

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42880
Docket No. MW-43861
18-3-NRAB-00003-160630**

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 Burlington Northern
(Railroad)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier terminated Claimant M. Hunsaker’s seniority by letter dated April 7, 2015 and when it failed to extend his medical leave of absence (System File S-P-2011-G/11-15-0432 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier must rescind its April 7, 2015 seniority forfeiture letter and correct Mr. Hunsaker’s employment status.”**

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.

On January 31, 2014 the Claimant was granted an initial medical leave of absence (MLOA) through March 31, 2014. Also on January 31, 2014 the Claimant was withheld from service pending the results of a disciplinary Investigation. Subsequently, the investigation, postponed nine times, was scheduled for February 2, 2016. The February 4, 2014 letter to the Claimant, as well as letters that followed, reminded him to familiarize himself with the relevant instructions and to either document the need for an MLOA extension or return to work. By letter dated April 1, 2014, the Claimant's MLOA was extended to June 2, 2014. The leave obviously was extended beyond June 2, as by letter dated August 7, 2014 the MLOA was extended from August 4 to October 1, 2014. Seemingly, the Claimant did not ask for a further extension because he received a leniency letter which, on a one-time basis, gave him ten days to document the need for an extension or return to work. At the Organization's request, the leniency letter was rescinded and the Claimant was given an MLOA extension covering the October 2 – December 2, 2014 period. The letter to the Claimant noting the action included the following: "Your record has been corrected to show that your medical leave has been extended." On December 9, 2014 the Claimant was sent a letter informing him that he had forfeited his seniority and thus his employment under the self-executing provisions of Rule 15. However, the Claimant was again given a one-time leniency offer to document a further extension within ten days. He took advantage of the offer, resulting in an MLOA extension covering December 8, 2014 through February 6, 2015. In February the Claimant was granted a further extension covering the February 7-March 31, 2015 period. On April 7, 2015 he was issued a letter noting his continued absence and the absence of documentation justifying an additional MLOA extension. As a result, the Claimant's seniority and his employment had been forfeited. The claim filed on the Claimant's behalf was processed on the property without resolution and therefore, was referred to the National Railroad Adjustment Board for resolution.

The Organization asserts that the Claimant was on an indefinite, unconditional leave by virtue of the October 6, 2014 letter and that this was unrebutted on the property and therefore established. If the October 6, 2014 letter is deemed ambiguous, it must be construed against the Carrier as the drafter. It is too late to supplement the now-closed record. If the MLOA is considered definite,

still the situation was confused because of the Carrier. The disciplinary investigation occurred on March 9, 2016, after the Claimant's seniority had been terminated. When terminated, the Claimant could not have returned to work because he had been withheld from service pending the Investigation. Thus, there was no need to update his medical status in order to preserve his seniority and there was no Rule 15 mandate to do so. The Claimant obviously had not abandoned his job. He provided a doctor's note showing that he would be medically unable to work for an indefinite period. That note was never modified or refuted by the doctor. Even standing alone, the Carrier's inconsistent actions justify the Board's ordering the Organization's requested remedy. The Carrier granted multiple leniency extensions of the MLOA while claiming, without proof, that leaves were for definite periods.

The Carrier notes that Rule 15 is self-executing so that the Claimant's seniority was automatically terminated when he failed to report for service or extend the MLOA. Third Division and on-property awards support the application of the self-executing language. There is no evidence that the Claimant ever complied with or was prevented from complying with Rule 15, of which he was aware. The Organization has not met its burden of proof as there is no evidence supporting allegations that several rules were violated. Were the Board to credit any of the Organization's allegations, there would be a dispute over material facts and the Board would have to dismiss the case or rule against the moving party. An award of damages would be improper as the Carrier should not be held liable for the Claimant's lack of diligence. If the claim is sustained, the Claimant should receive only the remedies called for in Rule 40G, with health benefits excluded because there are national negotiated Health and Welfare Plan provisions covering benefits for reinstated and fully compensated employees. Any Board-ordered reimbursement for lost wages should be reduced by outside earnings.

The Organization bases its claim on three contentions. First, the Claimant was given an indefinite MLOA. Second, there was no need to extend the MLOA because the claimant had been withheld from service and could not return. Third, the Carrier's confusing communications created the problem for which the Claimant cannot be blamed. As to the second contention, the Board agrees with the Carrier that the issues of possible discipline and the MLOA were separate and distinct. The Carrier's decision to withhold the Claimant from service did not strip

him of his contractual right to request a MLOA. Once he exercised that right, the Claimant was obligated to comply with Rule 15, including Rule 1E which states: “An employee failing to report for duty on or before the expiration of their leave of absence will forfeit all seniority rights, unless an extension is obtained.” Although the Claimant, even if medically fit, could not return to service, he was apparently not medically fit and thus required extensions of his MLOA. In Public Law Board 4768 Award 73, an on-property case, the Claimant forfeited his seniority when he failed to extend his leave. The award includes the following: “Pending disciplinary measures as to the Claimant’s performance as a cook are without relevance here.” This Board finds the Claimant Hunsaker’s pending discipline is not relevant to the question of whether he violated Rule 15E.

The Organization properly notes that the Carrier may have created some confusion with the October 6, 2014 letter to the Claimant that noted that the 10-day leniency letter had been rescinded and his medical leave had been extended. With 20-20 hindsight, the letter should have included the last date of the extended MLOA. However, for reasons set forth below, the Board finds that any confusion that initially might have been engendered by the letter should not have survived the events that followed, so that the Claimant knew or should have known that he needed to protect his seniority and his employment by documenting the need for additional extensions.

By letter dated October 9, 2014, the Claimant was granted a MLOA extension for the October 2, 2014 – December 2, 2014 period. When he failed to promptly extend his MLOA in December, he was told that he had forfeited his seniority and on a leniency offer had ten days to document the need for the extension. The Claimant provided the documentation and received an extension for the December 8, 2014 - February 6, 2015 period. He received an additional extension covering the February 7 – March 31, 2015 period, which could have occurred only if the Claimant had promptly submitted the necessary documentation. The import of the above-noted sequence of events is that if the Claimant believed at one point that he had received an indefinite suspension, there was abundant notice in the form of three limited extensions that followed that his MLOA was not for an indefinite period, but for defined periods subject to extension. By the March 31, 2015 expiration of the last MLOA, any prior confused communication, misunderstandings or mixed messages from the Carrier, if they ever existed, had

been clarified. The Claimant simply failed to protect his seniority when he had to have known what was required for an extension. The self-executing results must stand.

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.