

PUBLIC LAW BOARD NO 5850

Award No.  
Case No. 92

PARTIES TO DISPUTE:

(Brotherhood of Maintenance of Way Employees  
(The Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when on February 9, 1998, the Carrier dismissed Mr. H. Payton for allegedly violation of Rules S-28.13 and S-28.14 of the Safety rules and General Responsibilities for All Employees, effective March 1, 1997, in connection with being absent without proper authority for more than five (5) consecutive work days beginning December 29, 30, January 2, 5, 6 and 7, 1998 forward.
2. As a consequence of the Carrier's violation referred to above, Claimant's seniority shall be restored, he shall be paid for all wages lost and discipline shall be removed from his record.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

Claimant's seniority was terminated pursuant to a Letter of Understanding dated July 13, 1976, for being absent without proper authority for more than five (5) consecutive work days.

Pursuant to that understanding, the Carrier simply writes its termination letter and, as also provided for in the Letter of Understanding, should the recipient of such letter protest the termination, there is a twenty day window to request an investigation. Usually these investigations offer the recipient one last chance to salvage his career by offering evidence that his absences were authorized or that he was in such a dilemma that he could not reach anyone in authority to secure permission to be off. The burden of proof, usually the

responsibility of the Carrier in disciplinary hearings, shifts to the Claimant in this type of investigation.

This case is somewhat different in that Claimant, according to the Carrier, failed to timely and properly request an extension to his leave by furnishing a statement from his doctor as he was instructed to do. When Claimant did not furnish the required statement, the Carrier wrote the termination letter.

Claimant suffered an on-duty injury in 1980, and has not worked since. In 1984, Claimant furnished a doctor's statement stating he was to be returned to service as soon as possible. At this juncture, the paper trail ceases to exist. It appears to this Board that although Claimant has requested the leaves in his own behalf, he has done so since 1984, only at the Carrier's advice that he should to protect his seniority. Claimant, apparently, has been medically disqualified by the Carrier. If there is any other reason for not acting upon Claimant's statement of well being in 1984, it has not been made part of this record.

If Claimant has been medically disqualified by the Carrier, then surely he cannot be held responsible for a failure to apply for extensions to his leave. On the other hand, if Claimant initiated the request for a leave, which was granted by the Carrier, then he does have the obligation to seek timely proper leave extensions.

However, with the record before this Board it is evident that Claimant's absence has been authorized by the Medical Department when they did not act upon his 1984 certification of fitness to return to service. Under this scenario, his absences have been authorized.

Claimant's seniority is to be reinstated. Claimant's return to service is, however, contingent upon medical certification to determine if he is of sufficient physical well being to resume full duty. There is no pay for time lost.


AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the award effective on or before 30 days following the date the award is adopted.

  
Robert L. Hicks, Chairman & Neutral Member

  
Rick B. Wehrli, Labor Member

  
Thomas M. Rohling, Carrier Member

Dated: November 3, 1998