

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41402
Docket No. MW-41726
12-3-NRAB-00003-100257**

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement when it improperly terminated the seniority of Mr. R. Overton in connection with its letter allegedly sent on June 4, 2008 (System File S-P-1391-G/11-09-0284 BNR).**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant R. Overton shall now be reinstated to service with all seniority and other rights and benefits restored and he shall be compensated for all straight time and overtime work that he lost as a result of the improper seniority 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.

This case involved a dispute concerning the restoration of the Claimant's seniority and his employment rights with the Carrier. The facts indicate that the Claimant had been on leave of absence from June 2006, prior to his filing of an injury report on October 24, 2007, which he had been obtaining extensions to for more than one year. The last extension was issued on November 1, 2007, at which time the Claimant was advised that his medical leave of absence had been extended through March 29, 2008.

In a letter of June 4, 2008, the Claimant was advised that he had failed to mark up or request and provide any documentation for an extension of the leave of absence. Supervisor Iverson granted the Claimant 15 days, as a matter of leniency, in which to contact him; otherwise his employment would be terminated. On June 25, 2008, the Carrier wrote to the Organization stating:

“This letter is a notice in reference to R. B. Overton (XXXXXXX) and his failure to return from medical leave or to secure an extension to his medical leave resulting in his surrender of seniority and employment with BNSF.”

It is the position of the Organization that the record shows that the Claimant had been on a continuing medical leave of absence. It argued the facts verify that the Carrier provided no proof refuting its position that the Claimant's Roadmaster granted the Claimant an “indefinite leave of absence.” Therefore, it reasoned that substantial proof had been offered proving the validity of the claim. The Organization concluded by requesting that the claim be sustained as presented.

It is the Carrier's position that the claim filed on behalf of the Claimant was untimely and, on that basis alone, it should be denied. However, if the Board does examine the merits it will discover that the Claimant was notified on May 6 and June 4, 2008 to either request an extension to his leave of absence or report for duty. It asserted that the Claimant was to have done that by May 28, but instead did nothing, which resulted in the proper termination of his seniority. It further argued that the Claimant cannot simply ignore directives from the Carrier and then cry foul. Additionally, it stated that contrary to the Claimant's statement, Roadmaster Franco did not authorize the Claimant for an indefinite leave of absence. The Carrier closed by asking that the claim remain denied.

The Board thoroughly reviewed the record. We will first address the Carrier's argument that the claim was untimely filed. The Organization argued that the claim was of a continuing nature and could be filed at any time, but the Carrier only had liability going back 60 days. Conversely, the Carrier stated that there was a specific trigger date - that being June 4, 2008, when it issued the self-executing letter of termination. Thus the Organization's claim was untimely as it was filed more than 60 days after June 4. On January 19, 2010, the Organization wrote the Carrier and stated, in pertinent part, the following:

“The Carrier would suggest that receipt of that letter, would begin the toll of the sixty (60) day time limit under which a claim could be filed. But, the Carrier failed to provide a copy of that June 4, 2008 letter. In its letter of appeal, the Organization challenged the Carrier for proof, evidence that the referenced June 2008 letter was ever received by Claimant. During conference on December 7, 2009, the Carrier finally provided the Organization with a copy of the June 4, 2008 letter. That letter is addressed to Claimant, at his address in Surrey, B.C.

Accepting the challenge of the Organization, the Carrier also provided a UPS tracking summary, acquired by the Carrier on June 25, 2008. But, the tracking summary, as provided by the Carrier shows delivery to:

‘Surrey, CA’

During conference, the Organization promptly pointed out that the delivery location ‘CA’ is the designated postal abbreviation for the State of California. While the Carrier suggested that the abbreviation was maybe intended to mean Canada, his excuse does not establish evidence, nor could he explain the deviation from the address as carried on [the] June 4, 2008, letter depicting the intended address of Claimant as 'Surrey, BC'. 'BC' is the recognized postal abbreviation for the Province of British Columbia. With that June 4, 2008 letter, bearing that 'BC', address designation, clearly demonstrates that the Carrier knew and understood Claimant's correct mailing address. Lacking evidence of receipt of

that letter, the Carrier can not rely upon that letter, beginning any time limit provision.” (Emphasis added)

The Carrier did not refute the aforementioned statement, nor did it offer any other proof that the Claimant received the June 4, 2008 letter terminating his seniority. The facts also indicate that the Organization was not copied with the June 4, 2008 letter and the letter of June 25, 2008 sent to the General Chairman advising him that the Claimant forfeited his seniority is lacking that representative's address. The record is not persuasive as to when or whether the Claimant received the June 4 letter. Because of that, the Board rejects the Carrier's argument that the subsequent claim filed by the Organization was untimely. Accordingly, the dispute will be resolved on its merits.

On the property, the Organization argued that the leave of absence stemmed from an October 24, 2007 work-related injury, which shortly thereafter led to the Claimant's leave request that, according to the Organization, was granted by his immediate Supervisor Alex Franco Jr., in accordance with the process required under the applicable Rules of the Agreement. The Organization submitted a statement from the Claimant regarding the leave wherein he stated:

“On October 24, 2007, I met with Alex Franco Jr., my Roadmaster, at the New Westminster depot to file our Personal Injury Report. After filling out the report, Alex connected me with someone from BNSF Medical Department. After the call, Alex told me I was now off on Personal Injury Claim and I needed to contact him when I was able to return to work.”

In the Organization's claim letter of March 24, 2009, it specifically stated the following:

“His Roadmaster granted him an indefinite leave at the time of the filling out his P.I.R., telling him that now that you are on an injury leave, you don't need to call until you are ready to come back.”
(Emphasis added)

The Organization reiterated the above stated argument several times during the handling of the claim. The Carrier responded to that argument by stating that Roadmaster Franco did not authorize the Claimant for an indefinite leave of

absence. There was no statement from Roadmaster Franco set forth on the property that denied the Claimant's rendition of what transpired regarding his alleged granting of an indefinite leave of absence. The Board does note that an examination of the Carrier's Exhibits reveals an e-mail from Franco to K. Sage, Engineering Administration that contradicts the Organization's position. However, that document is de novo because it was not presented on the property and the Carrier makes no mention of it in its Submission. Additionally, that exhibit is not found in the Organization's Submission; nor does it offer any discussion. Therefore, it is clear that it was not exchanged between the parties and is not admissible.

After the Claimant introduced his statement, it was incumbent upon the Carrier to rebut it by providing some sort of evidence that might counter the Claimant's recollection. Absent any countering evidence the Board must conclude that the Claimant was advised that he was on a leave of absence until he informed the Carrier that he was able to return to work. The Board finds and holds that the Claimant, a Machine Operator with more than 30 years of service, is to be reinstated with seniority intact and all benefits unimpaired. In addition, the Carrier is responsible for wage loss from February 2, 2010 (the date the Claimant's physician determined he was able to return to work) until reinstated to service, in accordance with Rule 40G.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of July 2012.