

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44281  
Docket No. MW-45791  
20-3-NRAB-00003-200016**

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 Company)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier terminated the seniority of Mr. E. Silas following his recall to a position on Gang TSCX0244 on June 8, 2018 (System File C-18-A040-16/10-18-0308 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant E. Silas shall now be returned to work and his seniority must be reinstated.”

**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.

**“RULE 9. RETENTION OF SENIORITY BY LAID OFF EMPLOYEES**

When an employee is laid off by reason of force reduction, he must advise the carrier in writing of any change of address, and telephone number, receipt of which will be similarly acknowledged. When new positions of more than thirty (30) calendar days' duration are established, or when vacancies of more than thirty (30) calendar days' duration occur, employees who have complied with this rule will be called back to service in the order of their seniority. 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. If he returns to service and has complied with the provisions of this rule, his seniority will be cumulative during the period of absence.

NOTE: 1. Employees called back to service in accordance with provisions of Rule 9 must report at starting time of shift to which called within ten (10) calendar days.”

According to the Claimant, on April 15, 2018, while on furlough, he was rear-ended while driving his personal vehicle, resulting in \$3,365.36 in repairs. The vehicle was rendered inoperable, but he could not pay for the repairs because his furlough status provided no income and he was unable to maintain full vehicle insurance coverage. On May 31, 2018, the Claimant received a phone call from Manpower informing him of a mandatory recall to Gang TSCX0244 with a June 8 reporting date. He said nothing about his vehicle. The next day the Claimant phoned Manpower to learn the location and contact information for the Gang. Again, he said nothing about his vehicle. During a June 4, 2018 call from Manpower, the Claimant, not mentioning his vehicle, explained that his financial hardship made travel impossible, but that he would comply with the June 8, 2018 reporting date. He did not report on June 8 and did not call either the Roadmaster or the Foreman, and was informed by letter dated June 11, 2018 that his seniority had been terminated on the date he failed to report. On June 27, 2018 the Organization filed a timely claim on Mr. Silas' behalf. The claim was properly progressed on the property without resolution and thereafter referred to the National Railroad Adjustment Board for final adjudication.

The Carrier asserts that the claim should be denied because Rule 9 is self-executing so that the Claimant's failure to report on or before June 8, 2018

automatically terminated his seniority. The Organization has not proved that the Claimant complied with Rule 9. Time is critical when reporting and the Claimant said he would report on June 8, 2018, but he did not. There is significant arbitral precedent for upholding the self-executing provisions of Rule 9 and other rules with similar provisions. While the Organization has argued that a “satisfactory” reason provides an “escape hatch” from the self-executing provisions, the reason “must be one that absolutely made it impossible to report by the deadline and impossible to contact BNSF to present a satisfactory reason for his absence.” An award of damages would be improper in view of the Claimant’s own negligence, as “The Carrier should not be responsible for the claimant’s lack of diligence” (PLB No. 2746, Award No. 5). If damages are awarded there should be an offset for outside earnings and should not include damages for various medically-related expenses.

The Organization insists that the Carrier violated Rule 9 by terminating the Claimant’s seniority. The April 15, 2018 rear-end collision rendered the vehicle inoperable; the furlough depleted Mr. Silas’ resources so that he could not afford the repairs. By the time the claim was filed on June 27, 2018 the vehicle had been repaired and the Claimant was ready and able to report. He had a satisfactory reason for not reporting within the required ten (10) calendar days. Self-executing provisions such as those in Rule 9 are not entirely self-executing, as prior awards demonstrate, but are properly applied when an employee abandons the job.

Moreover, the Carrier’s defenses are without merit. The Claimant’s extenuating circumstances provide a satisfactory reason for not reporting within the allotted time. The Organization has provided proof of the accident, therefore substantiating the case. The Carrier has callously disregarded the Claimant’s undue hardship and the reason he could not report on June 18, 2018. The Carrier has not shown that Mr. Silas did not contact his Roadmaster or his Foreman before his reporting date, but he clearly contacted Manpower.

The awards submitted by the Carrier for the purpose of showing that the self-executing provisions of Rule 9 are consistently enforced are not persuasive because they are not viewed as on point. The awards involve termination of seniority because employees neglected to update their addresses and/or telephone numbers, but not because they failed to report. Indeed, they weren’t given the opportunity to report. PLB 2745, Award 5; PLB 2206, Award 49; PLB 4381, Case 25; PLB 4104, Case 59; PLB 4768, Award 73 and Third Division Awards 25669, 29516, and 32449.

Awards submitted by the Organization show that Boards have made exceptions and returned employees to work after seniority has been terminated because of self-executing awards. First Division Award 24501 and Third Division Awards 33153, 31908, 35296 and 36038. Had this Board found the Claimant's reason for not reporting on June 8, 2018 satisfactory, it would have ordered reinstatement. However, the record raised more questions than it does to provide answers. As noted above, the Claimant had opportunities on May 31, June 1 and June 4, 2018 to explain his lack of transportation, but did not do so. Nor did he call the Foreman and/or the Roadmaster of the Gang he was to report to with an explanation about why he could not report. Only after his seniority was terminated and he assumedly received notification did the Claimant e-mail his General Chairman on June 26, 2018 with news of the accident and his impaired financial position that previously had prevented him having the "non-drivable" car repaired. The Claimant's failure to say anything about the accident at a time when the Carrier might have given him relief from the June 8, 2018 reporting date raises the question about whether there was an accident at all.

The photos of the front and rear bumpers of a car, not submitted to the Carrier until March 19, 2019, eleven (11) months after the accident and almost eight (8) months after the termination of seniority raise additional questions. The photo of the rear bumper has the license plate blacked out so that there is no way to positively identify the car as that of the Claimant. The invoice from the body repair shop, also submitted to the Carrier on March 19, 2019, has the Claimant's name on it but does not identify the car that was repaired and does not indicate that the invoice had been paid.

The burden of proof in this case falls to the Organization to show with substantial evidence that the Claimant had a satisfactory reason for not returning to service. The Claimant has asserted his unwitting involvement in a rear-end collision that disabled his vehicle, but his failure to inform the Carrier when it might have done the most good, his delay in reporting the accident to his Organization and the absence of anything other than the Claimant's word that would link him and the disabled car falls well short of substantial evidence. He has neither protected his seniority nor left the Organization with the ability to carry the burden of proof.

**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 23rd day of October 2020.**