Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41182
Docket No. MS-41310
11-3-NRAB-00003-100239

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

PARTIES TO DISPUTE: (Charles Davis
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(Illinois Central Railroad

STATEMENT OF CLAIM:

"Being wrongfully terminated from Canadian National Railroad due to a foot injury I sustained which prevented me from safely performing my duties as a Track Laborer."

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 dispute raises the issue of whether the Carrier violated its Agreement with the Brotherhood of Maintenance of Way Employes (BMWE) when it notified the Petitioner that his seniority had automatically been terminated.

The facts underlying the issue are as follows. On June 14, 2009, the Petitioner was furloughed. There is no dispute that the furlough was in accordance with the BMWE Agreement. On June 24, 2009, the Carrier advised the Petitioner:

> "You were recalled back to work effective June 17, 2009, in accordance with Rule 10, paragraph (b) in the current BMWE agreement, which states: *When forces are increased, the employees will be notified in seniority order and must return to service within seven (7) days of recall. Failure to comply with these provisions, unless prevented by sickness or injury, will result in loss of seniority. A certified letter addressed to the employee at the last address filed will constitute proper notice.*
>
> Since as of today June 24 you have not reported to your position under ICBB-S06 under Supervisor Richard Slaughter, (Foreman N. Reece) you are hereby considered in violation of the aforementioned rule and considered resigned from the service."

The June 17 letter shows that a copy of the letter was sent to the General Chairman of the Organization representing the Petitioner.[1]

On June 30, 2009, the Organization filed an appeal. In essence, the Organization contended that the Petitioner had contacted Supervisor Slaughter on June 23, 2009, and had advised Slaughter that he was unable to report to duty as a result of a debilitating injury. Attached to the Organization's letter were several documents. One was a copy of a record of telephone calls made by the Petitioner on June 23 and 24, 2009. Among the telephone numbers called on those days were two calls to Supervisor Slaughter.

The other attached documents were medical statements indicating that the Petitioner was unable to work until sometime after June 24, 2009. There is no evidence or allegation that any of these documents were furnished to the Carrier prior to the Organization's appeal letter of June 30, 2009.

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[1]In addition to Rule 10(b), the Carrier also relied upon Rule 38(a) of the Agreement. Rule 38(a) is an automatic forfeiture provision similar to Rule 10(b). A major difference is that Rule 38(a) requires absence of "seven (7) consecutive workdays." Rule 10(b) requires a failure to return to duty "within seven (7) days of the date of recall." For purposes of this Award we need not reach the applicability of Rule 38(a).

In the Board's consideration of this dispute, two principles established by numerous prior Awards involving the same issues found in this case must be set forth. To begin with, the Board has held that the automatic forfeiture provisions of agreements are not to be considered as discipline and are not subject to the provisions of the agreement dealing with the subject of discipline. Accordingly, unlike discipline cases, where the burden of proof is upon the carrier, in disputes such as the one here, the burden of proof is upon the party petitioning the Board for an award in his favor. Thus, in this case, the burden of proof is upon the Petitioner to show that the Carrier improperly relied upon Rule 10(b) in terminating his seniority.

In addition, there is another well-settled principle that deals with an issue before the Board. The principle deals with the requirement that an employee must notify the carrier that he will be unable to come to work prior to the time he was required to return to service. Thus, in this case, the Petitioner was required to notify the Carrier prior to the time he had been required by his recall notice to return to work that he was unable to comply with the recall notice. A failure to provide such notification brings into play the automatic forfeiture provisions of the Agreement regardless of the Petitioner's physical incapacity. The only exception, not alleged here, would be the employee's physical inability to provide such advance notice.

There is an irreconcilable dispute of fact on this critical issue of advance notice. The Petitioner calls the Board's attention to the two telephone calls that were made to Slaughter on June 23 and 24, during which he alleges that he informed Slaughter of his medical problems and that he was physically unable to return to work. The Carrier does not deny that calls were made but asserts that the Petitioner called for other reasons and that no mention was made of a physical inability on the Petitioner's part that would prevent him from returning to work by June 24.

The Organization's letter to the Petitioner dated July 20, 2009, recognized the dilemma. The Organization, after reciting the provisions of Rule 10(b), continued:

> **"Unfortunately these rules are self executing in nature and nothing contained within your correspondence to this office, or personal conversations with your immediate supervisor, Mr. Richard Slaughter, seems to substantiate your allegation *that you had obtained permission from your immediate supervisor to absent yourself from duty.* The phone records furnished this office only substantiate conversations with your immediate supervisor but offer no content of what had been said during**

such conversation. Unless, your immediate supervisor were to come forward and confirm that he gave you permission to absent yourself from duty we have no basis for further appeal.

As such, we have determined that your request to appeal this decision does not warrant further handling."

It appears from the Organization's letter that the General Chairman spoke directly with Slaughter about the matter and Slaughter did not support the Petitioner's version of the facts.

The Board is not in the position to make credibility findings with respect to the conflicting recollections. In view of the principle that in disputes such as the one here the burden of proof rests with the petitioning party to demonstrate that prior notice was provided, the Board is constrained to conclude that the Petitioner failed to meet his burden of showing that the Carrier violated Rule 10(b) in taking the action it did. Accordingly, the claim must be 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 21st day of December 2011.