

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42871  
Docket No. MW-43602  
18-3-NRAB-00003-160378**

**The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division –  
IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(BNSF Railway Company (Former Burlington Northern  
Railroad)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Carrier’s decision to terminate Mr. G. Bryant for his alleged failure to timely report following recall to service was without just and sufficient cause and in violation of the Agreement (System File C-15-A040-16/10-15-0122 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant G. Bryant shall now have his seniority reinstated and ‘... he be paid for each day Claimant’s seniority would allow him to work until the violation ceases and Claimant is restored to service. Claimant is to be paid at the highest rate of pay his seniority would entitle him to work and paid at the time and one-half rate of pay for all overtime hours worked by the position. The Claimant should have all benefits restored retroactive to the date of seniority termination and paid for all other losses including, but not limited to, credit for lost vacation, insurance, and RRB credits.”**

**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 furloughed on November 28, 2014 and told in a December 18, 2014 telephone call from the Manpower Department that he was mandatorily recalled to service with ten days to report. Because December 27 and 28, 2014 were rest days, the Claimant was told to report on December 26, 2014, consistent with on-property practice, according to the Carrier. According to the Organization, the Claimant spoke to Manpower ten times in the nine days following the original call and was told to report to his position in Cheyenne, WY on December 28. The Claimant reported on December 29, 2014, worked his full shift, was sent home the next day when he reported and was subsequently terminated in accordance with self-executing Rule 9 for his alleged failure to report within the ten day limit. When the resulting claim was not resolved on the property, it was referred to the National Railroad Adjustment Board for arbitration.

The Carrier notes that recall letters have not always been sent to furloughed employees and that the Claimant was not sent a letter since Manpower spoke personally with him and twice told him to report by December 26, 2014. During a December 26 telephone conversation, the Claimant was told that he could not rescind the mandatory recall. He did not waive Rule 9 by reporting three days late because the self-executing rule resulted in his automatic termination. The Roadmaster's lack of knowledge on December 27, 2014 of the December 26 termination, did not result in reinstatement. The Claimant was sent home the day after the termination was discovered. Claimant has provided no justification for overturning the termination. There is a dispute over the Claimant's reporting date. This dispute over a salient fact means that the Board must either dismiss the case or rule against the moving party. If the claim is sustained, the Claimant is due compensation for wage loss only, minus outside earnings. He has a responsibility to mitigate damages.

The Organization notes that the Claimant did not receive a letter, which would have clarified misinformation from the Manpower Department. He had ten days to report, which would have been December 28, 2014 and not December 26 as the Carrier contends. There is no evidence of the Carrier's alleged established practice. The Claimant complied with the recall notice. The Carrier waived the right to apply Rule 9 when it allowed the Claimant to work his entire shift on December 29, 2014. Any communication lag between the Roadmaster and Manpower is irrelevant. The Claimant's reliance on information provided by Manpower shows that self-executing rules are not to be applied mechanically and must be considered in light of misunderstandings, confused communications and other extenuating circumstances. The Carrier had an obligation to make "reasonable efforts" to fill the Organization's request for recordings of the Claimant's calls to Manpower, but failed to provide all the records. Therefore, the Board should make a negative inference in the absence of transcripts.

The relevant sentence in self-executing Rule 9 Retention of Seniority by Laid Off Employees (sic) is the following, pertaining to furloughed employees who have been recalled to service: "Failure to return to service within ten (10) calendar days, unless prevented by sickness or unless satisfactory reason is given for not doing so, will result in loss of all seniority rights." The record establishes that the Claimant was phoned by "Priscilla" in Engineering Support on December 18, 2014 and told that he was being mandatorily recalled. The transcript of that call includes the following from Priscilla after she told the Claimant that he had up to ten days to report: 1) "you'd have to report by the 26th" and 2) "Tomorrow would start day one. . . your 10th day falls on Sunday the 28th, so you have to report by Friday the 26th." While in hindsight, following the call with a certified letter could have been useful, the transcript leaves no doubt about the instructions the Claimant received. There is no indication that at the time he questioned what was really an eight day reporting window.

The Organization asserts that on a later call from "Pamela or Patricia," according to the Claimant, he was instructed to report on December 28, 2014. This is open to question because the 28th was a Sunday, which was a rest day. Moreover, there is nothing in the record of the on-property correspondence that indicates that if, indeed, the Claimant was given conflicting instructions about his reporting date, he made any attempt to get clarification. In light of the self-executing provision in Rule 9, it might have been expected that the Claimant would have done more to protect his seniority and thus his employment.

Nevertheless, the Board will sustain the claim to the extent of returning the Claimant to work. We will not do so on the basis of the on-property Third Division Award 42274, a case in which a Rule 9 claim was sustained in full. That Award contains only the following sentence as an explanation for the Board's action: "Even though Rule 9 is self-executing, the fact that the Roadmaster permitted the Claimant to return to work constituted a de facto waiver of the application of the Rule, which enabled the Claimant to retain his seniority as a consequence of the unique circumstances contained in the on-property case record." This Board does not comment on the correctness or incorrectness of the prior Award. Rather, because that Award does not indicate how long the Claimant was allowed to work before Rule 9 was enforced or what the "unique circumstances" were, this Board cannot make a judgment about whether the earlier case is "on all fours" with the case now under consideration.

Rather, this case is resolved on the basis that the Claimant, while arguably derelict in the protection of his seniority, obviously had no intention of abandoning his job, and has paid an extraordinarily high price for missing one work day. Moreover, there is ample precedent where self-executing provisions are concerned, for returning employees to work under some circumstances when they have run afoul of self-executing provisions. See First Division Award 24501 and Third Division Awards 31908, 33153, 35926 and 36038. The Claimant is to be returned to service with his seniority unimpaired, but he is not to receive back pay or benefits.

**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 10th day of January 2018.