

PARTIES Brotherhood of Maintenance of Way Employees
TO THE
DISPUTE: and

 Union Pacific Railroad Company

STATEMENT OF THE CLAIM:

1. That the Carrier violated the provisions of the current Agreement when on April 2, 1988 it removed Mr. E. Otero, SSN 538-68-8853 name from the Seniority Roster. Thus violating Rules 23, 23(b) and Rule 48. Said action being unwarranted and in abuse of discretion.
2. The Carrier further violated the terms of the current Agreement specifically Rule 49, when the Manager of Program Services failed to respond in a timely fashion to the Organizations initial claim of April 20, 1988.
3. That the Carrier now be required to restore Claimant to his former position with seniority and all other rights restored unimpaired and with compensation for all wage loss suffered.

OPINION OF THE BOARD:

Claimant was employed by the Carrier as an Extra Gang Laborer on the Idaho Division, with a seniority date of August 27, 1984. As of July 7, 1985, Claimant established seniority in Group 26, which works on the Carrier's System Gangs. He was furloughed in September 1987.

On March 21, 1988, the Carrier sent Claimant a letter of recall to System Gang 9013, working near Troutdale, Oregon. The Carrier used its usual recall notice, which advised Claimant:

Failure to report within ten (10) calendar days will result in the forfeiture of seniority in the class in which recalled and in all lower classes in which seniority is held, unless prior to the expiration of

the reporting period, justifiable cause for not reporting is furnished.

This was pursuant to Rule 23(b) of the Agreement which states:

(b) Furloughed employees must return to service in the seniority class in which recalled within ten (10) calendar days after being recalled by certified mail at the last address of record. Failure to report will result in forfeiture of seniority rights in such class and all lower classes of groups in which seniority is held, unless satisfactory reason for not reporting in a timely manner is given. Satisfactory reason for failing to report has reference to sickness or other reasons over which the employee has no control.

Claimant's last address of record was his parents' residence, and it was there that the Carrier mailed his recall notice. The notice, which arrived at his parents' residence on March 24 or 25, 1988, instructed Claimant to report on April 4, 1988. However, Claimant states that he was not made aware of the notice by his family until April 2, 1988, and then temporarily lacked the funds to comply. On April 11, 1988, Claimant contacted the Carrier to explain his situation and was advised that he was deemed to have forfeited his seniority when he did not report or submit an excuse as of April 4. Claimant thereafter wrote a letter, received by the Carrier April 18, 1988, requesting reconsideration of his case. When that letter got no response, the Organization filed this claim dated April 20, 1988.

The claim asserted that Claimant had given the Carrier "satisfactory reason for not reporting in a timely manner,"

within the meaning of Rule 23(b). The Organization argued that the short notice to Claimant, coupled with his cash-poor financial condition, warranted that he be given another chance with additional time to report. However, this ignores that (1) the Carrier sent the recall notice to the correct address, in conformity with Rule 23(b); (2) Claimant had the notice for at least two days before the date upon which he was due to report, yet neglected to notify the Carrier that he could not comply;1 and (3) Claimant's reasons for his inability to comply with the notice had nothing to do with sickness or any similar disability beyond his control.

The Carrier official to whom the claim was addressed did not officially respond to the claim until August 3, 1988, three and one-half months after the claim had been filed. He then denied it for the reasons outlined above. Upon receipt of his written denial, the Organization wrote the Carrier to state that the denial was rejected and the claim would be pursued. That letter, dated August 11, 1988, also argued that the claim "was not denied within the time limits, therefore this grievance and claim should be allowed as presented." For this latter proposition, the Organization relied upon Rule 49(a)(1) of the Agreement which

1 In fact, he first contacted the Carrier a full week after the date he was supposed to report, and some ten (10) days after he acknowledges becoming aware of the notice.

provides:

All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

When the Carrier persisted in denying the claim, it was progressed to this Board for determination.

The Carrier argues that Rule 23(b) is self-effecting. In the Carrier's view, Claimant's failure to comply with the recall notice automatically resulted in the forfeiture of his seniority, and that forfeiture was not grievable under the Agreement. Therefore, the Carrier argues, the claim was a nullity when filed, and the Carrier was not required to respond at all.

The Organization responds that it has as much right to claim a violation by the Carrier of Rule 23 as it has to claim a violation of any other provision of the Agreement. The Organization points out that there is nothing in Rule 23 stating that the Carrier's interpretations of that rule are specially immune from challenge. Here, the Organization contends that the Carrier violated Rule 23 by deeming Claimant to have forfeited

his seniority even though Claimant had a "satisfactory reason" for failing to report when required.

However, the reasons asserted by Claimant are clearly not of the sort which may be regarded as "satisfactory" within the meaning of the rule. Rule 23(b) declares that a "satisfactory" reason must involve illness or a similar disabling circumstance which is beyond the employee's control. That Claimant's family failed to timely apprise him of the recall notice is not a sufficient excuse. The rule incorporates a presumption that ten days' written notice to an employee's last recorded address is enough to enable him to report for work. The Carrier gave Claimant at least that much notice. He must bear responsibility for failing to ensure that the notice, once properly delivered, came promptly to his attention.

Similarly, Claimant's cash shortage was not a sufficient reason for his failure to report. The Organization suggests that his financial plight was the Carrier's responsibility and not Claimant's, because had the Carrier not furloughed him, he would not have been short of cash. That reasoning is circular. By its terms, Rule 23(b) applies only to furloughed employees. The fact that Claimant was on furlough cannot possibly be an excuse for his failure to comply with a rule that only applies to furloughed employees.

Therefore, it is plain that Claimant failed to present the

Carrier with a satisfactory reason for failing to report in conformity with the recall notice. The remaining question is whether the claim must nevertheless be sustained because the Carrier's official did not deny it within sixty days after it was presented. This Board thinks not.

There is persuasive precedent that, under provisions like Rule 23(b), an employee automatically ceases to be an employee when certain circumstances occur, i.e., the employee fails to report within ten days after a recall notice is delivered to his last address of record. See, Third Division Award No. 22662 (1979); P.L.B. 4111, Award No. 4 (1987). When those events occur, the employee forfeits his seniority not by virtue of any action or decision by the Carrier, but by simple operation of the negotiated rule. The only way the employee may obtain relief is by presenting evidence that he was precluded from reporting by factors truly beyond his control.

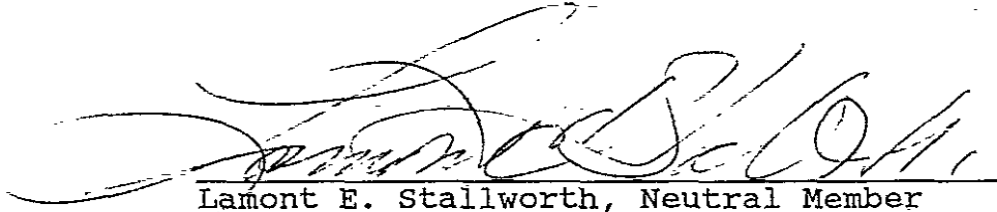
If the employee presents evidence that such factors prevented his reporting, the Carrier's undue delay in responding to the claim may warrant that it be sustained as presented. In this case, however, Claimant failed to even allege circumstances that would constitute an excuse under Rule 23(b). To require that his claim be sustained would do damage to the Agreement. It would encourage every employee who fails to comply with a recall notice without good reason to file a claim on the mere hope that

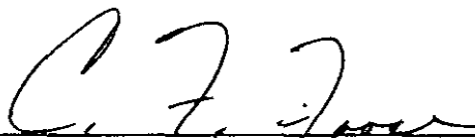
the Carrier might be late in responding. That would simply burden the Parties' dispute resolution procedure with meritless claims, to the detriment of claims meriting consideration. Instead, a grievance which fails to assert even a colorable claim for relief under the Agreement should not be sustained merely because the Carrier did not promptly reply to it.

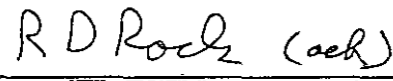
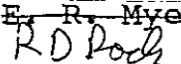
Accordingly, the claim is denied.

AWARD

Claim denied.


Lamont E. Stallworth, Neutral Member


C. F. Foose, Organization Member


R D Rock (aeb)
E. R. Myers, Carrier Member


Dated this 21st day of August, 1990.