

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37603
Docket No. MW-37355
05-3-02-3-388

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(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 Ms. M. S. Haney by notification dated December 20, 2000 from Division Engineer S. T. Heidzig was arbitrary, capricious and in violation of the Agreement [System File C-01-D070-2/10-01-0179D (MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, Ms. M. S. Haney shall now ‘. . . be reinstated immediately, and that she be made whole for all lost wages and benefits because of the carrier’s violation of the current Agreement.’”

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 Claimant established seniority as a Trackman on March 27, 1995. By way of background, the record shows that on November 12, 1998, the Carrier's Division Maintenance Engineer, S. T. Heidzig, granted the Claimant a medical leave of absence until 11:59 P.M. on March 20, 1999. That letter stated in pertinent part:

“ . . . If, for any reason, you will be unable to report for full duty on/or before March 20, 1999, you are to notify my office in writing prior to the expiration of this leave, setting forth the length of time you desire to have this leave of absence extended, and the reasons making such necessary. Requests for extensions must be made in ample time to permit action thereon before the expiration of this leave. If you have any questions or concerns, please do not hesitate to contact either myself or Aimee Forney, Case Medical Manager at (308) 763-2589.”

According to the record, on March 22, 1999 at 3:30 P.M., the Claimant sent the following note to Division Maintenance Engineer Heidzig:

“Mr. Heidzig,

I am requesting an extention (sic) on my maternity leave as my 6 week check-up is on March 31st 1999.

**Thank you,
/s/ Mandy S. Haney”**

The record further established that by letter dated March 24, 1999, Division Maintenance Engineer Heidzig approved the Claimant's above request, and thereby extended her leave of absence through 11:59 P.M. on April 2, 1999. Included in that letter was a “work ability form” which the Claimant and her physician were required to complete and submit to Heidzig's office prior to the expiration of her leave of absence. The letter of March 24 also stated:

“ . . . If, for any reason, you will be unable to report for full duty on/or before 11:59 PM, Friday, April 2, 1999, you must notify my office in writing prior to the expiration of this leave, setting forth the length of time you desire to have this leave of absence extended, and the reasons making such necessary.”

The Claimant's work history, as shown on the Carrier's personnel record entitled "Employee Transcript," indicates that on June 6, 2000, the Claimant was medically qualified for service. However, the record also reflects that, starting on August 20, 2000, the Claimant subsequently was granted a series of leaves, the penultimate of which was the leave which began on October 18, 2000 and was extended to November 18, 2000. This brings us to the circumstances that gave rise to the present case before the Board.

A letter dated November 14, 2000 from the Carrier's Medical Officer, M. Jarrard, M.D., M.P.H., to Provident Life & Health Insurance located in Chattanooga, Tennessee, reads as follows:

"... Medical Claims Dept.:

Ms. Haney was released to return to work by her treating physician with restrictions. However, BNSF cannot accommodate her restrictions. These restrictions may be temporary and we can reevaluate Ms. Haney's medical status on January 19, 2001.

If you have any questions, feel free to call Joy M. George..."

The on-property record further confirms that a leave of absence letter dated November 16 from Division Maintenance Engineer Heidzig granted the Claimant's timely request for a 30-day leave of absence beginning at 11:59 P.M. on November 18 and expiring at 11:59 P.M. on December 18, 2000. The November 16 letter also requested the Claimant's completion of a "Medical Status Form" prior to the expiration of the leave, and stated in part:

"If, for any reason, you find it will be necessary for you to extend this leave of absence, you are to notify my office in writing setting forth the length of time you desire to have this leave of absence extended, and the reasons making such necessary. Requests must be made in ample time to permit action thereon before the expiration of this leave. Refer to Agreement between BNSF and BMWE, Rule 15 E – Leave of Absence:

'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....' (Emphasis added)

The incident that gave rise to the instant dispute involving the Claimant's loss of seniority occurred on December 19, 2000, at 8:46 A.M., when the Claimant submitted, via fax machine, a form entitled "BNSF Authorized Leave of Absence" to Maintenance Engineer Heidzig. The reason for the extension, to commence on December 19, 2000 and end on January 17, 2001, according to her form, was purportedly for reason of "Injury On Duty," we note.

By letter dated December 20, 2000, Division Maintenance Engineer Heidzig denied the Claimant's request for an extension of her leave on grounds that her current leave had expired at 11:59 P.M. on December 18, and her faxed request received at 8:46 A.M. on December 19, 2000 was late. The Carrier emphasized that the Claimant's belated request was contrary to the instructions set forth in the November 16 letter to submit any extension request prior to the expiration of the leave. Invoking the "self-executing" provision of Rule 15.E, the Carrier terminated the Claimant's seniority. The Carrier stated:

"My office did not receive a request for an extension to your medical leave of absence prior to expiration; therefore, effective immediately, be advised that you have forfeited all seniority rights with Burlington Northern Santa Fe Railway."

On January 5, 2001, the Organization informed the Carrier in writing of its position that the Carrier's denial of the Claimant's medical leave of absence request was improper, and its decision to terminate her seniority was not supported under the Rules. On January 9, 2001, the Carrier denied the Organization's request for the Claimant's reinstatement for the same reasons as set forth in the December 20 letter. However, the Carrier consented to the Organization's request to afford the Claimant an Unjust Treatment Hearing pursuant to Rule 62. The Unjust Treatment Hearing was conducted on February 13, 2001, and the transcript of the proceedings was included in the on-property record and was very carefully reviewed by the Board.

At the close of the Unjust Treatment Hearing, the Organization renewed its request for the Claimant's reinstatement with backpay and benefits. In letters dated March 12 and April 11, 2001, the Carrier rejected that request stating that it had found no evidence at the Unjust Treatment Hearing that the Claimant's termination was tantamount to "unjust treatment in this case." Unable to reach a mutual resolution of the claim during the on-property handling of this matter, the dispute was listed before the Board.

We carefully reviewed the entire record before us, as well as the precedent Awards submitted by the parties in support of their respective positions. We find that the Claimant was late in requesting her leave and thus was in violation of the provisions of the November 16, 2000 letter and Rule 15.E. However, the Board also is convinced that the Carrier's decision to terminate the Claimant's seniority was arbitrary and excessive especially in light of the uncontroverted fact that previous late extension requests by her and another employee were not previously rejected as untimely. Additionally, at the time of her termination, we note, the Carrier was prepared to reevaluate her medical situation on January 19, 2001. Consequently, we believe that the interpretation and application of Rule 15.E as "self-executing" leaving no discretion to the Carrier was arbitrary and the resultant penalty unduly severe. Our reasons follow.

First, at the outset, the Board finds that, as the Carrier too suggested, under the circumstances we note that the Claimant was not entitled to an Investigation under Rule 40. Our finding is based on the earlier logic of the Board, which held in Third Division Award 37602, a similar case involving the Carrier's application of self-executing Rule 9, Retention of Seniority by Laid Off Employees, that an employee's seniority rights may be properly terminated "as a result of an employee's failure to act within the requisite time period." See on-property Third Division Award 29516. See, also, Case 25 of Public Law Board No. 4381, another "Rule 9" case involving these parties.

Second, the self-executing provisions contained in Rules 9 and 15 of the Agreement may be activated by the Carrier when circumstances so warrant and, as in this case, under paragraph E, without conducting an Investigation under Rule 40, we rule. Indeed, in on-property Award 73 of Public Law Board No. 4768, the Board upheld the Carrier's application of Rule 15.E in a similar case involving an employee's failure to request an extension of his leave prior to the specific deadline date, we note. The Board wrote:

"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. At the same time, however, the Carrier wrote to the Claimant, seeking his compliance under Rule 9 . . . on the supposition that the Claimant should have reported to work following his one-week leave to exercise his seniority.

In its letter, the Carrier gave the Claimant until April 27, 1992 to provide necessary information. The Claimant contended that he did not receive the letter until April 29. Even then, however, he did not take action to provide the necessary information. He was then notified by letter dated May 5, 1992, that, in accord with Rule 9, his seniority had been terminated.

The Board finds that the Claimant's seniority was properly terminated under Rule 15E. . . ."

Therefore, from the above we conclude that the Organization's procedural objection that the Claimant should have been afforded an Investigation under Rule 40 is not based on arbitral precedent or the parties' labor contract. Accordingly, the Organization's request that this claim be sustained for reason of alleged procedural error for lack of an Investigation under Rule 40 is rejected, we rule.

Third, however, we find that Rule 62 does grant the Claimant the right to an Unjust Treatment Hearing. Rule 62 provides:

"An employe who considers himself unjustly treated in matters other than discipline, or in matters other than those arising out of the interpretation and application of the rules of this Agreement, shall have the same right of hearing and appeal as provided in Rule 40, if written request is made to his immediate superior within twenty (20) calendar days after the date of the occurrence of the cause for complaint."

It is the Board's conclusion that the Claimant was asserting that she was treated unfairly under the Carrier's contention that Rule 15.E was "self-executing" and left no discretion with the Carrier as regards that Rule's application. She thus presented a claim of unjust treatment under the Carrier's application of a Rule and her sole avenue for obtaining a due process ruling was under the rubric of Rule 62, we hold.

Fourth, as noted above, we agree that, under the factual circumstances, the Claimant's December 19 request for an extension of her leave that had expired on December 18, 2000, was clearly untimely given the instructions conveyed in the November 16 letter and the clear language of Rule 15.E. The Claimant's testimony at the Unjust Treatment Hearing suggested that she had faxed her request prior to the 11:59 P.M. deadline on December 18, but the documentary evidence, i.e., the fax date stamp showing "12/19/00 08:46," proves otherwise. The documentary evidence also establishes that this is not a case in which the Claimant could convincingly argue that she was not aware of her responsibilities under Rule 15.E, to either report to work immediately upon the expiration of her leave or request an extension prior to the leave's expiration. The Claimant's knowledge of the proper procedures for securing an extension is demonstrated by the timely extensions she had previously sought on August 11, September 16 and November 15, 2000, we emphasize.

Therefore, we rule that, in this particular case, the Claimant clearly violated Rule 15.E when she failed to request her extension prior to the specific deadline of 11:59 P.M. on December 18, 2000, as already mentioned above. From our careful review of the record, we emphasize, we find that the Carrier's acceptance of the Claimant's late extension request of March 22, 2000, and its rejection of the December 19 request for reason that it was untimely, sent a mixed message to the Claimant that suggested that the Carrier was not always punctilious in its application of "self-executing Rule 15." Under those facts, the Claimant's seniority termination was arbitrary and capricious, we hold.

Moreover, the testimony offered by the Carrier's witness during the Unjust Treatment Hearing did not refute the Organization's position that at least one other employee, again, the Claimant's relative, Sue Haney-Wilcox, was also permitted to extend an existing leave of absence, Haney-Wilcox's untimely request notwithstanding. This happened during the same time frame as involved in this claim, we also conclude. The Claimant's termination in light of the sufficient evidence that the Carrier had treated Haney-Wilcox more favorably could indeed be construed as "disparate treatment." It certainly could have corroborated the Claimant's impression that there was leeway for a late filing of the leave requests, rather than the Carrier's contention that no such discretion existed, because Haney-Wilcox and the Claimant were related and the Claimant obviously knew of the leeway given Haney-Wilcox by the Carrier, we are persuaded.

Finally, we hold that the Carrier's application was harsh and unreasonable, given the Carrier's November 14, 2000 letter, referenced above, which confirms that

the Carrier was willing to re-evaluate her medical status on January 19, 2001. Thus, we specifically find no support for the Carrier's assertion that Haney-Wilcox's late request for a leave extension was somehow granted only because her situation had been "more closely monitored" than the Claimant's. The Carrier's use of discretion was evident in these other instances, we hold.

The Board thus concludes that Part (1) of the claim must be sustained for all of the foregoing reasons. However, given the Claimant's failure to prove that she had timely filed her request for an extension of her leave, Part (2) of the claim must be denied, as explained above. Therefore, the Claimant shall be reinstated, as provided below, with seniority unimpaired but without the payment of backpay or other benefits. The Claimant's reinstatement is also contingent upon her successful completion of the Carrier's applicable return-to-duty examinations.

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 22nd day of September 2005.