

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42404
Docket No. SG-42651
16-3-NRAB-00003-140091**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of T. Bogunovich, for reinstatement to service with compensation for all lost wages, including skill pay, with all rights and benefits unimpaired, and with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rules 36 and 54, when it failed to extend the Claimant's Medical Leave of Absence and then dismissed him from service without first providing him the fair and impartial Investigation. Carrier's File No. 35-13-0003. General Chairman's File No. 12-050-BNSF-87-B. BRS File Case No. 14948-BNSF.”

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 requested, and was granted, a Medical Leave of Absence commencing July 10, 2011. He subsequently obtained several additional extensions, the last one ending on October 3, 2011. He failed to mark up or obtain any additional extensions to his leave of absence. He was not terminated under Rule 36 until August 2, 2012. The Organization protested the termination, which the Carrier rejected on appeal. The claim was fully processed, without resolution. As a result, the Organization presented the dispute to the Board for hearing and decision.

The Carrier asserts the Claimant had previously extended his leave of absence so he knows how to do it. Both he and the Organization were sent a letter advising of the necessity of extending leave before its expiration. BNSF maintains it went above and beyond what was actually required when the Claimant was granted a final extension through July 31, 2012, after having failed to extend his leave. He was specifically advised of the need to reapply for medical leave prior to July 31, 2012. The Claimant failed to request an extension of leave in any of his calls to BNSF personnel. Audio recordings show that he did not request extension. Supervisor Flanagan testified that the Claimant indicated he would be returning prior to expiration of his leave, yet the Claimant was not released by his treating physician to return to work until September 24, 2012, almost two months after his leave expired. The Carrier argues that arbitrators have uniformly held Rule 36 to be self-executing, requiring no action on the part of the Carrier. The Carrier concludes that the Claimant automatically forfeited his rights under Rule 36 and no discipline was involved.

The Organization contends dismissal was wrongful and there was no investigation as required under Rule 54. It argues that Rule 36(D) provides for forfeiture of seniority but does not require termination of employment. Had forfeiture of employment been intended by the parties, the provision would have said so, it insists. The Organization further contends that the Claimant was confused about how to extend his Medical Leave of Absence. He made calls to Supervisor Flanagan and Medical Coordinator Farrah Boston detailing his condition. Flanagan did not return his calls. Further, in the Organization's view, the Carrier's practice of approving leave in 60-day increments is unduly burdensome for employees. The Claimant had failed to extend his leave before, yet his employment continued, adding to the confusion and demonstrating that Rule 36 is not self-executing. The Organization maintains that Rule 36 cannot be deemed self-executing because it does not contain the requisite language: "will be considered

as having left the service.” As a result, the Claimant’s status is identical to that of a new hire without seniority.

Rule 54 states: “An employee in service sixty (60) calendar days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held.” The requirement applies in the case of discipline or in cases of dismissal. Webster’s Dictionary of the English Language defines “or” as “1. (used to represent alternatives): to be or not to be. 2. (used to connect alternative terms for the same thing): the Sandwich, or Hawaiian Islands. 3. (used in correlation): whether . . . or.” This means that if there is an instance of discipline, there must be a fair and impartial investigation. Alternatively, if the subject matter of the case is dismissal, a fair and impartial investigation is equally required. In either the case of discipline “or” the case of dismissal, the requirement stands clearly articulated. The question raised is whether separation of employment upon expiration of leave constitutes dismissal within the meaning of Rule 54.

The Carrier argues that application of Rule 36(D) cannot be deemed a dismissal because the provision is self-executing and automatic. The Rule states: “An employee failing to report for duty on or before the expiration of a leave of absence will lose all seniority rights unless an extension has been granted.” This language is mandatory.

Under the facts in evidence, the Board finds the Carrier’s argument persuasive. Rule 36(D) automatically becomes operative upon expiration of an employee’s leave. The employee has the choice of applying to extend the leave or allowing it to expire. Though the Board might reach a different result where an employee’s requested extension to be denied, in this case there was no such request. The Claimant failed to request an extension even though he was familiar with the requirement and had previously processed an extension of leave. An employee on a leave of absence is charged with knowing both when his leave expires and how to request an extension. Hence, when the Claimant allowed his leave of absence to expire, his loss of seniority occurred by operation of contract and the resulting separation from employment did not constitute a dismissal within the meaning of Rule 54.

The Board is not persuaded by the Organization’s argument that an employee can lose seniority under Rule 36(D) yet retain employment. New hires have a seniority date. By contrast, when an employee has lost seniority for failure to

extend leave, that individual is no longer on the seniority list and separation of employment has occurred.

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 31st day of October 2016.