

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42878
Docket No. MW-43738
18-3-NRAB-00003-160226**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
(BNSF Railway Company (Former St. Louis-San
(Francisco Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly terminated the seniority of Mr. J. Boyd, effective July 7, 2014 (System File 518-FR2-141/12-15/0024 SLF).**
- (2) As a consequence of the violation referred to in Part (1) above, seniority of Claimant J. Boyd shall now be reinstated and “*** a continuation of his medical leave of absence be granted until such a time he is medically cleared and his medical condition permits his return to 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 (MLOA) for the October 31-November 30, 2013 period. Having failed to return to work or obtain a leave extension as required, by letter dated December 12, 2013 the Claimant was informed of the self-executing consequences of his non-compliance and given a ten day grace period in which to comply. He obtained an immediate leave and subsequent extensions through July 6, 2014, when he failed to obtain another extension or return to work. By letter dated July 7, 2014, the Claimant was informed that he had forfeited his seniority and his employment. The Organization's request for an investigation in accordance with Appendix 11 was denied and the resulting claim was not resolved on the property, leading to a referral of the matter to the National Railroad Adjustment Board for arbitration.

The Carrier asserts that the Claimant's employment was terminated in accordance with self-executing Rule 87 after he was given a second chance. The Claimant, not his doctor, was responsible for obtaining a timely MLOA extension. Past MLOAs did not establish that the medical condition being treated would continue past the leave expiration date and the Claimant has returned to work when past leaves have expired. The Claimant's Attention Deficit/Hyperactivity Disorder (ADHD) is a generally treatable condition. Even if the ADHD is severe, the Medical Department makes no long-term fitness for duty determination until treatment to stabilize the condition has been maximized. The Claimant offered no basis for an extended leave or a permanently unfit for service designation. The request for MLOA documentation is not unreasonable nor is the requirement that leaves be of reasonable duration. The Organization cannot apply leave of absence rules from ATSF and STSF contracts as they are different from Rule 87 in the consequences of a violation. Appendix 11 does not alter the language of Rule 87. The Claimant is not due damages as his claim asks for none and his lack of diligence is not the Carrier's responsibility.

The Organization insists that the Claimant should receive a fair and impartial investigation because the unjust dismissal constituted discipline. Since no

Investigation was held, the claim must be sustained. Appendix 11 also provides the Claimant the opportunity to request an Investigation after termination for unauthorized absence. The Claimant did not abandon or walk away from his position, making the application of Rule 87 inappropriate. The Carrier was aware of the Claimant's medical condition. There is strong support for the Organization's contention that Rule 87 should not be mechanically applied.

The analysis focuses on two provisions from the former Saint Louis-San Francisco Railway (SLSF) Agreement with the Organization. Rule 87(a)(3) states: "Employees failing to return on or before the expiration of their leave of absence will lose their seniority rights, unless an extension is obtained." This is a self-executing Rule. Appendix No. 11 Handling Certain Disciplinary Matters, and particularly the Letter of Understanding (LOU) dated July 13, 1976 relates to Rule 13 Discipline of the SLSF Agreement. The LOU sets forth the process afforded employees who allegedly have been absent without authority and consequently have been terminated. A January 1, 1984 amendment restricted application of the LOU to employees allegedly absent without authority for five days or more. The Carrier relies on Rule 87 and the Organization relies on Appendix 11.

For two, related reasons, the Board finds that Appendix 11 does not apply to this claim. First, there are two routes by which an employee may be terminated: a disciplinary route and a non-disciplinary, administrative route. The disciplinary route is obvious; the administrative route includes the self-executing Rule 87. Second, one of the prime rules of contract interpretation is that the Agreement should be read as a whole so that it is given as full an effect as possible. If Appendix 11 were to apply, then the self-executing provisions of Rule 87 would be nullified. The Board believes that contract provisions are drafted by thoughtful, experienced negotiators in response to work-related issues. Appendix 11 could have been written to explicitly override Rule 87, but it was not. Nor is there bargaining history or parole evidence or even grounds for an implicit interpretation that would nullify the self-executing language of Rule 87.

Thus, the question before the Board is whether the self-executing provision should prevail or whether circumstances justify other than termination. The Claimant's October 31 – November 30, 2013 MLOA, initially not extended, resulted in a Carrier letter dated December 12, 2013 informing the Claimant that his

seniority had been terminated in accordance with Rule 87 but that he had ten days in which to document the need for an extension of his leave. The Claimant obtained the extension and subsequent extensions through July 6, 2014. This alone shows that he was aware of the need to timely document extension requests in order to protect his seniority.

The Board acknowledges that this case does not involve job abandonment. The Organization provided several cases in which Boards overrode self-executing contract provisions where, in the Boards' judgment, Claimants had not abandoned their jobs and where other factors such as confused communications or unique facts patterns existed. See First Division Award 24501 and Third Division Awards 31908, 35926 and 36038. The Carrier submitted Awards in which Boards denied claims resulting from self-executing provisions that resulted in terminations. See on-property Third Division Awards 25669, 29516 and 25669 as well as on-property PLB 4968 Award 73, PLB 2206 Award 49, PLB 2746 Award 5, PLB 3460 Award 36, PLB 4104 Award 59 and PLB 4381 Award 25. The Board is not concerned with the number of Awards submitted but with the pattern that emerges from a careful reading of these Awards. Claimants were returned to work without back pay in cases where there was confused communications or other unique facts. Claims were denied in cases in which the facts were relatively straightforward, devoid of unique circumstances.

On December 12, 2013, when he had not returned to work or documented the need for an extension of his leave, the Claimant was given a one-time grace period in which to take one of the aforementioned actions. He complied by obtaining additional leave. It was the Claimant's responsibility, not his physician's, to comply with Rule 87. He did not take seriously enough the need to protect his seniority and the Board cannot justify a second leniency opportunity.

AWARD

Claim denied.

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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 10th day of January 2018.