

PUBIC LAW BOARD 2366

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| Brotherhood of Maintenance of Way Employees | : |                |
|   | : |                |
| and   | : | Award No. 84   |
|   | : | Docket No. 100 |
| Illinois Central Gulf Railroad Company      | : |                |

STATEMENT OF CLAIM

1. The record of Derrick Operator R. A. Capra was improperly closed out by the Carrier on October 25, 1984 as a consequence of claimant's involuntary absnece from work because of an on duty injury. (Organization File: System Gang Capra; Carrier File 1681).

2. Claimant R. A. Capra shall be reinstated with all rights unimpaired and compensation from the date he was released by his doctor to return to work.

OPINION OF THE BOARD

This Board's Award No. 62 restored the Claimant to service with retention of seniority and other benefits, but without reimbursement for compensation lost during the prior period of suspension. As a result, the Claimant received a complete company physical examination and he was notified that he was qualified to return to service.

The Claimant worked for four (4) days and on September 27, he informed his foreman that he would not be at work on October 1, 1984. The Claimant had a four (4) day, 10-hour per day schedule. On October 1, the Claimant advised the Carrier that he would not be at work at all during that week and again on October 8, 1984, the Claimant called the Carrier and stated that because of an off-duty injury to his shoulder he would not be able to perform duties for the Carrier. He stated that a letter from his personal physician would be furnished.

Because the Carrier had not received a medical letter or heard from the Claimant by October 25, 1984, (the thirteenth (13) work day after the last contact had been made) the employee was notified that he had been absent from his position without permission for more than seven (7) consecutive work days and thus, under Rule 38, he was presumed to have abandoned his position and resigned from service.

The Carrier reminds us that Rule 38 is self-executing and when the Claimant failed to furnish a written statement or a doctor's report, it had no alternative but to terminate the employee under Rule 38. The Carrier has cited various prior awards of this Board concerning the Carrier's discretion in applying Rule 38.

The Claimant's personal physician sent a letter dated October 18, 1984, to the ICG Railroad at an address which had been abandoned several years ago and the Claimant himself did not receive his copy of that statement until October 24, 1984. The Company did not actually receive the document from the personal physician until four (4) days after the Claimant's seniority had been terminated. Thus, the Carrier concludes that the employee failed to give the doctor adequate information concerning the time elements and the address to be utilized. Moreover, the Carrier questions the medical conclusion stated in the record.

The Claimant contends that the Carrier was arbitrary and capricious in its action. The Claimant cites an October 25, 1984, letter from the Carrier which concedes that the employee contacted the Carrier on October 8, 1984 and stated that, due to a previous off-duty injury to his shoulder, he would be unable to perform duties. The letter also conceded that the employee's doctor would furnish his advise to the Carrier "shortly." Although the Claimant did not contact the Carrier after October 8, 1984, there is a concession in the December 10, 1984, letter by the Carrier that "We realize Mr. Capra had no control over the time lag between his examination and the doctor's report. . ."

The Board has not only considered the record in this case but has contemplated prior awards dealing with this self-executing provision of the agreement. In past, we have been quite clear to point out that the language is mandatory and the Carrier must act if the employee takes action which suggests an abandonment of the position. However, we do not agree that the prior awards necessarily control this case. Here, the employee did advise the Carrier that he could not report to work and stated a reason. He

notified the Carrier that medical advise would be forthcoming. Certainly, the Claimant's physician is the agent of the Claimant and delays are - legally - attributable to the Claimant. However, the Carrier did seem to recognize, while the matter was under review on the property, that an individual cannot always timely control the reports issued by an individual's physician.

Based solely upon this record in this case we are inclined to rule that the employee should receive the benefit of the doubt and we will restore him to the seniority roster. Of course, based upon the facts or record we find no basis for any award of back pay.

We are compelled to note that this Employee has had two severe disciplinary actions taken against him concerning attendance for duty. We feel that this Claimant should be forewarned that his future employment relationship is subject to his demonstrating ability and desire to serve as a productive employee. Nothing in this award should indicate that this Carrier is required to tolerate conduct which is indicative of a contrary conclusion.

#### 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

1. The termination is set aside.
2. The Carrier is restored to service with retention of seniority and other benefits, but without reimbursement for compensation lost until the employee is restored to service.
3. The Carrier shall comply with this award within thirty (30) days of the effective date.

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Joseph A. Sickles  
Chairman and Neutral Member

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J. S. Gibbins  
Carrier Member

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Hugh Harper  
Organization Member

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Date