

PUBLIC LAW BOARD NO. 2366

Docket No. 1

Award No. 4

Case No. MW-1203

File: Mo-20-T-78

PARTIES TO DISPUTE:

Illinois Central Gulf Railroad

and

Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Trackman Ollie McLemore was without just and sufficient cause and wholly disproportionate with the alleged charge.

(2) Claimant McLemore be restored to service, his personal record be cleared of termination of service charge and be compensated for all time lost from January 3, 1978 until he is restored to service by the Carrier."

OPINION OF BOARD

The Claimant was, according to the Organization, injured at his home on December 23, 1977 and was unable to return to work until released by his physician on January 2, 1978. When he attempted to return to work on the next day, he was denied permission to do so, and was notified that he was removed from the seniority roster and his services with the Company were being terminated under provisions of Rule 39. Rule 39 provides that an employee who is absent from his assigned position without permission for seven (7) consecutive work days will be considered as having abandoned his position and resigned from the service.

The Claimant asserts that he attempted to make his injury known to the Carrier on December 30, 1977. In this regard,

it appears to be conceded that the Claimant did notify a Steno-Clerk in the office on the afternoon of December 30, 1977 that he "...would not be in for work because his ankle hurt."

The Carrier asserts that the Claimant was scheduled to work but did not report for duty on December 20, 21 and 22, as well as December 26, 27, 28, 29 and 30, 1977 and thus, by operation of Rule 39, as of December 29 he was considered to have resigned from the Company's employ. Moreover, the Carrier disputes that a telephone call to a Clerk-Steno constitutes "permission" as is required so as to deviate from Rule 39.

The fact that the Claimant may have obtained a medical certification - even though that certification was not presented to the Company in a timely manner - does not excuse the Claimant. In this regard, the Carrier notes that the prior wording of Rule 39 did make reference to absence from service due to "physical incapacity." However, in 1976 a period of permissible absence was increased from 5 days to 7 days, but reference to physical incapacity was eliminated.

In the final analysis, the Board is inclined to deny the claim. There is absolutely nothing of record to suggest that the Claimant's incapacity was such that he could not have notified the Carrier of his inability to report to work; yet he failed to do so.

The Carrier indicates that the Claimant's last work day was December 19, 1977. The Claimant has suggested that said date may be erroneous and he indicates that the Carrier precluded his representatives from reviewing Carrier records to ascertain the last day of work. The Carrier denies that it was obstructionist in this regard. In any event, there is nothing of record to suggest when the Claimant asserts his last duty day may have been, and under those circumstances, we are inclined to find that the only evidence before us is that the Claimant's unauthorized absence commenced on December 20, 1977.

Accordingly, the self-executing provisions of Rule 39 have been accomplished by December 29 and the phone call to the Clerk-Steno on December 30, 1977 was a gratuitous act, but not material to this dispute. As noted, the language of Rule 39 is self-executing, and thus the parties themselves agreed that if a certain action took place, the result would be resignation from service and such is the case here.

Of course, we are not concerned with a situation in which there may have been an impossibility of compliance on the part of the Claimant and, accordingly, that potential aspect

need not be addressed in this case.

FINDINGS

The Board, upon consideration of the entire record and all of the evidence finds:

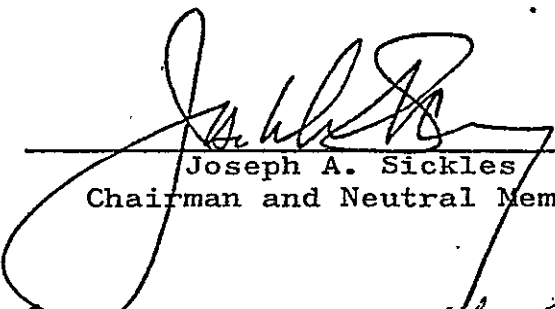
The parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.


The parties to said dispute were given due and proper notice of hearing thereon.

AWARD

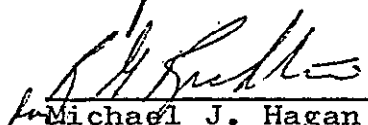
Claim denied.



Joseph A. Sickles
Chairman and Neutral Member



Hugh G. Harper
Organization Member



Michael J. Hagan
Carrier Member



3/10/80
DATE