

JAN 5 1989

AWARD NO. 34  
CASE NO. 34

B.M.W.E.

PUBLIC LAW BOARD NO. 4402

PARTIES )	BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
TO )	
DISPUTE )	BURLINGTON NORTHERN RAILROAD COMPANY

## STATEMENT OF CLAIM

- (1) The Carrier violated the Agreement when it terminated the seniority of Track Laborer F. V. Beltram for alleged failure to respond to a recall notice within ten (10) calendar days (System File #1 Gr./GMWA 87-10-29D).
- (2) The Claimant shall be returned to service with seniority and all other rights unimpaired, and he shall be compensated for all wage loss suffered commencing June 5, 1987.

OPINION OF BOARD

At the relevant time, Claimant, an employee with over 16 years of service, held seniority as a track laborer in the Chicago Seniority District. At the end of the 1986 work season, Claimant was laid off and filed a recall form in accord with Rule 9. On April 3, 1987, the Carrier placed a phone call to Claimant in order to recall him to service. After no contact was made, the Carrier sent a certified letter dated April 6, 1987 which advised Claimant that he was recalled to work at Galva, Illinois and further instructed Claimant to contact the call desk at Galesburg, Illinois before reporting to work.

Claimant is Hispanic and not fluent in English. Claimant resides in Aurora, Illinois which is approximately 100 miles from Galva. Through the use of an interpreter, on April 13, 1987, Claimant contacted the Galesburg call desk and advised the clerk that he did not drive and had no transportation to get from his home in Aurora to Galva. According to the clerk, the interpreter was advised that Claimant should have marked "Home-Sub" on his last furlough slip and that he was locked into the vacancy. The clerk also states that he told the interpreter that Claimant would have to comply with the recall letter and that he did not

have authority to change the letter. The clerk further told the interpreter that Claimant needed to contact the Roadmaster and submit something in writing concerning his problem.

The Organization contends that Claimant was under the impression that he would receive a return call "to advise him of a decision." However, according to the clerk, he did not tell the interpreter that such a return call would be made to Claimant concerning his problem.

By letter dated April 24, 1987, citing Rule 9's ten day requirement for returning to service when recalled for a vacancy of more than 30 days, Claimant was advised by the Carrier that he was closed out of service. The instant claim followed.

Rule 9 is clear and self-executing with respect to recall from furlough:

When new positions of more than thirty (30) calendar days' duration are established, or when vacancies of more than thirty (30) calendar days' duration occur, employees who have complied with this rule will be called back to service in order of their seniority. Failure to file his name or address or failure to return to service within ten (10) calendar days, unless prevented by sickness, or unless satisfactory reason is given for not doing so, will result in loss of all seniority rights.

Ordinarily, we would be required to uphold the Carrier's action in light of the self-executing nature of the rule. However, this is not the ordinary case. Upon receipt of the recall notice, Claimant called the Galesburg desk as instructed and through an interpreter explained his dilemma. From what we can gather from the record, Claimant was apparently under the impression, albeit wrongfully so, that he would receive a return call with a "decision". Although we are satisfied that no such representation was made to Claimant by the clerk, we find the language in SBA 986, Case 57 as guiding:

This Board recognizes the importance of Rule 21-A, its self-invoking quality, and that it was developed to allow the Carrier to deal with employees who abandon their jobs and never contact the Carrier to report the reason for their absence. This Board recognizes that rules such as 21-A exist throughout the industry. However, this Board also recognizes that this is not a case of a "walk-away" employee.

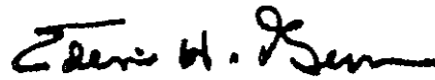
Since Claimant called the desk at Galesburg within the ten day period and explained his dilemma; was not fluent in English and had to use an interpreter; apparently was under

the mis-impression that he would receive a return call and, coupled with his lengthy seniority, we believe that Rule 9's self-executing provisions should not apply in this unique circumstance. We shall therefore require that Claimant be returned to service.

However, giving Claimant the benefit of the doubt that he thought he would receive a return call concerning his situation, when the call did not come, he should have made some effort to re-contact the desk or the Roadmaster. He did not do so within the ten day period. Therefore, under these circumstances, Claimant's return to service shall be without compensation for time lost.

**AWARD**

Claim sustained in part. Claimant shall be returned to service with seniority unimpaired but without compensation for time lost.



Edwin H. Benn  
Neutral Member



E. J. Kallinen  
Carrier Member



P. S. Swanson  
Organization Member

Denver, Colorado  
December 19, 1988