

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 44308
Docket No. MW-45688
20-3-NRAB-00003-190463

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

(Brotherhood of Maintenance of Way Employes 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. T. Brunner following his recall to a position on Gang TINS0881 in January 2018 (System File C-18-A040-5/10-18-0132 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Brunner shall have his seniority reinstated and he shall ‘... be paid for each day that he could have worked. I am requesting that the position Mr. Brunner could have held, that he is paid all overtime worked on that position. I am requesting that Mr. Brunner have all benefits restored retroactive to date of seniority termination and paid for all other losses including, but not limited to, credit for lost vacation, insurance, and RRB credits.”

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 had established seniority within the Carrier's Maintenance of Way Department. Prior to the dates giving rise to this dispute, the Claimant was in furlough status effective the month of January 2018 and was subject to recall. On January 12, 2018, the Carrier's Manpower office attempted, but was unable, to contact the Claimant via telephone to offer him a mandatory recall to a relief track inspector position. The Carrier next sent a recall notice via certified letter; the first attempted delivery was on January 19; the Claimant received it on January 23, 2018.

Prior to receiving the letter, the Claimant contacted the Carrier's Workforce Support office after noticing the recall notification online. The Workforce Support planner told the Claimant that he was to report no later than January 31, 2018. The Claimant contacted Roadmaster D. Hyatt to advise him that he would be reporting to his track inspector position on February 2, 2018. Roadmaster Hyatt informed the Claimant that February 2, 2018 was a rest day and that he would not be able to report until the next regularly scheduled workday. The Claimant intended to mark up for duty on February 4.

However, in a letter dated February 2, 2018 the Carrier informed the Claimant:

“This letter is a notice in accordance with Rule 9 of the BN Agreement with the Brotherhood of Maintenance of Way Employees. [Claimant] failed to report to his mandatory recall on gang TINS0881. As a result, he has surrendered his seniority and employment with BNSF Railway effective February 1, 2018.”

The Organization filed this claim which was appealed to the highest officer on-property. As the parties were unable to resolve the claim, it is now properly before this Board for final adjudication.

Rule 9 of the parties' Agreement provides,

“RULE 9. RETENTION OF SENIORITY BY LAID OFF EMPLOYES

When an employe 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, employes 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....”

The Organization contends that there is no evidence that the Claimant refused to comply with the recall notice. Instead, the Claimant was confused by the contradictory statements regarding when he was required to report. The Organization concedes that the forfeiture provision of the collective bargaining agreement is self-executing but contends that previous boards have lifted that burden when mitigating circumstances warrant it. The Organization contends that there is no evidence that the Claimant intended to walk away from his employment, and he did not willfully abandon his assignment.

The Carrier contends that Rule 9 of the Agreement is self-executing and that the Claimant automatically terminated his own employment by failing to respond to the recall in a timely manner. When the Claimant failed to report for service on February 2, 2018, he effected his own termination. The Carrier points out the Claimant spoke to Roadmaster Hyatt on January 16, who notified him of the recall. In addition, the first attempted delivery of the recall notice occurred on January 19. There is no dispute that Workforce Support notified the Claimant that he was to report no later than January 31, 2018. The Carrier contends that there is no question that the Claimant failed to comply with any of these timeframes.

The Organization acknowledges that Rule 9 is self-executing and if an employe fails to report within ten days of notification of a recall, all seniority rights are forfeited. However, the Rule makes an exception for employes who can give a satisfactory reason for not reporting in ten days. Certainly, other Boards have found that extenuating circumstances may mitigate operation of this provision. *See, e.g.,* Third Division Award 41402; Third Division Award 42871; Public Law Board 4402, Award 34.

After trying to reach the Claimant by telephone, the Carrier sent the Claimant a certified letter; first attempted delivery of this letter occurred on January 19. Prior

Board precedent makes clear that this constituted “notification” for purposes of operation of the Rule. Third Division Award 39364. Furthermore, the Claimant acknowledges that he spoke with Roadmaster Hyatt and the Workforce Support planner. Ten days after the latest of all of these communications was February 2, 2018.

The Carrier gave several notifications to the Claimant that he had been recalled. The Organization argues that the contradictory statements left the Claimant confused. But the Claimant has not offered any satisfactory explanation for his failure to report no later than February 2. The Claimant told the planner he was “unsure” whether he could report by the required date but has not explained why he could not.

The Board has studied the record carefully and concluded that the Claimant was aware of his recall and obligation to report and has not offered a satisfactory reason for not doing so. Pursuant to operation of Rule 9, the Claimant forfeited his seniority rights and his claim is denied.

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.