

BEFORE PUBLIC LAW BOARD NO. 6915

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
CN – WISCONSIN CENTRAL RAILROAD**

Case No. 21

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

- (1) The Carrier’s decision to invoke Rule 31 J as a means to dismiss Machine Operator James Walker, Jr. in connection with unauthorized absences on three (3) consecutive work days is unjust, unwarranted and in violation of the Agreement (Carrier’s File WC-134-107-22 WCR).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. Walker, Jr. should be restored to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.”

FINDINGS:

By letter dated July 23, 2007, the Claimant was advised that pursuant to Rule 31 J of the parties’ collective bargaining agreement, he was considered as having resigned from the Carrier’s service because he had been absent without authority on three consecutive workdays. The Organization thereafter filed a claim on the Claimant’s behalf, challenging the Carrier’s decision. The Carrier denied the claim.

The Organization initially contends that the Claimant clearly requested a leave of a specific duration, but management unilaterally shortened the Claimant’s leave for reasons that have not been disclosed. The Organization asserts that the Carrier then failed to comply with Rule 23 C of the parties’ Agreement when it failed to provide the General Chairman with a copy of the written permission. The Organization argues that because this action kept the General Chairman in the dark until management could invoke Rule 31

J as a means to dismiss the Claimant, management clearly deprived the Claimant of an avenue of discussion and possible resolution.

The Organization maintains that rules such as 23 C clearly provide a means of checks and balances that preserves both parties' interests in connection with a leave of absence. The Organization emphasizes that when the Carrier complies with Rule 23 C, it allows the Organization an opportunity to advise the employee of his responsibilities in connection with the leave, and it can prevent the unjust dismissal of employees. Rule 23 C also allows the parties to determine if there is a proper reason for the requested duration of the leave, or if there is a proper reason for reducing the duration of the requested leave. The Organization points out that this benefits the Carrier, and it reduces unnecessary claim and grievance work for both parties. The Organization insists that the Carrier's violation of Rule 23 in this case is no small or insignificant matter, and it requires a sustaining award.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the Organization has failed to meet its burden of proof. The Organization has not submitted any evidence to demonstrate that a violation of the Agreement has occurred. Citing prior Board Awards, the Carrier asserts that the Organization must prove that the Carrier improperly applied Rule 31 J of the parties' Agreement, but the Organization has provided no such proof in this case. The Carrier argues that the Organization instead has advanced two erroneous conclusions – that the Claimant's employment was "terminated" by the Carrier as some form of discipline, and

that Rule 23 C of the Agreement would obviate any reliance on or application of Rule 31 J because the General Chairman was not immediately provided with a copy of the leave authorization.

The Carrier maintains that the Claimant was neither discharged nor disciplined. The Carrier points out that Rule 31 J is explicit and self-executing. The Carrier emphasizes that no investigation is required when an employee, by his own actions and/or inactions, severs his service with the Carrier. The Carrier insists that the Claimant did exactly that by allowing himself to be absent without authority for more than three days after the expiration of his authorized leave of absence.

The Carrier emphasizes that the Organization's mere quotation of various parts of the controlling Agreement does not serve to satisfy its burden of proving that a violation occurred. The Carrier contends that the Organization is well aware of the past application and intention of Rule 31 J, and it has not supplied a shred of evidence to prove that the Carrier misapplied this rule. The Carrier asserts that the Claimant, for reasons unknown, caused himself to be absent without authority, and he thereby relinquished his right to an investigation and his seniority rights.

The Carrier goes on to argue that the Organization also has failed to provide any evidence as to why the Carrier should reinstate the Claimant to service. Instead, the Organization has attempted to divert attention to Rule 23 C, suggesting that a breach of that rule by the Carrier would summarily vitiate Rule 31 J. The Carrier emphasizes that Board Awards repeatedly and consistently have upheld the principle that the Organization bears the burden of proving its claim, but the Organization in this instance

has failed to provide any evidence to substantiate its allegations.

The Carrier points out that in its initial appeal and during the handling of this matter on the property, the Organization neither argued nor proved that the Carrier had violated Rule 31 J. The Carrier emphasizes that the language of Rule 31 J is clear and unambiguous, and this rule leaves nothing in dispute in this case. Rule 31 J is self-executing, and the intended operation of this type of rule has been recognized and confirmed by numerous arbitration awards, including notable awards on this property. The Carrier argues that the instant claim should be denied because the Organization has neither argued nor proven that a violation of Rule 31 J has occurred.

The Carrier then asserts that Rule 23 C is not relevant to the instant matter. The Carrier maintains that even if the Organization's arguments relating to this rule are valid, they should not be given much weight. The Carrier contends that the Organization has not offered any kind of proof that Rule 23 C takes precedence over Rule 31 J. Moreover, the Organization never has alleged or argued that the Claimant was not aware of the duration of his authorized leave of absence. The Carrier acknowledges that it may well be true that the Organization did not receive a copy of the leave authorization until it requested one, but the Carrier points out that the rule states that a copy "shall" be provided, and it was. The Carrier maintains that it was, at worst, an oversight that the General Chairman was not provided with such a copy until he requested one. The Carrier insists that even if this could be deemed a "violation," it does not and cannot serve to render totally meaningless the clear language and intent of the job-abandonment provisions of Rule 31 J.

The Carrier points out that if the Organization believed that a violation of Rule 23 C had occurred based on the time when the General Chairman's copy was provided, the Organization was within its rights to progress a separate claim on that basis. The Organization, however, did not do so, but instead asserted that the General Chairman's belated receipt of a copy of the leave document trumped the applicability and operation of Rule 31 J. The Carrier insists that this clearly is a self-serving argument on the part of the Organization.

The Carrier argues that there is no proof that the Claimant would have acted any differently if the General Chairman had received a copy of the leave document at some earlier point in time. The Carrier contends that there is no probative evidence to support the Organization's suggesting that it would have or could have intervened. This baseless hindsight is not proof that the Claimant would have acted differently merely because the General Chairman had a copy earlier. The Carrier emphasizes that there is no dispute that the Claimant had a copy of the leave authorization, but he elected not to return to work on the date specified therein.

The Carrier asserts that the Organization must not be permitted to totally disregard the self-executing provisions of Rule 31 J, while advancing a poorly veiled attempt to camouflage its purpose and effect with a totally different and irrelevant rule. The Carrier insists that the fact that the Organization never has argued that the Carrier violated Rule 31 J is compelling and must not be overlooked.

The Carrier then maintains that the requested remedy is excessive and without Agreement support. The Carrier argues that if this Board is compelled to consider

remedy, then the practice on this property demonstrates that any compensation due the Claimant must be subject to offset by all compensation earned in other employment.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the record in this case, and we find that the Carrier did not violate the parties' Agreement when it notified the Claimant that he had been dismissed because he had been absent from his regularly assigned position for more than three days. It is fundamental that Rule 31 J is a self-executing provision, and the Claimant allowed himself to be absent without authority for more than three days after the expiration of his authorized leave of absence. The rule states, in part:

Employees who are absent from work without authority for three (3) consecutive work days will be considered as having resigned from the service and forfeit all seniority without right of investigation . . .

Although the Organization believes that there were some procedural violations that occurred here, this Board finds that whatever errors occurred, if any, the Claimant was still appropriately dismissed pursuant to Rule 31 J.

The Organization failed to show that the Carrier violated the self-executing rule in this case. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 4-23-2009



CARRIER MEMBER

DATED: April 23, 2009