

BEFORE PUBLIC LAW BOARD NO. 7051

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
DETROIT, TOLEDO, AND IRONTON RAILROAD COMPANY**

Case No. 2

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

- (1) The dismissal of Mr. M. Skelton on April 14, 2004 for alleged violation of Rules 16 and 17 in connection with his sick leave was arbitrary, capricious and in violation of the Agreement (Carrier’s File DTI-134-104-001 DTI).
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now ‘. . . reinstate Claimant Mark Skelton with all benefits, seniority and rights unimpaired and further that the Carrier compensate Mr. Skelton for any and all monetary loss he suffers commencing May 5, 2004, and continuing until such time as Mr. Skelton has been reinstated with all benefits and seniority intact.’”

FINDINGS:

By letter dated April 14, 2004, the Claimant was informed that he had forfeited his seniority under Rule 17 of the parties’ Agreement when he failed to report to duty after being released from sick leave. The Organization thereafter filed a claim on the Claimant’s behalf, challenging the Carrier’s determination that the Claimant had forfeited his seniority and the Claimant’s accompanying dismissal from the Carrier’s service. The Carrier denied the claim.

The Carrier initially contends that this is not a discipline case, but a rules case, so the burden of proof is on the Organization. The Organization must provide probative evidence to support the validity of its claim and to prove that the Carrier violated the Working Agreement. The Carrier asserts that the Organization has failed to provide the evidence necessary to support its case. The Carrier argues that the Organization has done

nothing more than request reinstatement, alleging that the Carrier violated the parties' Agreement and some unsupported, unspecified past practice. The Carrier maintains that the Organization has provided nothing to refute the Carrier's position that the Claimant was not entitled to an investigation, nor has it shown that there was any applicable past practice, or that any violation of the Agreement or some unspecified past practice had occurred. Because the Organization has failed to provide the requisite evidence, the Carrier asserts that the instant claim must be dismissed.

The Carrier points out that it was the Claimant who triggered the self-executing provision of Rule 17 that resulted in his forfeiture of seniority. It is undisputed that the Claimant was advised on two separate occasions of his responsibility to provide medical information in order to finalize his leave of absence. The Carrier insists that the Claimant failed to provide any medical information whatsoever until after his seniority was forfeited and his employment was terminated. Moreover, when the Claimant did finally produce a doctor's slip, it clearly showed that he needed to be off until April 5, 2004.

The Carrier asserts that in its appeal and requested remedy, the Organization expects that the Carrier and this Board will accept, without question, the Claimant's ability to return after the May 3, 2004, date provided in the Claimant's second doctor's slip. The Carrier maintains that logic therefore dictates that the Organization's latent expectation supports, if not mirrors, the Carrier's expectation of the Claimant's ability to return after the April 5, 2004, date shown on the first doctor's slip.

The Carrier insists that the Claimant failed to protect his seniority as required by Rule 17. The Claimant informed his supervisor by telephone that he would be at work,

without indicating any further reason or need to be absent. As numerous Awards have held, the Carrier maintains that the consequence of the Claimant's failure is clear, unambiguous, and self-imposed. The Carrier emphasizes that the record clearly demonstrates that the Claimant did not report back to duty and protect his job at the expiration of his medical leave. The Claimant, at his own peril, failed to fulfill that responsibility, and that brought into play the self-executing provision of Rule 17, which clearly and unambiguously provides that if an employee fails to return to duty at the expiration of his leave, the employee forfeits his seniority.

The Carrier points out that there is no dispute that the doctor's slip dated March 31, 2004, and produced by the Claimant on April 14, 2004, covered the Claimant's absence only between March 25 and April 5, 2004. Similarly, there is no dispute that the Claimant was granted a medical leave that expired on April 6, 2004. In addition, there is no dispute that the Claimant did not report for duty on April 7, 2004, and he failed to keep the Carrier informed of his whereabouts or condition between March 30 and April 12, 2004.

The Carrier maintains that when the Claimant finally contacted Mr. Brandon on April 12, this was seven days after his doctor's leave had expired. The Carrier insists that the Claimant did not attempt to extend his leave, and he merely advised Brandon that he was unable to return to work due to "personal problems." Brandon informed the Claimant that the Medical Department could not authorize such a leave, and he instructed the Claimant to contact his supervisor. The Carrier points out that when the Claimant subsequently spoke with his supervisor, the Claimant indicated that he was "ready to

come back to work.” The Carrier maintains that even when the opportunity to save his job presented itself, the Claimant chose not to report for work as he said would.

The Carrier then asserts that even if the Organization had established the merits of the claim, which it has not, the Organization has failed to support the monetary claim. The Carrier points out that the first doctor’s slip indicates the Claimant’s release on April 5, 2004, and the second released the Claimant after May 3, 2004. The Carrier argues that the Claimant’s attendance history casts considerable doubt on whether the Claimant even would have reported on May 5, 2004, or whether the Claimant would have produced yet another doctor’s slip. The Carrier further emphasizes that because the Claimant had been absent from work since March 29, 2004, a return-to-work examination would have been required, and there is no assurance that the Claimant would have passed such an examination.

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

The Organization initially contends that the Claimant was denied his contractual and due process rights to a hearing. Addressing the Carrier’s apparent position that an employee who has been absent for five consecutive workdays has no recourse under the Agreement should the Carrier deem the absence as “unjustified,” the Organization asserts that several Board Awards uphold an employee’s right to recourse under the Agreement in such circumstances. The Organization argues that the Carrier’s actions in this matter unquestionably violated the Agreement, resulting in the Claimant not being afforded his contractual and due process right to the requested hearing.

The Organization maintains that there is no dispute that on April 12, 2004, the Claimant contacted Supervisor Gasiecki and reported himself as “ready for duty.” Moreover, there is no dispute that the Claimant reported for work on April 14, 2004, only two days later. The Organization insists that under these circumstances, there can be no question that the Claimant did not violate Agreement Rule 16.

As for the Carrier’s contention that the Claimant also violated Rule 17, the Organization emphasizes that the Claimant’s medical documentation shows that the Claimant’s doctor ultimately advised the Claimant to remain off work through May 3, 2004. The Organization therefore argues that the Claimant’s alleged failure to report on time was the result of an unavoidable delay created by his continuing illness. The Organization emphasizes that the Carrier did not dispute the fact that the Claimant was ill and under the care of a physician. Moreover, the record shows that the Claimant did contact the Carrier’s Medical Department, was granted a medical leave, and did provide medical statements regarding his condition. The Organization maintains that under the circumstances, the Claimant’s medical leave should have been extended to include such delay, as provided by the Agreement. The Organization asserts that there was no violation of Rule 17.

As for the Carrier’s allegation that between April 5 and April 14, 2004, the Claimant did not advise the Carrier that he was under a doctor’s care, the Organization points out that the Claimant attempted to provide Gasiecki with an excuse from his physician, but Gasiecki refused to accept it. The Organization further argues that although the Carrier alleged that Gasiecki indicated that he never refused such a

document and that the Claimant never offered one, the Carrier failed to provide any probative evidence that Gasiecki actually made any such statement. The Organization emphasizes that it would have been a very simple matter for the Carrier to obtain a written statement from Gasiecki to support its assertion, but the Carrier failed to do so. The Organization points out that the Carrier also has not refuted the Claimant's statement that he contacted the Medical Department on April 7, 2004, to report his continuing illness and that he was under the care of a physician.

The Organization contends that there is no dispute over the reason for the Claimant's absence, which was the direct result of an illness. The Organization asserts that personal injury or illness is a valid or justifiable cause for an employee's absence from his assignment. The Organization insists that there is no dispute that the Claimant was under a doctor's care for this illness on the dates at issue or that the Carrier was aware of the Claimant's ongoing illness.

The Organization argues that this Board has held that the Carrier may not dismiss an employee for failing to furnish documentation of his reason for absence when the Carrier is fully aware of the reasons for the employee's absence. The Carrier asserts that it is clear that the Claimant did not simply walk away from his job. The Claimant contacted the Carrier on several occasions and attempted to provide all pertinent information to the very manager who preferred the charges in this matter. The Organization emphasizes that the Carrier erred when it leveled its charge against the Claimant, and the Agreement was violated.

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 record in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant acted in violation of Rule 17(b) when he failed to report to work at the expiration of his leave of absence. Since Rule 17 is self-executing, and the separation has been held not to be discipline, the Carrier acted appropriately when it terminated the Claimant's seniority and dismissed him from service. (See Award No. 65 of PLB 1760.)

The record reveals that the Claimant was off work from Monday, March 25, 2004, due to an illness. The Claimant's supervisor suggested that he request medical leave and supply medical information in order to obtain it. The Claimant produced a doctor's note dated March 30, 2004, which stated the following:

The above-named was seen here today due to illness.
He has been unable to work from 3-25-04 and should
remain off work until 4-5-04.

The above note was signed by the Claimant's doctor.

The Claimant did not return to work after April 5, 2004, and simply contacted the Carrier's Medical Department a week later. At that time, he told the Medical Department he was unable to return to work because of personal problems.

Rule 17(b) states the following:

An employee who fails to report for duty at the
expiration of his leave will forfeit his seniority rights,
except when such failure to report on time is the result

of unavoidable delay, in which case the leave will be extended to include such delay.

There is no showing that the Claimant had experienced any unavoidable delay.

The Claimant's doctor's slip, as set forth above, clearly showed that he only needed to be off until April 5, 2004. The Claimant did not return to work at the expiration of his leave.

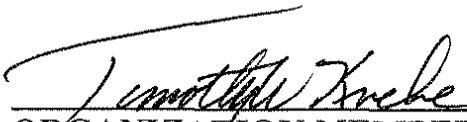
As stated above, this is a self-executing rule; and since the Claimant failed to report following the expiration of his leave; his loss of leave of absence, his loss of seniority, and termination, were automatic under that rule. Therefore, this Board has no choice but to deny the claim.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: Sept. 5, 2008.



CARRIER MEMBER

DATED: Sept. 5, 2008