

PROCEEDINGS BEFORE PUBLIC LAW BOARD NO. 3781

AWARD NO. 20

Case No. 59

Referee Fred Blackwell

Carrier Member: R. O'Neill

Labor Member: W. E. LaRue

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

CONSOLIDATED RAIL CORPORATION

STATEMENT OF CLAIM:

Claim of the Brotherhood (CR-1374) that:

- (a) The dismissal of Claimant Donald New was arbitrary and capricious and an abuse of Carrier's discretion, in that Carrier failed to heed the procedures found in the Scheduled Agreement and reneged upon the promises made by Carrier's officials to Claimant's wife and brothers.
- (b) Claimant New shall be reinstated into Carrier's service with all seniority rights unimpaired.

FINDINGS:

Upon the whole record and all the evidence, after January 18, 1988 hearing in Washington, D. C., the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter, and that the Claimant, who was duly notified of said hearing and of his right to be present and participate in same, did not attend said hearing.

OPINION

This case arises from the Claimant's appeal and protest of the Carrier's action of October 31, 1983, whereby the Carrier

notified the Claimant that his seniority had been forfeited under Rule 28 of the parties' Agreement due to his absence from work without permission in excess of fourteen (14) days.

Rule 28 of the Agreement reads as follows:

"RULE 28 - 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 receiving permission from his supervisor will forfeit all seniority under this Agreement. The employee and the General Chairman will be furnished a letter notifying them of such forfeiture of seniority. The employee or his representative may appeal from such action under Rule 27, Section 3."

The pertinent facts are that at the time of the incident which led to the Carrier's forfeiture action under Rule 28, the Claimant was assigned as a Foreman on the Carrier's property at Jackson, Michigan; and that by letter dated October 31, 1983, the Carrier's Division Engineer, Mr. T. E. Dinger, wrote to the Claimant at his home address, advising that his seniority had been forfeited under Rule 28 due to his absence from work without permission in excess of fourteen (14) days.

By letter dated December 13, 1983 the Claimant wrote to Mr. J. R. Stump, Assistant Division Engineer, requesting a leave of absence due to circumstances beyond his control. The Claimant's letter stated that he was going to school at the Muskegon Correctional Facility, Muskegon, Wisconsin, and taking counselling

on substance abuse (Carrier Exhibit 2). Division Engineer Dinger responded to the Claimant's letter by letter dated December 28, 1983 which stated that his employment with the Carrier had been previously terminated on October 31, 1983 under the provisions of Rule 28 and that accordingly, his request for a leave of absence could not be granted.

No further correspondence occurred in the matter until December 27, 1984, when the BMW Vice General Chairman wrote to Mr. Dinger requesting that the Claimant be restored to service with seniority unimpaired.

The Organization contends that the claim should be sustained because since the Claimant was incarcerated in September of 1983, his absence from work for more than fourteen (14) days was for reasons beyond his control which is an exception under Rule 28 which precludes forfeiture of seniority; that prior to October 31, 1983, Assistant Division Engineer Stump orally assured the Claimant's Brothers that the Claimant could rely upon having employment with the Carrier after his release; and that the Carrier should have used the disciplinary provisions in Rule 27 in dealing with the problem, rather than Rule 28 which is not properly applicable to the problem.

The Carrier's position is that incarceration is not a "circumstance beyond the control" of the Claimant under the self-executing provisions of Rule 28; that when the Claimant's Brothers spoke to Assistant Division Engineer Stump, it was not known whether the circumstances would result in a substantial prison

term; and that Mr. Stump's statement was made with the expectation that no confinement would occur if judicial proceedings were pursued. The Carrier also asserts that the Organization's protest letter dated December 27, 1984, was outside the fifteen (15) day time limit required for such an appeal by Rule 27, Section 3.

After due study of the foregoing, and of the whole record, inclusive of the submissions presented by the parties in support of their respective positions in the case, it is concluded that the claim lacks merit and that the Carrier's position is supported by the record.

Specifically, it is found that the Carrier's October 31, 1983 notice to Claimant of the forfeiture of his seniority was well based, inasmuch as the Claimant's incarceration did not constitute an excusable reason for his absence from work for a period which triggered the self-executing provisions of Rule 28. In dealing with a prior dispute between these same parties in a forfeiture case under this same rule, Rule 28, Public Law Board No. 3514 held in Award No. 31 that:

"Confinement in jail does not constitute unavoidable absence or provide a valid basis for an exception to Rule 28. See Third Division Awards 24606 and 22868, e.g. It was claimant's own fault that he was not able to protect service for Carrier during the lengthy period he was absent." (10-04-84)

A like ruling was made in Third Division Award No. 26704 (11-23-87) which dealt with a similar claim that arose on Conrail's property.

"On August 5, 1985, the Carrier terminated the em-

ployment of the Claimant under the self-executing provision of Rule 28. The Claimant had been absent from work without permission since July 8, 1985.

There is no evidence of record that the circumstances of the Claimant's absence prevented him from fulfilling his obligation to notify the Carrier. In particular, numerous Awards of this Board (see Third Division Awards 24606, 22868, 21228, 24760) and various Public Law Boards (especially see PLB 3514, Award #31) have held that confinement in jail does not constitute unavoidable absence for good cause."

Moreover, the record contains no convincing evidence that the nature of the conversation between the Claimant's Brothers and Assistant Division Engineer Stump was of a nature which estops the Carrier from relying on its October 31, 1983 notice to Claimant of the forfeiture of his seniority under Rule 28. In view of these findings, consideration will not be given to the Carrier's time limit objection.

Accordingly, in view of the foregoing and based on the record as a whole the claim will be denied.

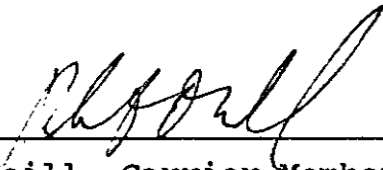
AWARD:

Claim denied.

BY ORDER OF PUBLIC LAW BOARD NO. 3781.

A handwritten signature in cursive script that reads "Fred Blackwell". The signature is written in dark ink and is positioned above the printed name of the signatory.

Fred Blackwell, Neutral Member



R. O'Neill, Carrier Member



W. E. LaRue, Labor Member

Executed on May 14, 1988

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