

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44011
Docket No. MW-45522
20-3-NRAB-00003-190427**

The Third Division consisted of the regular members and in addition Referee Keith D. Greenberg when award was rendered.

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

PARTIES TO DISPUTE: (

(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Carrier’s decision to terminate Mr. S. Eno’s seniority, by letter dated March 20, 2018, was arbitrary and in violation of the Agreement (Carrier’s File MW-18-22 STR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant S. Eno shall be reinstated to service with seniority and all other rights and benefits unimpaired and he shall be made whole for all wage loss suffered including lost overtime and benefits.”

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.

This matter involves the Carrier's termination of the Claimant's seniority. The Claimant last performed service for the Carrier on March 1, 2018. The Claimant marked off from work on March 2, 2018. The Claimant then requested and used sick time through March 9, 2018. The Claimant communicated with his supervisor via text message on March 5, 2018 and March 9, 2018 to update the supervisor as to the Claimant's condition and his efforts to contact his doctor; at no time did the supervisor or any other Carrier official request that the Grievant submit an update or any medical documentation related to his absence.

On March 20, 2018, the Carrier had sent the Claimant a letter stating in relevant part that:

“Please be advised that you have been absent from work without written authorized leave since Friday, March 9th, 2017. [sic] Article 12.9 of the Current Agreement Between The Springfield Terminal Railway Company and Brotherhood of Maintenance of Way Employees reads:

‘Employees who absent themselves for more than ten (10) calendar days without written authorized leaves of absence as provided in this Rule will forfeit their seniority.’

Failure to not show up to work without written authorized leave within the specified time frame as stated in Article 12.9 has resulted in the removal of your name from all seniority rosters. . . .”

(Spelling as in original.) The record reflects that, on that same day, the Claimant obtained a letter from his physician indicating that the Claimant had been under the physician's care and that snowstorms and flu season had hampered efforts to schedule a medical evaluation for the Claimant. A subsequent letter from the Claimant's physician, dated April 2, 2018, indicated that the Claimant had been seen in the physician's office on March 29, 2018, where the physician had determined that, due to a chronic medical condition, the Claimant was unable to work and would be out from work until mid-June 2018.

On April 17, 2018, the Organization filed a claim that alleged a violation of several provisions of the Agreement, including Article 12 thereof. The claim stated in relevant part that:

“This claim is for all lost seniority and all lost compensation at the applicable straight time, time and one half and double time rates of pay, as well as any other benefits and credits for vacation beginning March 20, 2018 and continuing.

A letter dated March 20, 2018 was sent to Mr. Eno, by the Carrier, advising him that under Article 12.9 of the Agreement that his name would be removed from all seniority rosters. Article 12.9 reads ‘Employees who absent themselves for more than ten (10) calendar days without written authorized leaves of absence as provided in this Rule will forfeit their seniority.’ The letter stated that Mr. Eno had been absent from work without written authorized leave since Friday March 9th.

....

Since Article 12.10 would govern this matter and Mr. Eno would not be required to obtain a written authorized leave, due to a bona fide sickness or injury, Article 12.9 does not apply. He had been in contact with his supervisor on separate occasions notifying him that he would be out of work. Also, medical documentation was sent in on his behalf to the Carrier by his Medical Doctor on separate occasions and the Carrier did not request any further updates at that time.

....

The Carrier has wrongfully stripped Mr. Eno of his seniority by not following the Collective Bargaining Agreement. The fact remains he did not need to obtain a ‘Leave of Absence’ and when requested by the Carrier, Mr. Eno provided updates to the Carrier, thus following the CBA.”

By letter dated June 22, 2018, the Carrier denied the claim, responding in relevant part that:

“The grievance claims that Mr. Eno was ‘improperly dismissed and removed from all seniority rosters without a fair and impartial investigation as required.’ Article 12 ‘Leave of Absence’ is a self-effectuating rule not requiring an investigational hearing. The action

taken was not related to Article 26 ‘Discipline’, which does require an investigational hearing.

The grievance states that, under Article 12.10, Mr. Eno ‘would not be required to obtain a written authorized leave, due to a bona fide sickness or injury’. Mr. Eno failed to provide the proper documentation from his doctor advising the Carrier of this ‘bona fide sickness or injury’ even after the AWOL notice was mailed. Notifying the Carrier properly would have avoided this whole situation. Mr. Eno had ample opportunity to appraise the Carrier of his situation, but failed to do so.

(Spelling and emphasis as in original.) The claim was discussed by the Parties in conference on September 18, 2018.

Article 12, Leave of Absence, of the Parties’ Agreement states in relevant part that:

“12.9 Employees who absent themselves for more than ten (10) calendar days without written authorized leaves of absence as provided in this Rule will forfeit their seniority.

12.10 Leaves of Absence are not required when employees are unable to perform service due to a bona fide sickness or injury. Upon request by the Carrier, Employees are required to provide the Carrier with an update. Failure to comply with the Carrier’s request will result in the implementation of paragraph 12.9 of this rule.”

(Emphasis as in original.)

The Organization contends that the Carrier violated Article 12 of the Agreement when it improperly terminated the Claimant’s seniority. The Organization asserts that the Claimant was in contact with his supervisor, who was aware that the Claimant’s absence from work was due to a claimed medical issue, conditionally approved his absence, and never expressed any issues to the Claimant regarding either the duration or reason for his absence. The Organization points to the record evidence, which reflects that the Claimant was, in fact, off from work due to a bona fide injury or illness determined to be lumbar spondylosis. The Organization further maintains that the fact that the Claimant’s absence was due to a bona fide

sickness or injury required that the Carrier apply Article 12.10, rather than Article 12.9; under Article 12.10, the Carrier must specifically request an update, such as medical documentation, in order to determine whether a claimed illness or injury is bona fide or whether circumstances exist to justify action pursuant to Article 12.9; the Carrier did not do so here before terminating the Claimant's seniority. The Organization notes that, had the Carrier requested medical documentation from the Claimant and not received it, it may have been proper to terminate the Claimant's seniority pursuant to Article 12.9; however, those were not the circumstances here. The Organization contends that, notwithstanding the Carrier's position, nothing in the Agreement required the Claimant to seek FMLA-protected leave in the context of his March 2018 absences. The Organization maintains that the Carrier acted improperly in applying the self-executing provisions of Article 12.9 against the Claimant given the circumstances here. See Third Division Award Nos. 28877 and 33153.

The Organization asserts that the appropriate remedy is an award finding that the termination of the Claimant's seniority was in error and reinstating him to service, with seniority intact and benefits unimpaired, as well as with full back pay from the date he was certified by a medical physician as being fit for service.

The Carrier maintains that it properly terminated the Claimant's seniority given his failure to supply the Carrier with medical documentation to excuse his absence; the only medical documentation received came well after the Claimant received the Carrier's March 20, 2018 letter and failed to give any specifics regarding his condition. The Carrier notes that the Claimant applied for FMLA-protected leave on March 20, 2018 and his request was denied. The Carrier contends that Article 12 is a self-executing rule that requires no hearing; this is not a disciplinary matter. Rather, the Carrier asserts, the Claimant abandoned his job and forfeited his seniority, and the Carrier responded to that action. The Carrier argues that the Claimant did not substantiate the assertion that was ill or injured and unable to work (see First Division Award No. 28099), that he did not timely submit medical documentation (see Public Law Board No. 5940, Award Nos. 92 and 94), and it was not shown that he marked off for a bona fide illness after March 9, 2018 (see Public Law Board No. 5940, Award No. 91).

The Board carefully reviewed the record, the Submissions, and the arguments of the Parties at the Hearing.

The Board finds that the Carrier violated the Agreement when it terminated the Claimant's seniority pursuant to Article 12. Although Article 12.9 of the Agreement provides that employees who absent themselves for more than ten calendar days without written authorized leaves of absence will forfeit their seniority, Article 12.10 clearly provides an exception to that rule. Under Article 12.10, an employee need not obtain a leave of absence when unable to perform service due to a bona fide sickness or injury for which the employee, upon request by the Carrier, must provide an update, with a failure to provide such documentation resulting in the application of Article 12.9. Here, the Claimant maintained in his communications with his supervisor that he was unable to perform service due to a bona fide sickness or injury. The record does not reflect any request by the Carrier to the Claimant that he provide an update on his condition or any medical documentation related thereto. Because the Claimant asserted that he was unable to perform service due to a bona fide sickness or injury and he was not shown to have failed to provide an appropriate update to the Carrier on request, he was not required, under Article 12, to obtain a leave of absence to maintain his seniority. The Carrier, therefore, violated the Agreement when it terminated his seniority on March 20, 2018.

With regard to remedy, the Board finds that the Claimant, S. Eno, shall be reinstated to service, with seniority intact and benefits unimpaired, and with full back pay from the date he was certified by a medical physician as being fit for service.

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 28th day of April 2020.