

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 14166
Docket No. 14023
16-2-NRAB-00002-140060

The Second Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen-Division of TCU/IAMAW
(The BNSF Railway Company

STATEMENT OF CLAIM:

- “1. That the Burlington Northern Santa Fe Railroad Company violated the terms of the February 1, 2006 Agreement, specifically Rule 35, when on April 3, 2012, Carmen Floyd Smith was notified that he was considered out of service for alleged failure to report for duty at the expiration of a leave of absence.
2. That accordingly, the Carrier is ordered to reinstate the Claimant and place him back on the Twin Cities Seniority Roster and compensate him eight (8) hours pay at the pro-rata rate for all workdays he is withheld from service commencing April 3, 2012 and continuing until his return to active duty.
3. Additionally, the Carrier is ordered to make the Claimant whole as follows:
 1. return to service with seniority rights unimpaired;
 2. made whole for all vacation rights;
 3. made whole for all health, welfare and insurance benefits;
 4. made whole for pension benefits including railroad retirement and unemployment insurance;
 5. made whole for any other benefits he would have earned during the time he is out of service;
 6. made whole for all wages, lump sum payments, general wage increases and cost-of-living adjustments;

7. paid for any overtime hours that he may have lost during his suspension; and
8. all correspondence and record of the investigation be removed from his personal record and file.”

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On September 9, 2011, the Claimant, Minneapolis, Minnesota Carman Floyd Smith, began an injury leave of absence that was scheduled to expire on February 29, 2012. The record indicates that, during that leave, the Claimant ceased communicating with the Carrier's medical department concerning his condition or anticipated return to work. The Claimant did not return to work on the expiration of his leave nor did he request to have the leave extended.

The Carrier's Rule 16(c), governing leaves of absence, provides:

“An employee who fails to report for duty at the expiration of leave of absence shall be considered out of the service, except that when failure to report on time is the result of unavoidable delay, the leave will be extended to include such delay.”

On March 16, 2012, two weeks after the Claimant should have returned to work from his leave, the Carrier sent the Claimant a letter stating that, if he wished to have his leave extended, he should within thirty days submit information justifying such an extension. That letter, however, went unclaimed and was returned to the Carrier. Consequently, on April 3, 2012, the Carrier sent the

Claimant another letter, informing him that he was considered out of the Carrier's service due to his failure to report for duty at or before the expiration of his leave of absence.

In a letter that was dated June 15, 2012 and received by the Carrier on June 18, 2012, the Organization initiated the instant claim. The claim asserted that the Carrier violated Rule 35 of the Agreement by not scheduling an investigative hearing before treating the Claimant as separated due to his failure to return from his leave. On August 17, 2012, the Carrier wrote the Organization denying the claim. The denial did not state that Carrier deemed the claim untimely, but simply stated:

"I do not agree that BNSF was in violation of any rules or terms of the Contractual Agreement. Therefore, your claim is denied in its entirety."

However, the Carrier now contends that the claim is untimely because it was initiated more than sixty days after the Carrier informed the Claimant that his employment was deemed terminated. The Carrier also contends that the claim lacks substance and should be denied for that reason as well.

On the same date as the Carrier's letter denying the claim, August 17, 2012, the Organization wrote the Carrier contending that the claim effectively was allowed. For that contention, the Organization relied upon Rule 34(a) of the Agreement, arguing that the Carrier had not timely notified the Organization that the claim was disallowed, and so it had to be deemed allowed. Rule 34(a) provides:

"Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented."

The Parties were unable to resolve these disagreements and consequently have submitted the Claim for arbitration before this Board.

On the issue of whether the instant claim is time-barred, the Carrier appears correct that the claim was initiated more than sixty days after the date of the Carrier's letter informing the Claimant that he was considered separated. That

letter from the Carrier was dated April 3, 2012, but the Organization's letter initiating the claim was not dated until June 15, 2012, some 73 days later.

However, as the Organization points out, the Carrier did not initially deny the claim on timeliness grounds. The Carrier's denial, dated August 17, 2012, did not mention a concern about timeliness, stating simply that the Carrier disagreed with the substance of the claim. Rule 34(a), as the Organization points out, required the Carrier to notify the Organization in writing, within sixty days of the claim being filed, "of the reasons for . . . disallowance" of the claim. In light of the failure of the Carrier to raise a timeliness objection in its denial, it is the opinion of this Board that this Board should not now deny the claim on timeliness grounds.

The Organization also argues that the initial denial by the Carrier was itself untimely, so that the claim must be considered as allowed under Rule 34(a). The Board cannot agree with that contention. As the Carrier points out, in assessing whether a party has acted within the time limits of the Agreement, there is extensive arbitral authority for the proposition that the date of the event triggering a time limit is not counted. The count begins with the day following that event. *See, e.g.,* Public Law Board No. 6744, Award No. 38. The Carrier received the instant claim on June 18, 2012, and issued its written denial on August 17, 2012, exactly 60 days later. Therefore, although the denial may not have been effective in raising and preserving a timeliness objection to the claim, the denial was timely to deny the claim on its merits.

Turning to the merits, then, the issue is whether Rule 35 of the Agreement required the Carrier to convene an Investigation before considering the Claimant as out of the service. The record is clear that no such Investigative hearing was convened. It is the opinion of the Board, however, that as the Carrier argues, no such Investigative hearing was required in the instant case.

As the Carrier has observed arbitrators have characterized Rule 16(c) as "self-effectuating," insofar as it provides that an employee who does not report back to work upon expiration of a leave of absence is automatically then "considered out of the service," unless the employee's failure to report on time is the result of unavoidable delay. *See, e.g.,* Public Law Board No. 7052, Award No. 48. There is no contention in the instant case that the Claimant attempted to report back to work on time was or impeded by "unavoidable delay." The record reflects that the Claimant made no attempt to contact the Carrier about returning, or about

extending his leave. In fact, the record indicates that the Claimant was unable to work at the time his leave expired and that he began receiving disability payments from the Railroad Retirement Board effective June 1, 2012, before the instant claim was filed. Therefore, it is the conclusion of this Board that the employment of the Claimant was terminated by operation of Rule 16 of the Agreement as of the expiration of the Claimant's leave of absence, without there being any need for a Rule 35 Investigation.

Accordingly, the Board finds that the Carrier did not violate the Agreement in considering the employment of the Claimant as terminated, and by so notifying him. Therefore, the Claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 20th day of December 2016.