PUBLIC LAW BOARD NO. 2142

Award No. 6

Docket No. MW-1121
Case No. 14

Parties to Dispute: Brotherhood of Maintenance of Way Employees and Illinois Central Gulf Railroad

Statement of Claim:

1. Carrier violated the effective Agreement by refusing to reinstate Trackman Gerald Boyce after his release from Doctor's care on January 25, 1977.

2. Claimant Gerald Boyce shall be restored to Carrier's service as a Trackman, with full seniority and that he be paid for each day's work that he has missed since January 26, 1977, plus any overtime made by a junior employee and continuing until such time that he is returned to work.

Findings: The Board, after hearing upon the whole record and evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated January 23, 1978, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

As a result of job abolishments in August 1975, Claimant Trackman was displaced on August 11, 1975 from his position. Claimant failed to exercise his seniority as per Rule 30. However, instead of losing his seniority Claimant was given a second chance to exercise it He failed to again, but this time advised his Division officer on September 4, 1975 that he was unable to displace due to being admitted into the Veterans

Administration Hospital on September 2, 1975 for eye trouble. On October 15, 1975 Claimant advised the Division Engineer's office that he was being released October 16th to return to work and would displace at Dyersburg, Tennessee, October 17, 1975 and bring his release with him. Claimant failed again to exercise his seniority.

On November 13, 1975 Claimant called to advise that he was bringing a medical release and returning to work. He again failed to report. Carrier, on November 17, 1975, sent Claimant notice that because of his failure to exercise his seniority after being released from the VA Hospital September 22, 1975, his employment relationship was terminated. November 19, 1975 Claimant submitted a release from the VA which caused Carrier's investigation and discovery that Claimant was released from the VA September 22, 1975. Claimant refused to sign a letter authorizing Carrier to receive from the VA the dates of his hospitalization and release. Nevertheless the VA Hospital verified that the release Claimant gave Carrier November 19, 1975 was not the one it gave Claimant.

As a result Carrier, on November 20, 1975, wrote Claimant reciting the factual history of his being rolled August 11, 1975, his several failures to exercise his seniority, his failure to date to report for work or, in the alternative, to furnish medical reason for not reporting and for such failure his employment relationship was terminated and his service record closed.

Fourteen (14) months later Claimant's Local Chairman furnished a medical release from a Doctor wherein it alleged that Claimant had been

under medical care since September 1975 and was being released to work January 25, 1977. Carrier's refusal to permit Claimant to return on January 26, 1977 caused the instant claim to be filed and progressed.

Rule 39, as of August 1, 1973, provided:

> "An employee who is absent from his assignment without permission for five (5) consecutive work days, will be considered as having abandoned his position and resigned from the service, unless such absence from service is due to physical incapacity as evidenced by a release signed by a medical Doctor."

Rule 39 is a self-executory rule and places a burden on an absentee thereunder to prove that the reason for such continuous absence was medically inspired.

The record clearly supports the conclusion that Claimant willfully violated Rule 39. He had every opportunity to contact his supervisors. Claimant's repeated failures to report for work, particularly after his release, in September 1975, his failure to prove physical incapacity from September 22 to November 20, 1975, all serve to support the conclusion that he had forfeited his seniority and severed his relationship with Carrier.

The medical evidence offered in January 1977 is held to be untimely offered and is barred from consideration. The organization had been placed on record November 20, 1975 by receipt of copy of Claimant's termination. The intervening silence is deemed to be a bar to their instituting the instant claim. In the circumstances, this claim will be denied.

Award: Claim denied.

A. J. Cunningham, Employee Member

M. J. Hagen, Carrier Member

Arthur T. Van Wart, Chairman
and Neutral Member

Issued at Falmouth, Massachusetts. August 29, 1978.