

BEFORE SPECIAL BOARD OF ADJUSTMENT 986

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE
and
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)
NORTHEAST CORRIDOR**

Case No. 309

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

1. The Carrier’s seniority termination of Mr. A. Gray, issued by letter dated December 18, 2013, was arbitrary, unjust, on the basis of unproven facts and in violation of the effective working agreement (System File NEC-BMWE-SD-5174).
2. As a consequence of the violation referred to in Part 1 above, Claimant A. Gray shall be returned to service immediately and granted all other relief due under the agreement.”

FINDINGS:

By letter dated June 10, 2013, the Claimant was notified that his seniority was being terminated immediately under Rule 21-A of the parties’ Agreement after being absent from work during the period between May 25 and June 10, 2013. The Organization thereafter filed a claim on the Claimant’s behalf, challenging the Carrier’s decision to terminate the Claimant’s seniority. The Carrier denied the claim.

The Carrier contends that the instant claim should be denied in its entirety because the Claimant absented himself from service for fourteen consecutive days without notice to his supervisor, because the Claimant’s seniority therefore was properly terminated in that he was considered as having resigned from service pursuant to Rule 21-A, because the Claimant did not furnish the Carrier with any medical documentation that establishes

a physical incapacity or circumstances that prevented notice to the Claimant's supervisor, because the medical documentation that was submitted dates from after the issuance of the notice of termination of seniority, and because the forfeiture of the Claimant's seniority was not an abuse of the Carrier's discretion. The Organization contends that the instant claim should be sustained in its entirety because the Claimant's absence was due to long-standing completely incapacitating mental health issues of which the Carrier was long aware, because the Claimant did notify his immediate supervisor of his absences within the two-week time period in question, because the Claimant did what he needed to do to preserve his seniority under Rule 21-A, because the Claimant was incapacitated due to circumstances beyond his control, and because the Carrier violated the Agreement by confiscating the Claimant's rights and by taking his seniority.

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 the Carrier violated the parties' collective bargaining agreement when it terminated the Claimant's employment pursuant to Rule 21-A. Rule 21-A states the following:

Employees who absent themselves from work for fourteen (14) consecutive days without notifying their supervisor shall be considered as having resigned from the service and will be removed from the seniority roster unless they furnish the Carrier documented evidence of either physical incapacity or that circumstances beyond their control prevented such notification.

The record reveals that the Claimant did absent himself from work for the period May 25, 2013, to June 10, 2013, at which time the Carrier exercised what it believed was

its right to terminate the Claimant's seniority pursuant to Rule 21-A.

The problem with what the Carrier did in this case is that the Claimant was clearly suffering from physical and mental issues which prevented him from contacting the Carrier or preserving his position. For whatever reason, the Carrier returned medical documentation dated June 3, 2013, because the Claimant's employment was terminated on June 10, 2013. Amtrak Medical Services stated in that letter dated June 25, 2013, that:

Medical Services would not review any of your medical documentation as you no longer are an Amtrak employee.

The record in this case also contains a doctor's note from Dr. Vinaychandrab Shah, which states that the Claimant was incapable of working for the period May 28 through June 13, 2013 (Organization Exhibit 3). There is also another exhibit which was prepared by Dr. Shah in September of 2013, where he states that the Claimant was physically and mentally incapacitated between May 28 and June 15, 2013.

It is true that the Carrier can terminate employees and consider them resigned from service if they absent themselves from work for fourteen consecutive days without notifying the supervisor. The Carrier has defended this case in part by stating that the Claimant did contact somebody at work, a Hugh Williams, on May 28, 2013, and again on June 5, 2013, stating that he would not be able to come to work. Mr. Williams told the Claimant that he had to contact his supervisor. Further, the record is clear from the medical evidence and the previous mental condition of the Claimant that the Claimant's case fits into the second part of Rule 21-A, which makes it clear that the Claimant is

excused from being terminated if the Carrier has documented evidence of physical incapacity or circumstances beyond his control that prevented such notification.

Given the facts and documents in this record, this Board has no choice but to find that the Claimant should have been afforded the "safe harbor" because of his inability to make contact with the Carrier for physical and mental reasons.

Once this Board has determined that there is insufficient evidence to support the termination of the Claimant's seniority pursuant to Rule 21-A, we next turn our attention to the remedy. There is no evidence in this record that the Claimant has been physically or mentally capable of returning to work at any point since the Claimant's termination. Consequently, this Board has no choice but to order that the Claimant should be reinstated to the seniority roll and employment with the Carrier, but with no back pay. The Claimant must pass all physical and mental requirements in order to be reinstated to employment with the Carrier before being placed on the job. The Claimant has been made well aware of the Carrier's attendance policy and has received numerous letters of instruction and warnings from the Carrier during the course of his fifteen years of employment. Consequently, if the Claimant is able to return to work on the job with the Carrier, this Board recommends that the Claimant be extra careful with respect to making sure that he complies with all of the Carrier rules relating to attendance.

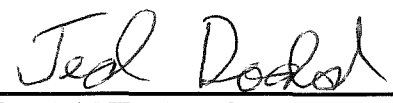
AWARD:

The claim is sustained in part and denied in part. The Claimant shall be reinstated to employment and the seniority roll with the Carrier, but without back pay. The Claimant shall not be returned to actual work until such time as he can pass the physical


and mental requirement tests of the Carrier.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER
DATED: 1/13/16



CARRIER MEMBER
DATED: January 13, 2016 @ 9⁵³ am
see attached dissent

CARRIER MEMBER'S DISSENT
SBA 986, Award No. 309

The Carrier dissents to this Board's findings as they are contrary to the clear and unambiguous language of Rule 21A and not consistent with the facts developed on property.

Rule 21A is self-invoking, that is, if an employee is absent from work for fourteen (14) consecutive days without notifying his supervisor, he shall be considered as having resigned unless he can demonstrate that he was physically incapacitated or precluded from contacting his supervisor by circumstances beyond his control.

Claimant never contacted his supervisor nor did he demonstrate that he was unable to contact his supervisor during the fourteen day (14) period. In fact, Claimant made numerous phone calls as demonstrated by phone records submitted in the appeal, completed medical forms and sent texts to non-supervisory personnel at Amtrak during the fourteen (14) day period. Although Claimant may have demonstrated that he was unable to work, clearly he was not incapacitated to the point that he could not have contacted his supervisor. Claimant failed to contact his supervisor, despite his responsibility to do so under Rule 21A and a letter of instruction reminding him of his responsibility to do so within the previous twelve months.

Therefore, this Board's finding that Claimant should have been afforded a safe harbor because he was suffering from medical issues which prevented him from contacting the Carrier or preserving his position is clearly erroneous and contrary to the facts.

For the reasons set forth above, we respectfully dissent.

A handwritten signature in dark ink, appearing to read 'Sharon Jindal', with a long horizontal line extending to the right.

Sharon Jindal
Carrier Member