Without Permission].

As a result of your failure to protect your assignment and in accordance with the provisions of the effective Agreement, you are being removed from all appropriate seniority rosters effective immediately.

On December 5, 2005 the Organization challenged Claimant's dismissal and requested an Unjust Termination Hearing for early January 2006. BMW states that the Carrier terminated Claimant's seniority based on his alleged absenteeism but did not conduct any investigation to determine the cause or circumstances for his absenteeism.

Rule 26 extends an exception for absenteeism based on "sickness or disability, or circumstances beyond the employee's control" and an unjust treatment hearing is necessary to develop the facts pertinent to Claimant's situation.

The Organization states that the hearing was not convened within the time limits under the Agreement; however, on August 8, 2006 the Carrier revoked the Claimant's seniority termination.

On August 23, 2006 the Carrier notified Claimant by letter of the following:

Records indicate that you have not reported to work since September 2, 2005. ...our understanding [is] that you were impacted by Hurricane Katrina, which occurred on August 29, 2005. CSX allowed employees affected by Hurricane Katrina to be off with pay for one month. However, you have now been off 355 days, and to date, CSX has received no communication from you as to your continued absence.

Per Rule 26, an employee...absent for more than 14 consecutive days without notifying his supervisor or the proper carrier official will forfeit all seniority under the Agreement.

Therefore, please provide us no later than September 6, 2006 with written documentation and justification as to any circumstances beyond your control that would prevent your return to work. Failure to respond by September 6, 2006 will result in forfeiture of all seniority under the... Agreement[.]

On September 5, 2006 Claimant responded to the Carrier's letter of August 23:

We all understand that my life along with many other employees' lives were impacted by Hurricane Katrina. Due to the severity of the damages that I received as well as the displacement of my immediate family as well as my aged mother whom I care for, I was placed in a position of trying to pull my life back together.

It was said that I did not make any attempt to notify anyone of my reasons for not returning to work, but on two occasions I spoke with

my immediate supervisor, Mr. R. B. Elliot, and Kenny Durbin, stating that I would notify them of my return to work, once I had gotten my home and my mother's home in order.

According to the Organization, Claimant reasonably believed he had an authorized absence based on prior consent (early September 2005) and his on-going health and family issues.

Notwithstanding Claimant's asserted reasonable belief, on September 26, 2006 the Carrier issued to Claimant and the Organization a notice of Claimant's dismissal. The letter states:

Your tragedies notwithstanding, your [September 5] letter did not provide justification for your extended absence of over a year. Also, you have not provided any documentation that sufficiently explains the circumstances beyond your control that has prevented your return to work. Furthermore, neither Mr. Elliott nor Mr. Durbin corroborated your statement that you would '*notify them*' of your return to work. Even if you made this statement to them, this is not the proper procedure for requesting a leave of absence.

There is no record that you every made a [Rule 7] written request for a leave of absence, either at the division level or higher. The 'Highest Designated Labor Relations Officer' never received a request from your General Chairman for a leave of absence in excess of ninety (90) days as required by the agreement.

Pursuant to Rule 26 (b) which reads in part...'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', you have forfeited all seniority. The reason for this action is that you have been absent without permission from October 3, 2005, and continuing for over fourteen days in violation of the above referenced Rule.

As a result of your failure to protect your assignment and in accordance with the provisions of the effective Agreement, you are being removed from all appropriate seniority rosters effective immediately.

Pursuant to Rule 26(b), the Claimant "or his representative may appeal" this [forfeiture-of-seniority] "action to the carrier's Highest Designed Labor Relations Officer [HDO] within thirty (30) days under Rule 25 [Discipline, Hearings, and Appeals], Section 3."

On April 6, 2010 the Organization filed a claim contesting Claimant's dismissal of September 26, 2006. BMWE asserts the following:

This claim is filed because the carrier violated the [Agreement] when [it] denied Mr. Henry the right to return to work after Leave of Absence and Medical Leave ...after Hurricane Katrina in August, 2005. The Claimant received permission from Supervisor R. Elliot to be [absent] from work account of the devastating affect Hurricane Katrina caused to his home, his mother's home and finding a place for his mother and him to live. Supervisor verbally granted Mr. Henry leave of absence.

Mr. Henry needed an extension account of the difficulty he was having finding housing. Mr. Elliot and Mr. Durbin granted the extension.

The Carrier denied the claim noting that Claimant did not respond to or appeal the September 26, 2006 dismissal letter "and there are no records of any correspondence from Mr. Henry regarding his alleged verbal leave of absence. CSX does not grant verbal leaves of absence" and Supervisors Elliott and Durbin do not have "any recollection of indicating anything of this nature. Based on the foregoing, Mr. Henry is found to no longer be an employee of CSX[.]"

On July 1, 2010 the Organization appealed the claim denial to the Carrier's HDO. According to the Organization the Claimant requested an extension for his leave of absence on September 5, 2006 but the Carrier denied it with the September 26, 2006 dismissal letter.

BMWE argues that Claimant advised the Carrier "that it would be impossible to return at this time [September 5, 2006] account of the problems [Claimant] was encountering with the effects" of Hurricane Katrina.

Mr. Henry residence was destroyed by Hurricane Katrina and if the Carrier would have granted this unjust treatment hearing as defined in Rule 25 and Rule 26...this matter could have been avoided and a valuable employee with 27 years of service would have been permitted to return to work[.]

First and foremost, Rule 7, leave of absence is clear due to nature and circumstances beyond the claimant control he had no choice but ask permission for leave verbally and Supervisor R. Elliot verbally granted Mr. Henry the leave of absence. Mr. Henry needed an extension account of the difficulty he was having with finding housing. Mr. Elliot and Mr. Durbin granted the extension.

On December 5, 2005 the Organization requested an unjust treatment hearing...but the Carrier denied his request...if [the hearing] had been granted as defined in Rule 25 and Rule 26...this matter could have been avoided[.]

Following conference on October 28, 2011 the HDO denied the Organization's appeal by letter dated February 15, 2011. Claimant's situation was not unique for "many...employees in your town were impacted just as severely as yourself" and he was instructed by letter (August 23, 2006) to provide "written documentation and justification as to any circumstances beyond your control that would prevent your return to work."

Claimant's response (September 5, 2006), the Carrier asserts, reiterated the impact of Hurricane Katrina, did not include written documentation or justification as to circumstances beyond his control that prevented his reporting for duty and continued with his unfounded assertion that supervision had approved his absence continuing since October 3, 2005. Since Claimant was absent from work for more than 14 consecutive days without justifiable excuse the Carrier invoked Rule 26(b) on September 26, 2006 and dismissed Claimant.

Having reviewed the record of this proceeding the Board finds that the Organization and the Claimant were properly notified on September 26, 2006 of Claimant's dismissal based on his absence from work for more than 14 consecutive days without justifiable excuse. At that time

they also were notified that there was a 30-day window to file an appeal with the HDO under Rule 25 to contest the dismissal.

Although properly notified of their right to appeal, the Claimant and the Organization did not file a Rule 25 appeal at any time. Therefore Claimant's dismissal pursuant to Rule 26 is final and not subject to review by the Board.

Notwithstanding the closure and finality of Claimant's dismissal on September 26, 2006 the Organization filed this claim on April 6, 2010 - - approximately three one-half (3-1/2) years after Claimant's dismissal. As noted by the Carrier in its submission, Third Division Award 41094 (CSXT) states that a claim is considered closed unless presented to the HDO within nine (9) months from the date of a decision.

In the context of this proceeding the 9-month window to file a claim commenced on or about October 26, 2006, the closure date of the 30-day window to appeal the Rule 26 dismissal. From the date of decision that starts the 9-month period to file a claim (October 26, 2006) to the date that the claim was filed (April 26, 2010) is approximately three (3) years and six (6) months - - well beyond the 9-month window for filing a claim.

Since the Organization and Claimant did not appeal Claimant's dismissal under Rule 26 and the Organization's claim in this proceeding is not timely, the claim is dismissed.

Award:

Claim dismissed.

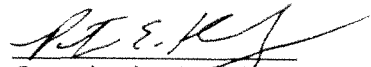


Patrick J. Halter
Neutral Member

PLB No. 7163 Case No. 111



Carrier Member
Robert A. Paszta



Organization Member
Peter E. Kennedy

Dated this 27th day of June, 20 12