

PUBLIC LAW BOARD NO. 6564

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

CSX TRANSPORTATION, INC.

Case No. 30

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

1. The termination of seniority for Mr. A. B. Alexander for his alleged unauthorized absence commencing August 18, 2003 was without just and sufficient cause and in violation of the Agreement [System File I49130003/12(03-0689)].
2. Mr. A. B. Alexander shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

Background:

Claimant A. B. Alexander was hired by the Carrier on May 13, 2002, and assigned to a trackman position in Cincinnati, Ohio. On February 4, 2003¹, Claimant sustained an injury to his left knee. Claimant pursued a course of physical therapy and returned to service with the Carrier in March. On August 1, Claimant returned to the doctor because of new problems with his knee, and on August 3 he notified his supervisor, Assistant Roadmaster K. E. Robertson, that he would be off work for two weeks.² Claimant did not return to work on August 18, or thereafter. Carrier management attempted to contact Claimant between August 18 and September 2, leaving telephone messages. Claimant did not answer or return any of these calls.

¹ All dates hereafter are 2003 unless otherwise indicated.

² According to Claimant, he told Robertson he would be off work "at least" two weeks.

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By letter dated September 2, the Carrier terminated Claimant's employment,

stating:

... [P]ursuant to ... Rule 26-part (a) and (b) and/or Rule 7-part (a), your employment with CSX Transportation is hereby terminated. The reason for this action is that you have been absent without permission from August 18, 2003 until September 2, 2003.... [B]etween August 18, 2003 and August 29, 2003 Roadmaster M. W. Little attempted numerous times[sic] and left messages, in an attempt to contact you to determine your status and you did not respond.

The Collective Bargaining Agreement ("CBA") in effect between the parties provides in pertinent part:

Rule 7 – Leave of Absence

- (a) When requirements of the service will permit and if satisfactory reason is given therefor[sic], employees, upon written request, shall be granted leave of absence for a limited time, without loss of seniority. If for thirty (30) days or less, request must be made to the employee's supervisor. If more than thirty (30) days, request must be made to the Designated Officer, in writing, with a copy to the designated union representative. Leave of absence in excess of ninety (90) days shall not be granted unless agreed to between carrier's Highest Designated Labor Relations Officer and the General Chairman. Employees failing to return when leave of absence expires will forfeit seniority unless proper extension has been obtained.

Rule 26 – Absent Without Permission

- (a) An employee unable to report for work for any reason must notify his supervisor as soon as possible.
- (b) Except for sickness or disability, or under circumstances beyond his control, an employee who is absent in excess of fourteen (14) consecutive days without notifying his supervisor or proper carrier official will forfeit all seniority under this Agreement....

Claimant applied for sickness benefits from the Railroad Retirement Board, and received them for the period August 4, 2003 to January 19, 2004. Claimant's doctor released him to return to work on January 29, 2004. In July 2004, Claimant and the Carrier reached settlement regarding Claimant's knee injury.

The Organization appealed Claimant's dismissal by letter dated September 9, 2003. The matter was discussed in conference on January 14, 2004. By letter dated February 10, 2004, the Carrier declined the appeal. The Organization replied with a rebuttal letter dated March 8, 2004. The matter not being resolved, the parties presented it to this Board for final decision.

Carrier's Position:

The Carrier contends that Claimant's dismissal was the appropriate and natural consequence of Claimant's own failure to fulfill his obligations. According to the Carrier, it is unrefuted that Claimant was absent without permission beginning August 18, 2003, and had no contact with the Carrier until the Organization's September 9, 2003 appeal on Claimant's behalf. The Carrier argues that the exceptions set forth by Rule 26(b) do not apply in the instant case because no evidence of record establishes that Claimant's extended absence was due to sickness, disability, or circumstances beyond his control.

Moreover, even if such a Rule 26(b) exception did apply, the Carrier asserts, neither Claimant nor the Organization provided a timely explanation for Claimant's extended absence. It is unrefuted that Claimant did not respond to management's many attempts to contact Claimant during his absence. The Carrier contends that employees do not have "the unilateral discretion not to come to work for an indeterminate period of time and cut off all communication with [the] employer during the period of absence." Car. Subm. at 5. Therefore, the Carrier submits, the Organization's claim should be denied.

Organization's Position:

The Organization contends that the Carrier's dismissal of Claimant was not justified. According to the Organization, neither Rule 7 nor Rule 26 properly applies to Claimant. The Organization argues that Rule 7, regarding leaves of absence requests, is inapplicable to the instant case because Claimant was out with an injury and did not require or request a leave of absence. The Organization further asserts that Claimant complied with Rule 26(a), requiring an employee to notify his supervisor as soon as possible if he is unable to report for any reason, when Claimant notified Robertson on August 3, 2003 that he would be off work.

In addition, the Organization argues, Rule 26(b) specifically excepts from its terms employees absent for sickness or disability, and therefore Rule 26(b) is inapplicable to Claimant. The Organization submits that the Carrier knew Claimant had been injured in February 2003. Claimant informed his supervisor in August 2003 that he would be off work because of his injury, and he received sickness benefits from the Railroad Retirement Board from August 4, 2003 to January 19, 2004. For Claimant to receive sickness benefits, the Organization argues, the Carrier had to verify to the Board that Claimant was an employee off work due to injury. The Organization contends that because Claimant was indisputably absent because of disability and therefore excepted from Rule 26(b)'s requirements, the Carrier's September 2, 2003 termination of Claimant was not justified.

Findings:

The Organization argues that Rule 7 of the parties' Agreement is inapplicable in the instant case because Claimant did not require a Rule 7 leave of absence in order to be

off work with an injury. The Board agrees with the Organization's position in this regard. Claimant did not require or request a Rule 7 leave of absence when he notified Robertson on August 3, 2003 that he would be off work for a period of time. The Board finds that because Claimant was not out on a Rule 7 leave of absence, he did not fail to return from such a leave of absence, and therefore was not subject to forfeiture of seniority under Rule 7.

The Organization also asserts that subsection (b) of Rule 26 is inapplicable to Claimant's situation. The language of Rule 26(b) is unambiguous:

Except for sickness or disability, or under circumstances beyond his control, an employee who is absent in excess of fourteen (14) consecutive days without notifying his supervisor or proper carrier official will forfeit all seniority under this Agreement.... (Emphasis added.)

While the Carrier asserts that there is no evidence of record that Claimant's absence was due to the injury to his knee, it is undisputed that Claimant received sickness benefits from the Railroad Retirement Board for the period from August 4, 2003 to January 19, 2004. For Claimant to receive such benefits, he unarguably must have been disabled during the pertinent time period. Under Rule 26(b)'s explicit terms, an employee absent due to sickness or disability is not subject to forfeiture of seniority for failing to notify the Carrier regarding an absence in excess of fourteen days. The Board finds that the Carrier's application of Rule 26(b) to Claimant in the instant case was therefore in error, and the Carrier's termination of Claimant's employment on the basis of an alleged violation of Rule 26(b) was improper. The Claimant should be reinstated.


However, the Claimant is not entirely without fault. Rule 26(a) states, "An employee unable to report for work *for any reason* must notify his supervisor *as soon as possible*." (Emphasis added.) While Claimant fulfilled his obligations under Rule 26(a)

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regarding the initial two weeks of his absence when he notified Robertson on August 3, 2003 that he would be off work, Claimant failed to contact anyone at the Carrier after the initial two weeks had ended to inform the Carrier that his absence would continue. Indeed, Claimant failed even to return phone calls from members of Carrier management attempting to find out where he was. Even if, as Claimant asserted, he told Robertson on August 3 that he would be off work for "at least" two weeks, Claimant had an obligation under Rule 26(a) to keep the Carrier apprised of his status. As soon as he knew he would be unable to return to work after the initial two weeks of his absence, he was required under Rule 26(a) to provide the Carrier with further information. The Board finds that Claimant's conduct in failing to contact the Carrier between August 18, 2003 and September 9, 2003 constituted a violation of Rule 26(a), for which a penalty is warranted. Therefore, the Board finds that Claimant should be reinstated without back pay.

Award:

The claim is sustained in part. Claimant shall be reinstated without back pay.


JOAN PARKER, Neutral Member


CARRIER MEMBER


ORGANIZATION MEMBER

DATED: 04-18-05

DATED: 4-18-05