

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41075
Docket No. MW-41015
11-3-NRAB-00003-090174**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1) The dismissal (seniority termination) of Mr. K. R. Klundt as outlined in a Carrier letter dated August 28, 2007 to General Chairman D. Joynt was improper and in violation of the Agreement [System File C-08-P018-2/10-08-0012 (MW) BNR].
- 2) As a consequence of the violation referred to in Part (1) above, Claimant K. R. Klundt shall now have the seniority termination removed from his record and be reinstated with all rights intact and he shall be compensated for any wage loss he may have suffered as a result of the improper termination.”

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.

Claimant K. R. Klundt had established and held seniority in various classifications within the Maintenance of Way and Structures Department beginning on September 25, 1978. Prior to his medical leave of absence, the Claimant had been assigned and was working as a Surfacing Crew Foreman on RSG SC-09.

The Claimant requested, and was granted, a medical leave of absence starting November 3, 2005. The Claimant was granted several extensions, the last one ending on June 15, 2007. The letter granting his medical leave extension through June 15, 2007 contained the following provisions:

“You will be expected to mark up for duty at or before 2359 hours, June 15, 2007. . . . If you need to extend this leave of absence, please provide a doctor's statement on letterhead stationary to my office before the expiration of the above referenced period that states your inability to perform any service and the length of time you will be unable to perform any service.”

On June 15, 2007, the Claimant neither marked up for duty, nor provided a doctor's statement to extend his leave of absence. The Carrier sent the Claimant a letter on August 13, 2007 with instructions to contact Medical and Environmental Health Field Manager L. Gladney by August 22, 2007. The Claimant did not respond to the letter. Pursuant to his behavior, his seniority date and name were removed from the roster on or about August 28, 2007.

By letter dated October 22, 2007, the Organization appealed the decision based on the contention the Claimant was unable to work and should not have been removed from the roster. On November 15, 2007, Director of Maintenance Support L. A. Baker denied the appeal, on grounds that the Claimant ignored his opportunity to supply medical information regarding the extension of his medical leave of absence. On January 9, 2008, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on March 6, 2008. A conference was held, but the parties were unable to resolve the matter. The matter was then appealed to the Third Division.

First, the Organization contends that the Claimant had originally been granted medical leave until June 30, 2007. In addition, the Organization contends that the

Claimant did attempt to submit medical information, but the information was never transmitted properly. It further contends that the matter should be treated as a disciplinary matter. Lastly, it requests that the Claimant's termination of seniority be overturned and that the Claimant be made whole for all losses.

Conversely, the Carrier takes the position that Rule 15 (E) is -self-executing and that when the Claimant did not report for work at the conclusion of his medical leave, it had the right to terminate his seniority. The Carrier argues that once it had established that the Claimant did not return from his medical leave without notification, the burden of proof shifted to the Organization. The Carrier contends that the Organization failed to meet that burden and, therefore, the Claimant's seniority termination should not be disturbed. The Carrier further contends that it acted reasonably and asserts that this is not a disciplinary matter. Therefore, a disciplinary Hearing was not required. The Carrier also contends that the claim was filed in an untimely fashion.

The relevant provision in Rule 15 reads as follows:

"An employee failing to report for duty on or before the expiration of their leave of absence will forfeit all seniority rights, unless an extension is granted."

The Board notes at the outset that the Carrier failed to prove that the claim was filed in an untimely fashion. Regarding the merits, after a thorough review of all record evidence, the Board finds that the facts support the Carrier's position. Although the Claimant was notified of his obligation to either return from his medical leave or provide satisfactory information of his inability to do so, he failed to fulfill either responsibility. Sufficient evidence does not exist to show mitigating circumstances that would have prevented the Claimant from contacting the Carrier regarding a request for an extension of his medical leave. In addition, the Carrier went beyond its minimal requirements and contacted the Claimant after he failed to report by June 15, 2007 as directed. The Carrier only considered the Claimant's seniority terminated after it was clear that he was not returning to work or supplying medical information to the Carrier.

As Referee Marx held in Public Law Board No. 4763, Award 73, Rule 15(E) is a self-executing Rule:

“The Claimant failed to request a leave extension prior to April 6, 1992. The record shows no medical requests from his physician for a leave of absence at any time. Rule 15E states:

An employee failing to report for duty on or before the expiration of their leave of absence will forfeit all seniority rights, unless an extension is obtained.

Under this self-executing provision, it is clear that the Claimant forfeited his seniority as of April 7, 1992.”

The Board concurs with Referee Marx’s analysis. In the instant case, the Carrier proved that the Claimant did not provide the requisite notification to the Carrier. The Carrier acted appropriately in terminating the Claimant’s seniority. Further, the Board notes that the burden of proof in this matter is on the Organization. The Board concludes that the Organization failed to meet its burden of proof.

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 18th day of October 2011.