

BEFORE PUBLIC LAW BOARD NO. 6043

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION
and
ILLINOIS CENTRAL RAILROAD**

Case No. 52

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

1. The Carrier's decision to invoke Rule 38(a) as a means to dismiss Derrick Operator Kyle D. Spring in connection with unauthorized absences on seven (7) consecutive workdays is unjust, unwarranted, and in violation of the Agreement (System File S.C010306.0/134-107-06).
2. As a consequence of the violation referred to in Part 1 above, Mr. Spring should be allowed to return to work immediately and the dismissal letter of December 31, 2006 rescinded."

FINDINGS:

By notice dated November 27, 2006, the Claimant was directed to attend a formal investigation to determine if he had violated Carrier rules, policies, and/or instructions relating to his absence without authority due to his arrest in connection with an off-duty incident. By letter dated December 1, 2006, prior to any formal investigation, the Claimant was notified that the Carrier considered him as having resigned from service under Rule 38(a) of the parties' Agreement because of his being absent from his assignment, without permission, for a period of more than seven consecutive workdays. The Organization thereafter filed a claim on behalf of the Claimant, challenging the Carrier's decision to discharge him. The Carrier denied the claim.

The Carrier initially contends that the Organization has failed to provide any

evidence of a violation, and the record demonstrates that no violation of the Agreement has occurred in this case. Pointing to a number of Board Awards, the Carrier asserts that in a matter of this type, the Organization bears the burden of proof. The Carrier argues, however, that the Organization has not offered any proof that the Carrier's improperly applied Rule 38(a).

The Carrier maintains that the Organization has advanced its erroneous conclusion that the Carrier's action was disciplinary in nature, and then has asserted that the Grievant should be reinstated to service because he was not afforded a fair and impartial investigation or because the Carrier misapplied an unrelated rule. The Carrier argues that the Organization cannot plug itself into other more favorable arguments simply by virtue of describing this as a disciplinary matter.

The Carrier emphasizes that under the self-executing provisions of Rule 38(a), no investigation is required for an employee who, by his own actions or inactions, severed his service with the Carrier. The Carrier points out that the Claimant did this in the instant case when he caused himself to be absent without authority for more than seven days.

The Carrier then asserts that the Organization's mere quotation of Agreement rules does not, by itself, fulfill the Organization's obligation to meet its burden of proof. The Carrier insists that the Organization is well aware of the past application and intention of Rule 38(a), and it has not supplied any evidence that the Carrier misapplied this rule. The Carrier contends that the Claimant caused himself to be absent without authority, and by doing so, he also relinquished his rights to a hearing under Rule 33.

The Carrier maintains that the Organization has not provided any evidence as to why the Carrier should reinstate the Claimant to service, nor has it provided any evidence to support the allegations in the instant claim. The Carrier asserts that various Board Awards repeatedly and consistently have upheld the principle that an organization bears the burden of proving the claim, but the Organization has failed to provide any evidence to substantiate its allegations of violations in the instant case.

The Carrier emphasizes that the language of Rule 38(a) is abundantly clear and leaves nothing to dispute. The Carrier asserts that in prior Awards on this property, Boards clearly have affirmed the self-executing nature of Rule 38 and have held that no hearing was required. The Carrier points out that based on this precedent, it is evident that Rule 38(a) is self-executing, that no investigation is required, and that Rule 33 therefore is not applicable. Accordingly, the Carrier contends that there could be no violation of Rule 33 in this matter.

As for any alleged violation of Rule 34 of the Agreement, the Carrier argues that this assertion is seriously flawed because the Claimant's own actions caused his employment to be severed, so Rule 38(a) applies to this matter and no investigation under Rule 33 is required. The Carrier maintains that the Claimant had no right to an investigation in this matter because it does not involve censure, discipline or dismissal. The Carrier argues that because Rule 33(h) is not applicable, there is no right to appeal under Rule 34. Accordingly, the time limits and obligation to respond under Rule 34 also are not applicable to the instant matter.

The Carrier emphasizes that it is not denying the Organization's right to advance a

claim, even one totally deficient in merit, under Rule 34. Instead, the Carrier points out that the Organization must do so in accordance with the relevant Agreement rules. The Carrier maintains that the Organization must not be permitted to take a “self-executing” action, which is clearly contemplated and covered by Rule 38(a), and attempt to repaint it for the sole purpose of obtaining a second and better “bite at the apple” under Rule 33, Rule 34, or any other rule. The Carrier asserts that the Organization’s position that the Carrier violated Rule 34 is totally without merit.

The Carrier argues that if the Organization’s position were adopted on this point, then in connection with every job abandonment/resignation under Rule 38, regardless of the circumstances, the Organization could initiate a claim, and then attempt to reshape that claim to make it fit within the scope of an inapplicable rule containing a time limit in the hope of “catching” the Carrier in a time-limit breach. This cannot be permitted to happen, because it would render meaningless the clear intent of Rule 38 and all relevant arbitral precedent.

The Carrier then asserts that under Rule 38, the employee has resigned and no remedy is prescribed by the Agreement. The Carrier suggests that even if this Board were to consider a remedy, the Organization has not requested any compensation, but instead has asked only that the Claimant be returned to work and the December 1, 2006, letter be rescinded. The Carrier insists that there is no justification to grant more than was requested by the Organization.

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

The Organization initially contends that there is no dispute that the Carrier did not deny the January 5, 2007, claim until April 5, 2007, well beyond the sixty-day period set forth in Rule 34(a). Pointing to a number of Board Awards, the Organization asserts that the Carrier's violation of Rule 34(a) requires that the instant claim be sustained as presented. Addressing the Carrier's position that Rule 38 is self-executing, without a right to grieve, the Organization argues that Rule 34(a) clearly does not limit the Carrier's response to only those claims it deems proper. The Carrier is obligated to timely respond to all claims or grievances. The Organization insists that the Carrier's failure to timely respond requires that the claim be sustained.

Turning to the merits of this dispute, the Organization acknowledges that incarceration is not a valid reason to be absent from work. The Organization maintains that in the instant matter, however, the Claimant was denied the opportunity to take the remaining week of his vacation as he requested. The Organization emphasizes that the Carrier has failed to provide any explanation for why the vacation request was denied.

The Organization points out that the Claimant was straightforward and honest in reporting the need for vacation, and the Carrier has not cited any rule, practice, or policy that would prevent the Claimant from observing his vacation on the days requested. The Organization argues that absent any proof that the Carrier's operational needs or some other urgent need required the Claimant to be present, it is apparent that the only reasons to deny the vacation request were to charge the Claimant with unauthorized absence and then invoke Rule 38(a) as a means of terminating the Claimant's employment once it became clear that the Claimant would be absent in excess of seven days. The

Organization asserts that this is evidenced by the fact that the Carrier first scheduled a formal investigation to determine if the Claimant was absent without authority, then dismissed the Claimant under Rule 38(a), and finally cancelled the formal investigation because it found another way to dismiss the Claimant. The Organization emphasizes that the Carrier's actions deprived the Claimant of his right to due process by denying him his contractual right to a fair and impartial investigation.

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

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

This Board has reviewed the procedural argument raised by the Organization, and we find it to be without merit.

This Board has reviewed the record in this case, and we find that the Carrier did not violate the parties' Agreement by invoking Rule 38(a) to dismiss the Claimant in connection with his unauthorized absences on seven consecutive work days in November of 2006. The record reveals that the Claimant was absent because he was incarcerated and charged with second-degree murder. The Claimant was absent without permission.

It is fundamental that Rule 38(a) is a self-executing provision and that the Claimant is responsible for severing his relationship with the Carrier. The Claimant is not entitled to an investigation under that rule, nor does the Carrier have to prove any just cause. The rule simply states:

An employee who is absent from his assigned position

without permission for seven (7) consecutive work days,
will be considered as having abandoned his position and
resign from the service.

In Case No. 13 of this same Public Law Board, this Board held that the Claimant
was not entitled to a hearing since the action taken by the Carrier was not discipline.

For all of the above reasons, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: 5-20-09



CARRIER MEMBER

DATED: 5/20/09