

**BEFORE PUBLIC LAW BOARD NO. 6152**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**And**

**CHICAGO, CENTRAL AND PACIFIC RAILROAD COMPANY**

**Case No. 4**

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

- (1) The Carrier's decision to terminate the seniority of ~~Trackman~~ P. J. Hegarty pursuant to Rule 35(h) was without just and sufficient cause and in violation of the Agreement (System File No. 1030982).
- (2) As a consequence of the violation referred to in Part (1) above, ~~Trackman~~ P. J. Hegarty shall now be allowed the remedy prescribed in Rule 35(g).

**FINDINGS:**

Claimant P. J. Hegarty was employed by the Carrier as a ~~trackman~~ at the time of this claim.

On July 6, 1998, the Carrier notified the Claimant to report for a physical examination on July 16, 1998, because his medical leave had expired and neither he nor his doctor had kept in contact with the Carrier. The Carrier informed the Claimant that, under Rule 35(h), if he is found to be absent from his assigned position without authority for seven consecutive workdays, he would be considered as having abandoned his position and resigned from the service of Carrier without right of investigation or appeal. On July 17, 1998, the Carrier notified the Claimant that he was being closed out of the

service of the Carrier effective that date as a result of his failure to comply with the Carrier's letter of July 6, 1998. The Carrier also issued an investigation letter to the Claimant dated July 17, 1998, requiring the Claimant to appear for a formal investigation in connection with his failure to comply with the instructions and report for a physical examination as set forth in the Carrier's letter of July 6, 1998, and for failure to keep the Carrier informed of his current address and telephone number. The Carrier issued another letter postponing the hearing to August 24, 1998. However, no hearing was held due to the Carrier's enforcement of Rule 35(h).

The Carrier argues that the claim is without merit. The Carrier contends that since it did not hear from the Claimant or his doctor in response to its July 6, 1998, letter, he was no longer an employee under the terms of Rule 35(h). The Carrier argues that no investigation was held because none is necessary when applying Rule 35(h). The Carrier maintains that Rule 35(h) is self-executing. Further, the Carrier contends that the Claimant did not and still has not attempted to explain his absence from work after his medical leave expired and that the Carrier attempted to contact him on more than one occasion without a single response from the Claimant. The Carrier claims that the Claimant was informed of the consequences of not keeping in contact with the Carrier, and the Carrier exercised its rights under Rule 35(h). The Carrier asserts that the Claimant did not request a further leave of absence or secure permission to be absent and

subjected himself to dismissal.

The Organization maintains that the Claimant was off duty on a medical leave of absence on account of an injury he sustained while operating Carrier equipment, a rail heater, on April 27, 1998. The Organization argues that the Claimant was not afforded a fair and impartial hearing because the Carrier dismissed the Claimant before the hearing took place. The Organization claims that neither it nor the Claimant ever received the Carrier's letter of July 6, 1998, and the Carrier has failed to present any evidence that the letter was ever sent. The Organization argues that the Carrier was well aware of the reason for the Claimant's absence and that it terminated the Claimant's seniority simply because he was injured while on duty. The Organization argues that the Claimant did not violate any rules in this instance. The Organization asserts that the Carrier has failed to show any intention on the part of the Claimant to disregard Rule 35(h). The Organization claims that the Claimant's actions did not warrant his dismissal.

The parties being unable to resolve the issues, this matter came before this Board.

This Board has reviewed the procedural arguments raised by the Organization and we find them to be without merit.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of violating Rule 35(h). Therefore, the claim must be denied.

Rule 35(h) states as follows:

An employee who is absent from his assigned position without authority for seven (7) consecutive work days will be considered as having abandoned his position and resigned from the service without the right of investigation.

Numerous awards have held that Rule 35(h) is self-executing. The record in this case reveals that the Claimant failed to explain his absence from work for the period after the expiration of the Claimant's leave of absence. The record reveals that on July 6, 1998, the Carrier sent the notice to the Claimant at his last known address instructing him to attend a physical examination and follow the doctor's orders relating to his physical condition. He was also told of the consequences of not keeping in contact with the Carrier. The Claimant did not communicate with the Carrier, nor did he show up for a physical. On July 17, 1998, a notice was sent to the Claimant advising him that he was being terminated pursuant to Rule 35(h).

This Board finds that Rule 35(h) is a self-executing rule. This Board also finds that the Claimant was absent from his assigned position without authority for seven consecutive work days and, therefore, was properly considered as having abandoned his position and resigned from the service as set forth in Rule 35(h). It is true, as the Organization argues, that the Carrier was aware that the Claimant had incurred an on-duty injury. However, his leave of absence had expired and he was under a duty to notify the Carrier as to his whereabouts and why he was not showing up for work. The Claimant

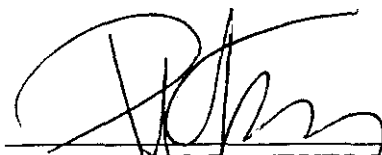
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failed to do that and he was properly removed pursuant to Rule 35(h).

For all of the above reasons, the claim must be denied,

**AWARD:**

The claim is denied.

  
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**PETER R. MEYERS**  
Neutral Member

  
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**CARRIER MEMBER**

  
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**ORGANIZATION MEMBER**

DATED: 6/29/01

DATED: 6-29-01