

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39720
Docket No. MW-40359
09-3-NRAB-00003-080144**

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

**(Brotherhood of Maintenance of Way Employes 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 dismissal (seniority termination) of Mr. A. C. Olivetti by letter dated May 16, 2007 was improper and in violation of the Agreement. [System File C-07-P018-14/10-07-0240 (MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. C. Olivetti shall now “. . . be reinstated to service immediately with seniority unimpaired and paid for all time and benefits lost account this improper removal from service.”**

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 was granted a medical leave of absence from December 7, 2006 until February 8, 2007. By a letter dated February 12, the Claimant's medical leave of absence was extended until February 28. The letter advising him of that extension contained the language "you will be expected to markup for duty at or before 2359, February 28, 2007 . . . if you need to extend this leave of absence, you must provide an original doctor's statement on letterhead stationery 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." It is undisputed that the Claimant did not mark up or request an extension of his medical leave. The Carrier informed the Organization in a May 16, 2007 letter that the Claimant had forfeited his seniority rights. The Organization filed a claim in a letter dated June 21, 2007 and included two doctor's notes from Claimant's treating psychiatrist dated April 30 and May 14.

The Organization does not deny that the Claimant neither reported for duty nor sought a medical leave extension by February 28, 2007. Rather, the Organization argues that the Claimant was suffering from a persistent and chronic mental illness that rendered him in a diminished capacity. According to the Organization, the Carrier improperly and arbitrarily cited the Claimant for failing to comply with Rule 15E. The Claimant was unable to comply with the requirements of the Carrier's medical leave policy. The Organization cites to Third Division Award 37603 in support.

The Carrier asserts that the Claimant automatically forfeited his employment and seniority rights on March 1, 2007, because of the self-executing nature of Rule 15E. Further, the Organization's claim must be rejected because it was not filed within the 60-day requirement of Rule 42. Rule 42 requires that claims be filed within 60 days of the date on which the occurrence giving rise to the claim occurred. According to the Carrier, the 60 days expired on April 29, 2007. The Carrier issued a letter to the Organization on May 16, 2007 informing of the Claimant's forfeiture. The Carrier cites a number of Awards in support of the proposition that Rule 15 is self-executing. It contends that the instant claim was not timely filed, the Claimant did not report for duty, and there was no medical leave extension beyond February 28, 2007.

In response to the Organization's contention that the Claimant's medical condition rendered him unable to comply with the medical leave policies, the Carrier provides three responses at page 8 of its Submission:

“First, the Claimant was apparently able to submit paperwork extending his first leave of absence to February 28, showing that he understood the procedure and had the wherewithal to comply. Second psychiatrists are able and willing to send notes to their patients’ employers, and routinely do so, and there is no reason that it should be any different in this case. Third, even if the Claimant was somehow unable to figure out how to send or fax a doctor’s note to the Carrier – which is unlikely given the instructions were exceptionally clear in the Carrier’s February 2 and 12, 2007 letters to the Claimant, and that he had apparently done it once before in order to secure his first extension the doctor’s note is dated April 30, 2007, which is 60 days beyond the date that Claimant needed to submit it in order to secure another extension.”

At the panel discussion on the instant matter, the Carrier also offered Third Division Awards 36214, 39145 and 39333 in support of its position.

The Board carefully reviewed the evidence. Clearly, Rule 15E is a self-executing Rule and the Claimant failed to report for duty or seek an additional medical leave extension prior to February 28, 2007.

Rule 15E reads, in relevant part, 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.”

As a self-executing Rule, Rule 15E is not disciplinary in nature and a formal Investigation is therefore not required. However, Third Division Award 36214 advises that “[w]e recognize that there have been a few limited exceptions to that general Rule, cited by the Organization, but they involve special circumstances not present here.” Third Division Award 37603 provides insight into the “special circumstances” discussed in Award 36214. The instant matter is one of the “special circumstances” discussed in Award 36214.

The Organization established through the Medical Status Form dated April 12, 2007, that the Claimant was diagnosed with a Major Depressive Affective

Disorder and had been hospitalized since April 9, 2007. The form also reveals that the Claimant was “Unable to Perform Any Activity” from February 28 to April 27, 2007. The “Prescribed Medications” include a number of prescriptions.

A letter from a treating psychiatrist dated April 30, 2007, indicates that the Claimant is being treated, cannot return to work, and will be re-examined in two weeks. A subsequent letter from a treating psychiatrist dated May 14, 2007, indicates that the Claimant is being treated, cannot return to work, and will be re-examined in two weeks. A letter from a treating psychiatrist dated June 19, 2007 indicates that the Claimant is still being treated, but could return to work as of June 5, 2007. The Organization had been advised of the Claimant’s forfeiture in May.

Contrary to the Carrier’s assertions quoted above that the Medical Leave instructions were clear, that psychiatrists routinely fax notes to employers, and that the 60 days to file a claim had elapsed, the Organization established that the Claimant was unable to perform any activity because of his illness from February 28 until at least April 27, 2007 – well beyond the Carrier’s cited forfeiture date of March 1, 2007.

The Board finds that the circumstances presented in the instant matter constitute one of the limited “special circumstances” discussed in Award 36214. Here, the Claimant was unable to perform any activity from February 28, 2007. Seeking a leave extension or even notifying the Organization, under the unique circumstances presented in this matter, were some of those activities that he was unable to perform. By the time he was able to perform any activity, the Carrier had considered him as having forfeited his seniority and employment. In effect, under the unique and special circumstances of the instant matter where the Claimant was suffering from mental illness, the Claimant cannot be found to have violated the requirements of the Carrier’s medical leave policy when he was unable to perform any activity.

The Claimant shall be reinstated to service with seniority unimpaired and compensated for all time lost commencing Friday, June 29, 2007. The Claimant’s reinstatement is contingent upon his 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 26th day of June 2009.