

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39333
Docket No. CL-39931
08-3-NRAB-00003-070094
(07-3-94)

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(CSX Transportation, Inc. (former Seaboard
(Coastline Railroad)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Union (GL-13169) that:

1. Carrier violated the Agreement(s) when by certified mail dated October 21, 2005, Mr. T. L. Lucas was advised that he had forfeited his seniority effective immediately for exceeding his time to return to work from a leave of absence.
2. As a result of Carrier’s violative act, T. L. Lucas will be immediately reinstated to the service of the Carrier with seniority and all rights unimpaired. In addition, he shall be compensated for all wages and all other benefit losses sustained (including health insurance) and his personal record cleared of any reference to his arbitrary dismissal.”

FINDINGS:

The Third 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.

The October 21, 2005 letter referenced in the Statement of Claim provides a summary description of the background of this dispute. The body of the letter reads in full as follows:

“Dear Mr. Lucas,

This will confirm the telephone message left on your voice mail October 20, 2005 informing you that you have forfeited your seniority effective immediately because you exceeded your time to return from LOA. You will not be allowed a displacement nor be allowed to work.

The background leading to this event is that you were a union officer who lost the bid for re-election and your LOA as a union official was terminated on close of business August 31, 2005. In accordance with the SCL Agreement you had 30 days in which to assert your seniority. On the 30th day you attempted to exercise but had not taken the required physical exam. That physical was scheduled, taken and you were qualified with no restrictions on 10/13. You were notified via your answering machine on 10/13 and again on 10/14 with a conversation with the Manpower Group. During that conversation you stated you would make your displacement on 10/20. As you know, the COPS roster allows 2 days for displacements, not 5 days. Therefore, you should have made your displacement by Tuesday 10/18. You did not and therefore forfeited your seniority on Tuesday 10/18. You requested from Manpower an

extension until 10/24 to displace and were told you would have to get permission from management. You did not contact the undersigned or any other management person to make such request and no agreement was made between the TCU General Chairman and Labor Relations to extend the displacement time. Consequently, the time to return from leave of absence has expired and Rule 41(e) of the SCL Agreement is clear that, absent extenuating circumstances resulting in unavoidable delay in reporting, you forfeit your seniority. The rule is self-executing.

If you have any questions relative to this matter you should contact your union representative.”

The instant dispute arose out of the interaction between the Carrier’s medical exam policy for employees seeking to return to work following an extended absence and three provisions of the applicable Agreement: Rules 41, 42, and 43. Additional background information is needed to explain why the Carrier did not assert the self-executing forfeiture provision of Rule 41 until after October 17, 2005.

Among other categories, Rule 43 grants a leave of absence to employees who are elected to official positions with the Organization. The Claimant was so elected to the position of Vice General Chairman and served in that capacity for eight years until he was defeated for re-election in the summer of 2005. His official position ended at midnight on August 31, 2005. According to Rule 43, the Claimant retained all of his rights under the Agreement and continued to accumulate seniority while on the official leave of absence “. . . if asserted, in accordance with Rule 42, within thirty (30) days after release from such position.” The Rule made September 30 the final day on which the Claimant could assert his return rights.

Rule 42 establishes the exercise of seniority mechanism by which an employee returns to service after a leave of absence. It provides that “. . . the returning employee will have the privilege of exercising seniority rights over junior employees, if such rights are asserted within thirty (30) days after termination of his leave of absence, provided he reports in accordance with Rule 41(e).”

Rule 41(e) reads in full as follows:

“(e) An employee who fails to report for duty at the expiration of leave of absence will forfeit his seniority rights, except when failure to report on time is the result of unavoidable delay, in which case the leave will be extended to include such delay.”

The record in this dispute is lengthy and includes several more exchanges of correspondence than is normally seen in non-disciplinary claims of Agreement violation. In addition to filing the instant claim, the Claimant requested and received an Unjust Treatment Hearing after receiving the Carrier’s forfeiture notification letter of October 21, 2005. The transcript of that Hearing was also made a part of the evidentiary record of the claim. (See companion Third Division Award 39334.)

According to the Claimant’s testimony, he contacted the Carrier in late August to inquire about his planned return to service. The Carrier waived the advance written notice requirement and accepted his verbal notification. During the conversation, the Claimant admits he was informed about the 30-day window in which to assert his seniority and he was also told he needed to have a medical clearance before actually returning to work. The Claimant did not make any inquiry about the medical clearance and what it would entail. He assumed that it would be a quick assessment that could be done in minutes on the Carrier’s premises. Thus he made no arrangements to obtain the clearance before the end of September.

On September 29, 2005, the Claimant presented a handwritten note to the Carrier that stated his intention to report for work the following day. He was informed again that he needed the medical clearance. The clearance was much more involved than he had expected. He needed to make an appointment and undergo a more thorough examination. The exam was conducted on October 4 and the results were communicated to the Carrier on or about October 12. A Carrier official sent an email to Clerk Stephanie Howard to notify the Claimant of the clearance and assist him in making his displacement. On October 13, Howard left a message on the Claimant’s answering machine asking him to contact her.

Howard and the Claimant spoke on October 14. Their accounts differ significantly about who said what to whom. Both the Organization and the Carrier concur that the content of this conversation is pivotal and represents the crux of the instant dispute.

October 14 was a Friday. The position the Claimant wanted to “roll” had weekend rest days and was not scheduled to work again until Monday, October 17. The Claimant admits that Howard told him these details as well as the position number he would be rolling onto: 0824-A66. The Claimant admits he then asked Howard if there would be any problem reporting a week late on Monday, October 24. He testified, “She indicated there would be no problem.”

During her testimony at the Unjust Treatment Hearing, Howard agreed that the Claimant did ask for an extension of the time limit for reporting. In response, she testified as follows:

“I told him that he needed to contact management. I told him I didn’t have a problem with extending it as long as the management was notified and agreed to it.”

It is undisputed that the Claimant did not ask who he needed to contact, nor did he attempt to contact Carrier management to obtain an extension to his leave of absence.

This case turns on whether the Claimant failed to properly return to service upon the expiration of his leave of absence. It is clear that his leave had expired unless he obtained an extension of the expiration date. On this point, the Organization and the Claimant have the burden of proof to establish that his leave was properly extended. The facts, however, are essentially offsetting. The Claimant contends Howard gave him the requisite extension. Howard’s testimony directly conflicts with that of the Claimant.

The record confronts the Board with a conflict of material fact regarding the existence of the claimed extension of the Claimant’s leave of absence. It is well settled that the Board’s role is essentially appellate in nature. As a result, we have

no capability or authority to resolve questions of fact that are left in ambiguity by the evidentiary record. When confronted with such irreconcilable questions of fact, we have no choice but to find that the requisite burden of proof has not been met. Accordingly, we find that the Claimant has not satisfied his burden to prove that he properly obtained an extension to his leave of absence. It follows, therefore, that when he did not report for work prior to the expiration of his leave of absence, he failed to comply with Rule 41(e). We have no power to ignore the operation of the Rule that the parties negotiated.

Given the foregoing factors, we must deny the claim.

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 Third Division

Dated at Chicago, Illinois, this 29th day of September 2008.