

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42879
Docket No. MW-43795
18-3-NRAB-00003-160337**

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 St. Louis-San
(Francisco Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Carrier’s decision to terminate the seniority of Mr. D. Otts by letter dated October 13, 2014 for allegedly failing to justify the continuation of a medical leave of absence was arbitrary, without just cause and in violation of the Agreement (System File 1600-FR2-151/12-15-0047 SLF).

(2) As a consequence of the violation referred to in Part (1) above, Claimant D. Otts shall be reinstated to service with seniority and all other benefits unimpaired and he shall be compensated for all wage loss suffered.”

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 received a medical leave of absence (MLOA) for the September 15-26, 2014 period. His approval letter provided specific instructions for the MLOA process. He saw a medical specialist on September 26, 2014 to obtain documentation to extend the MLOA, but on the two-hour drive home, the Claimant realized that he had not obtained the necessary documentation. On October 1, 2014 the Claimant was notified of the consequences of self-executing Rule 87—forfeiture of seniority and therefore employment. The letter offered a ten day grace period through October 10, 2014, to either obtain an extension or return to work. The Claimant received the documentation on October 9 and faxed it to the Carrier on October 13, 2014, which was the day the Carrier informed the Claimant that he had forfeited his seniority and his employment. The Claimant requested and was provided an unjust treatment hearing, with unjust treatment not found. A claim filed on Mr. Otis' behalf requested an Investigation, which was denied. After the claim was not resolved on the property, it was referred to the National Railroad Adjustment Board for arbitration.

The Organization contends that the Letter of Understanding (LOU) incorporated in Appendix 11 is controlling. Since January 1, 1984 the LOU has been applied to employees absent without authority for five or more consecutive days. The claim is timely as the initial appeal was denied only on the merits, thus the Carrier's timeline assertion is procedurally defective and thus barred. Several Third Division awards support the Organization's approach. Moreover, the claim was filed less than 30 days after the December 22, 2014 decision that the Claimant had not been treated unjustly—well within the 60 days allowed by Rule 90. If the original October 13, 2014 notice of forfeited seniority were to have applied, the Claimant would have had to have elected either to file a claim or to allege unjust treatment. Rule 91 language allows the unjust treatment allegation followed by a claim and logic confirms the equity of this approach. The Carrier violated the Agreement. As of July 1, 2013, Appendix 11 applied to the Claimant so that he had to have been absent without authority for at least five (5) days before forfeiting his seniority. Even then the Claimant could have been due an Investigation. But he

was not absent for five days because he was to have extended his leave or returned to work by October 10, 2014. Even on October 13, 2014 the Claimant was medically excused by his physician as of October 9, 2014. It is noted that the initial MLOA was issued on October 24, 2014, retroactive to October 15, after the Claimant had been gone without approved leave. Rule 87 does not apply because the July 1, 2013 Memorandum of Agreement and Appendix A supersede and thus replace Rule 87. Even if Appendix 11 did not apply and even if the Claimant was not properly considered absent without authority, prior awards argue for a different outcome because the Claimant had not abandoned his position and should not have been subject to the self-executing provisions of Rule 87.

The Carrier insists that the claim was untimely since it was not filed within the required 60 days. The untimely claim precludes the Board from ruling on the alleged violations of Rules 2 and 87 and the application of Appendix 11. Because Rule 87 is self-executing, the Claimant was not treated unfairly. Forfeitures of seniority and employment were automatic. The Claimant twice ignored his responsibility to protect his employment, only providing documentation three days past the ten day grace period he was given. The Organization's reliance on an October 13, 2014 text message is misplaced since that date was 19 days beyond the expiration of the original leave. The Organization has not showed that the Claimant saw his doctor on September 27, 2014. The document relied on, which is questionable, could have been faxed to the Carrier prior to expiration of the MLOA, as the Claimant had the fax number and had communicated with his Roadmaster after hours. The Claimant's ignorance of the 10 day grace period was his fault because he did not pick up the relevant letter until October 20, 2014, although it was available for delivery on October 4. Rule 87 is not modified by Appendix 11. Leave of absence rules in the former ATSF and SLSF Agreements are different, as failure to return after a leave expires resulted in an AWOL status rather than forfeitures, with the ATSF Agreement allowing for dismissal following five days of unauthorized absence. Appendix 11 cannot serve to nullify Rule 87. The Claimant was not absent without authority as per Appendix 11 and had no right to an investigation. He is not due damages since his own lack of diligence led to his termination and he had not been medically cleared to return to service on October 13, 2014, nor could he return to work thereafter due to his medical limitations.

Before the question of the relevant provision is addressed, the Board considers the Carrier's challenge to the timeliness of the claim. The Claimant lost his seniority rights on October 13, 2014 and the claim considered herein was filed on January 16, 2015, beyond the 60 days allowed for filing in Rule 90 but within 60 days of the decision that the Claimant was not treated unfairly. The Organization argues persuasively that the decision on fair/unfair treatment, not the loss of seniority, triggered the 60 day clock. Moreover, the Board observes that Director, Maintenance Support Tripp's denial to the claim was solely on the basis of substance, as timeliness was not mentioned. Only General Director Heenan's denial asserted that the claim "is procedurally defective because it was filed outside of the time limits stipulated in Rule 90." In Third Division Award 11570 the Board found that the time limits had been waived by the Carrier because the matter had not been raised at an earlier step in the progression of the claim. This Board applies the logic of the earlier decision and considers the timeliness contention waived. Thus, we proceed to the merits.

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 (5) days or more. The Carrier relies on Rule 87 and the Organization relies on Appendix 11.

The Organization's contention in the appeal to General Director Heenan that bargaining history shows that Appendix 11 applies is quickly dealt with. The Organization has the burden of proving this contention, but there is no supporting evidence in the record, thus the Board has not considered such history

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.

Finally, there is the question of whether, despite the self-exercising provisions, the Claimant should not have been terminated. His Employee Transcript shows a January 14, 2008 date of hire and MLOAs in 2010, 2011, 2012 and 2014. The 2010-2011 MLOA extended beyond five months. Clearly the claimant knew or should have known what his obligations were regarding MLOAs and how to protect his seniority when a leave became necessary. The Board acknowledges that this is not a case in which the Claimant abandoned his job, but that by itself does not resolve the question.

The Organization has provided cases in which the Board reduced terminations following self-executing provisions to reinstatement with seniority but without back pay where the Claimants had not, in the Board's judgment, abandoned their jobs. See Third Division Awards 31908, 35926 and 36038. The Carrier provided Awards in cases with self-executing terminations where the claims were denied. See PLB 4968 Award 73, PLB 2206 Award 49, PLB 2746 Award 5, PLB 4104 Award 59, PLB 4381 Award 25 and Third Division Award 29516. 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 September 26, 2014 while returning from a medical appointment, the Claimant realized that he had failed to obtain the necessary documentation to extend his leave, but took no immediate action to protect his seniority. Consequently, when his leave expired, he was notified of the termination of his

seniority on October 1, 2014 and given a ten day leniency period in which to comply with Rule 87, the ten days ending on October 10. He obtained documentation on October 9, 2014 but did not fax it to the Carrier until October 13, thus missing the Carrier-imposed deadline. The Claimant has paid a high price for his seemingly casual approach to protecting his seniority and thus his employment, but the Board finds no special circumstances that would justify setting aside the termination.

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 10th day of January 2018.