Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39380
Docket No. MW-39327
08-3-NRAB-00003-060196
(06-3-196)

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes 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. T. C. Jones on May 5, 2004 was in violation of the Agreement [System File C-05-P018-9/10-05-0147 (MW) BNR].

(2) As a consequence of the violation referred to in Part (1) above, Claimant T. C. Jones shall now be fully reinstated to service and compensated for all wage loss."

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 began work as a Grinder Operator on March 7 and worked until he was released from duty for the day at 5:30 P.M. on May 5, 2005. At that time, after completing his regularly assigned workday and two hours' overtime service, the Claimant was handed a letter informing him that his application for employment had been disapproved. The Organization filed a claim on his behalf on the ground that the Carrier violated Rule 3 and terminated the Claimant without benefit of a fair and impartial Investigation in violation of Rule 40A.

Rule 3 provides, in relevant part:

> "A. An applicant for employment will be required to fill out and execute the Company's application forms and pass required physical and visual examinations, and his employment shall be considered temporary until application is approved. Applications for employment will be rejected within sixty (60) calendar days after seniority date is established, or applicant shall be considered accepted. Applications rejected by the Company must be declined in writing to the applicant. . . .
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> B. When new employes enter the service, if their work is satisfactory and application for employment is not declined within sixty (60) calendar days, their names shall then be listed on the seniority roster with a seniority date as of the date of first paid service, except as provided in Sections C and E of this rule. . . .
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> E. Pending approval of applications for service, employes will hold temporary seniority rights. Employes whose names have been permanently listed on the seniority roster in accordance with B or C of this rule will be considered permanently employed, and shall not thereafter be dismissed on account of unsatisfactory references, other than as provided in Rule 40."

Under Rule 40A, "An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held." The Organization's claim is based on the erroneous premise that the Carrier failed to reject the Claimant's application for employment within 60 calendar days, and as a result he could not be terminated without an Investigation pursuant to Rules 3E and 40A.

It is undisputed that the Claimant established a seniority date on March 7, 2005. Pursuant to Rule 3E, that was a temporary seniority date, pending approval of his application for employment. It is also undisputed that the Carrier did not give him a written rejection of his application for employment until he was released from duty for the day on May 5, 2005, which was actually the 59th day after his seniority date was established, i.e., not the 60th day as had been argued on the property. Because of the parties' miscalculation, the core question presented by the Organization is whether a notice of rejection or disapproval given to an employee at the end of his work day time on the 60th day after his seniority date is established is within the time limit specified in Rule 3A, and secondarily, whether it makes any difference that the employee worked overtime that day, so that he did not receive the notice until after the close of his regularly assigned work hours.

Assuming arguendo, the Carrier had disapproved the Claimant's application for employment on the 60th day (as erroneously asserted) such would not change the result. This is so because the Board is persuaded by the reasoning of Third Division Awards 15026 and 19177, as well as Second Division Awards 3545, 8536 and 13098, all of which construed contract terms requiring the Carrier to take action "within [x] calendar days." Illustrative is Second Division Award 3545, where the Board, construing language very similar to Rule 3A, held that an action taken on the 60th day is taken within 60 calendar days after an applicant begins work. The Board there explained (and as quoted in Third Division Award 19177):

> "'The general rule (in law) is that the time within which an act is to be done is to be computed by excluding the first day and including the last, that is the day on which the act is to be done * * *' 86 Corpus Juris Secundum 13(1). 'The words 'from' and 'after' are frequently employed as adverbs of time, and when used with reference to time

> are generally treated as having the same meaning.' Ibid, 13(3). 'Thus, if something is to be done 'within' a specified time 'from' or 'after' a given date or a certain day, the generally recognized rule is that the period of time is computed by excluding the given date or the certain day and including the last day of the period, and similarly, if something is to be done 'within' a specified time 'from' or 'after' a preceding event, or the day an act was done, the day of the preceding event or on which the act was done must be excluded from the count.' Ibid, 13(7).
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> We think the foregoing method of computing time is the only reasonable application of the agreement language in question. . . ." (Emphasis added)

As noted, we agree that action taken on the 60th day after the seniority date is established is taken within 60 days. Because the time limit of Rule 3A is set in terms of "calendar days," it is irrelevant that the letter was not delivered until after the end of the Claimant's regular shift, after he completed two hours of overtime, and after he was relieved of duty for the day. In reality, the rejection was delivered on the 59th day and, therefore, within 60 calendar days. This is consistent with the decision of Second Division Award 8825:

> "We find that regardless of whether Mr. Marquez was notified on June 23, 1978 at 3:45 P.M. or 2:50 P.M., he was, in fact, notified on the thirtieth day of service. As has been held by the Board, a day commences with the time of the work assignment and ends 24 hours later – in this case 7:00 A.M. and ending 7:00 A.M. on the following day. See for example Third Division Award 14927 and Fourth Division Award 2697. Thus Mr. Marquez would not have completed 30 days of service until 7:00 A.M. on June 24, 1978. Also, it is proper for the Carrier to remove a probationary employee from service on the last day of the probationary period. See Public Law Board No. 845, Award No. 1."

This means that the rejection letter at 5:30 P.M. delivered on May 5, 2005 was delivered "within sixty calendar days after" the Claimant established seniority on March 7, 2005, as Rule 3A requires. In fact, the rejection letter was delivered one day earlier than required by the Rule.

Due to the miscalculation, the Organization relied on the apparently contrary decision of Third Division Award 20900. However, Award 20900 does not stand for the principle cited. Simply put, the Board in Award 20900 did not decide when a rejection is untimely under Rule 3A, although it laid out the parties' positions in great detail to show the "serious dispute" between the parties as to the interpretation and reconciliation of Rule 3(A) and Rule 42(A). The Board then declined to rule on the issue, stating that the problem "is not the issue before us. It should have been, but it is not. The simple issue before us is compliance by Carrier with Rule 42(A)." Instead, the Board concluded only that because the Carrier had not responded to the claim within the time limits of Rule 42(A) (a fact not in dispute) the claim must be allowed as presented. The Board held that the Carrier's position that the Claimant was not covered by Rule 40 or Rule 42(A) begged the question, because the Claimant's employment status was precisely the issue of his claim. Observing that even a claim deemed "fanciful" or "without merit," must be rejected within the contractual time limit, the Board in Award 20900 merely sustained the claim as presented due to the Carrier's procedural error.

The Carrier did not make that procedural error here, so we addressed the meaning of Rule 3A, and, as discussed, we hold that the Claimant's application was properly disapproved within the time limit set by Rule 3A.

The question remains whether the Claimant nonetheless had the right to a fair and impartial Investigation before he was terminated, a question not reached in Award 20900. Due to its miscalculation the Organization erroneously asserted that regardless of Rule 3A, by completing his assigned schedule on May 5, 2007, the Claimant had been "in service sixty days" and was therefore entitled to an Investigation under Rule 40A. However, the Claimant was not "dismissed" within the usual meaning of the word; his application for employment was disapproved. Under Rule 3E the Claimant was never placed on the seniority roster; instead, throughout his employment, he held only "temporary seniority rights," and, pursuant to Rule 3A, his

employment was temporary. As did the Board in Third Division Award 15026, we find that Rule 40A, the Rule requiring an Investigation before discipline or dismissal, is not applicable in this case. The general Investigation procedure in Rule 40A does not modify the Carrier's specific right under Rule 3A to disapprove an application for employment within the employee's first 60 days. It would be illogical to say that the Carrier had the right under Rule 3A to disapprove an application for employment any time on the 60th day of the employee's temporary employment, but that if, and only if, the Carrier waited to disapprove the application for employment until after the employee had begun service on that 60th day, the employee, although still only a temporary employee, would be entitled to an "investigation" of the reasons for the disapproval. See, Second Division Award 13098, as well as Third Division Awards 19674 and 22196.

For all of these reasons, the claim is 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 Third Division

Dated at Chicago, Illinois, this 8th day of December 2008.