

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

1. Machine Operator Conrad C. Barb's termination for allegedly not requesting a leave of absence while absent due to injuries received in an automobile accident is without just and sufficient cause, arbitrary, and capricious. (Carrier's File 81-1-287).
2. Claimant Conrad C. Barb shall be reinstated with seniority and all other rights unimpaired and compensated for all wage loss suffered.

OPINION OF THE BOARD:

On or about August 23, 1980, the Claimant was involved in an automobile accident in which he received a back injury. The Claimant did not return to work until December 22, 1980. Upon his return, he was given the following letter:

"This letter is to advise you that since you failed to protect your assignment or file for a leave of absence since August 23, 1980, and since the position you should have been protecting was abolished on November 4, 1980, and at that time you failed to file for a furloughed status or exercise your authority to displace a junior employee, your employment with the Chicago and North Western Transportation Company is hereby terminated."

The Organization points out that the Carrier does not deny that Claimant was involved in an accident and that they do not deny that they were aware of his physical condition. As evidence of the Carrier's awareness of the injury, the Organization offers copies

of Claimant's insurance forms that were partially filled out by the Carrier in connection with the accident. In light of the Carrier's awareness of the injury vis-a-vis the insurance forms, it is argued that the action of termination is an abuse of discretion. In the support of this position they direct our attention to Second Division Award 8233, Award 87 of PLB 1582 and Award 146 of PLB 280 which give some support for the notion that verbal notice is constructively a request for leave of absence.

The Carrier argues the termination is not arbitrary but is a direct result of the Claimant having failed to displace a junior employee or file his name and address as mandated by Rule 10 after his job was abolished November 4, 1980. Rule 10 reads:

"Employees whose positions have been abolished or who have been displaced who desire to retain their seniority without displacing employees with less seniority must, within fifteen (15) calendar days, file their name and address with the Assistant Division Manager-Engineering and thereafter notify him in writing of any change in address. An employee who is absent on vacation or leave of absence when his job is abolished or he is displaced will have the same rights, provided such rights are exercised within ten calendar days of his return to active service."

The Carrier also points out Rule 10 should be read in concert with Rule 13 which reads:

"Employees whose positions have been abolished or who have been displaced will have the right to displace within ten (10) working days of the date of their position was abolished or they were displaced. An employee who is absent on vacation or leave of absence when his job is abolished or he is displaced will have the same rights to displace provided such rights are exercised within ten (10) calendar days of his return to active service. Junior employees cannot be displaced during course of a day's work."

The Carrier then argues that because the Claimant was not on a leave of absence or vacation at the time his job was abolished, there

should be no exception to Rule 10 or 13 and the Claimant should be considered as properly dropped from the seniority roster. The Carrier further argues that the Claimant should not be thought to have been on leave of absence by virtue of his verbal contact with the Carrier. They admit he was in contact with Carrier but contend that during this contact he was advised to file for a leave of absence and failed to do so. In this respect, he is argued to have waived his right to retention of seniority. To have properly received a leave of absence the Claimant should have complied with Rule 54 (Leave of Absence) which reads:

"An employee desiring to remain away from service must obtain permission from his Supervising Officer. All authorized absences of thirty (30) calendar days or more will be in writing and will be made a matter of record on regularly prescribed form and copy of same will be furnished employee."

It is the conclusion of the Board, after carefully considering the competing arguments, that the Carrier has properly applied the contract as written. Rules 10 and 13 are clear that an employee, unless on vacation or on leave of absence, must in order to retain his seniority either displace or file his name and address. Rule 54 (Leave of Absence) is equally explicit that in order to receive a leave of absence an employee must file for same "in writing."

The Carrier has asserted without refutation that Claimant was advised to file for a leave of absence and that he failed to do so. Without having filed for a leave of absence in writing as the contract specifically requires, the Claimant cannot be thought of as being on a leave of absence and therefore he was required to comply with Rule 10 and 13 which he failed to do.

Unfortunate as it is, the Claimant's failure to comply with the unambiguous provisions of the contract mandates that he cannot retain seniority. Our function is not to do equity but to apply the contract as written.

In regard to the Awards cited by the Organization, we must say we have no dispute with their findings. However, we also observe that those awards are distinguished in that they do not appear to have involved language similar to Rule 54 which specially requires a leave of absence to be filed in writing. The Claimant is bound by the clear provisions of the Rule and additionally had the benefit of advice by the Carrier to file for such a leave of absence. The termination flows most directly from his own inaction.

AWARD

Claim Denied.



Gil Vernon, Chairman



J. D. Crawford, Carrier Member



H. G. Hapner, Employee Member

Date: March 25, 1982