

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41033  
Docket No. MW-40767  
11-3-NRAB-00003-080650**

**The Third Division consisted of the regular members and in addition Referee Steven M. Bierig 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's action of dismissing Mr. S. L. Penn, without an investigation pursuant to Rule 40, on June 14, 2007 was unjust and in violation of the Agreement [System File C-07-D070-5/10-07-0315(MW) BNR].**
- 2) As a consequence of the violation referred to in Part (1) above, Claimant S. L. Penn shall now be reinstated to service with his seniority unimpaired and he shall be compensated for any and all lost time beginning June 14, 2007 and continuing.”**

**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 hired by the Carrier as a Sectionman on April 16, 2007. Subsequently, on June 12, 2007, the Claimant's application for employment was disapproved in writing, pursuant to which the Claimant was terminated on June 14, 2007. The Carrier asserts that it had the right to revoke the Claimant's application within 60 days of his hire. The Organization claims that the Carrier did not act in a timely manner.

According to the Organization, the termination of the Claimant was improper for a number of reasons. First, it claims that the Carrier improperly denied the Claimant a fair and impartial Investigation. According to the Organization, the Claimant had been on the job for 60 days and, therefore, should have received an Investigation. Because he was entitled to an Investigation and did not receive one, the claim must be sustained and the Claimant be made whole for all losses. As noted above, the Claimant began work on April 16 and remained in service until he was removed on June 14, 2007.

Conversely, the Carrier takes the position that because the Claimant worked only 57 days, he was not entitled to an Investigation. The Carrier has the right to revoke any application within the first 60 days of employment. In this case, the Claimant's first day of compensated service was April 17, and he was notified via a letter dated June 12, 2007 that his application was being revoked. This is a period of 57 days. In addition, the Claimant did not provide compensated service on June 14, 2007. However, even assuming, arguendo, that the Claimant had worked 60 days, the Carrier nonetheless contends that it still had the right to revoke his application based on Board precedent. Therefore, the Carrier asks that the claim be denied in its entirety.

Rule 3A provides as follows:

"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. In the event applicant gives false information, the Company will have the right to disapprove such application after the sixty (60) calendar day probationary period has expired if the information involved was of such a nature that the employee would not have been hired if the Company had timely knowledge of it.”

A review of the facts in this case shows that the Claimant was hired on April 16, 2007. A letter dated June 12, 2007, informed the Claimant that his application for employment was rejected. Further, he did appear for work on June 14, 2007, and was dismissed that day - a period of 60 days. According to the Carrier, he performed no compensated service on June 14; therefore, his last day of service was June 13, or the 59th day. Further, the Carrier contends that the Claimant’s date of hire, i.e., April 16, should not count toward the probationary period, reducing the number of days to 58. Finally, the Carrier contends that the date of the letter, June 12, should count as the final date of employment, again reducing the number of days worked to 57 days. The Organization contends that the Claimant worked from April 16 until June 14, 2007, when he took a test and, therefore, the date should count as the 60th day.

The Board finds that the Claimant was terminated on the 59th day because his last day of compensated service was on June 13. However, the Board further finds that even if the Claimant had been terminated on the 60th day, i.e., June 14, the Carrier is nonetheless allowed to revoke an application for employment if that determination is made on the 60th day, which is still part of the probationary period. As the Board held in Second Division Award 8825, another disapproval of employment application case, “. . . it is proper for the Carrier to remove a probationary employee from service on the last day of the probationary period.” Thus, under either scenario discussed above, it is clear that the Carrier did disapprove the Claimant’s application for employment in a timely manner, pursuant to Rule 3A.

We remind the parties that the Organization has the burden of proof in a Rules case. After a thorough review of the record, we cannot find that the Organization met its burden of proof. Consequently, we have determined that the Carrier properly revoked the Claimant's application for employment prior to the conclusion of the probationary period. As noted above, Board precedent dictates that the Carrier is allowed to revoke an application for employment on the final day of the probationary period.

**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 23rd day of August 2011.