

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44540  
Docket No. 46028  
22-3-NRAB-00003-200349**

**The Third Division consisted of the regular members and in addition Referee Jeanne Charles 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 Agreement was violated when the Carrier terminated the seniority of Mr. M. Brann by letter dated July 6, 2018 (Carrier’s File MW-18-38 STR).**
- (2) The Agreement was violated when, beginning on November 14, 2018 with Mr. Brann’s being cleared of any and all medical restrictions, the Carrier allowed junior employees to perform service and/or work for which Mr. Brann was qualified (Carrier’s File MW-19-08).**
- (3) As a consequence of the violations referred to in Parts (1) and (2) above, Claimant M. Brann shall have his seniority reinstated and he shall have Railroad Retirement Board months of service accredited to him and be paid for any and all time (hours in straight time and overtime) that have thus far been worked by junior employees, including but not limited to employees M. Denham and J. Littlefield, in the trackman’s position on Crew No. 3742 in Rigby, Maine or on any other position which Claimant was qualified for in Zones 2, 3 or 4 on an ongoing, continuous and inclusive basis, until the Claimant is allowed to return to active service and exercise his seniority.”**

**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.

Claimant M. Brann established and maintained seniority under the Carrier's Maintenance of Way Agreement. By letter dated July 6, 2018, the Carrier terminated the Claimant's seniority under Article 12.9, stating that he had been absent ten (10) calendar days without written authorized approval beginning May 15, 2018. This led to a formal claim being filed on August 15, 2018, protesting this termination. While the Claimant was out of service with what the Organization believed to be a bona fide medical condition at the time, the claim challenging the Claimant's termination was supplemented with an additional claim dated December 6, 2018, for the wages that the Claimant began losing when the Carrier terminated his employment. These claims were combined on the property by the parties. The claim was properly handled by the parties at all stages of the appeal up to and including the Carrier's highest appellate officer. The combined claims were not resolved and are now before this Board for resolution.

This claim is based on the proper application of Article 12 of the ST/BMWE Agreement which, in pertinent part, provides:

**"Paragraph 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."

**Paragraph 12.9 States:**

**“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.”**

**At issue is whether the Claimant was improperly terminated for allegedly being absent in excess of ten (10) calendar days without written authorized approval beginning May 15, 2018.**

**The Organization asserts that the Claimant was not absent without authority because he was off on account of a bona fide medical condition (sickness/injury), which made it physically impossible for him to perform any service and thus, under the plain language of Article 12.10 of the Agreement, Article 12.9 was in applicable to him, at least until such time as he could physically/medically qualify to perform service under the Agreement again. Therefore, and in keeping with the Carrier’s practice and the parties’ previous joint understanding of the Agreement in this type of situation, Claimant was in furlough status and had no position which he was required to protect. Had the Claimant become occupationally qualified and a position became available in his “home zone”, then under Article 8.3(d), the Claimant would have the maximum ten (10) days to report to such a position before becoming liable for forfeiting his seniority.**

**Second, even if the Claimant had to protect a leave of absence, he had done so in uncontested fashion, when he provided medical documentation on March 27, 2018, supporting his need for continued FMLA leave.**

**Finally, the Organization argues, the Carrier’s cancelling of his seniority in this case was still arbitrary and thus, not allowed under the Agreement because the Carrier only alerted the Claimant of his need to update any leave status by email on July 2, 2018 (by Carrier admission, its “initial” request for further information from Claimant) and provided no deadline as to when the Claimant needed to comply with an update nor any warning as to his failure to so comply possibly leading to forfeiture of his seniority. Instead, the Claimant was “abruptly” and without warning terminated four (4) days later where Article 12.9,**

upon which the Carrier relies, allows a minimum of ten (10) days before being subject to termination.

The Carrier contends that the Claimant failed to provide the contractually required update. The Carrier acknowledges that the Claimant established the presence of a bona fide sickness/injury and qualified for FMLA in connection with this sickness/injury.<sup>1</sup> The Carrier exercised its contractual right to require the Claimant to provide an update and the Claimant failed to respond which resulted in the forfeiture of his seniority. Therefore, the Claimant is not entitled to any relief.

In reaching its decision, the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. After careful review of the record, the Board finds the Carrier did not have sufficient cause to terminate the Claimant's employment.

The record evidence reflects that the Carrier failed to properly execute Article 12.9 of the Agreement. By the Carrier's own communication to the Claimant on July 2, 2018, the Claimant's continued medical leave status was conditioned upon the Claimant providing medical documentation that he was "still under a doctor's care or that the doctor has cleared [you], please provide it *promptly*." (Emphasis added). This communication presumed the Claimant had been in a medical leave status and sought to confirm one way or the other whether that status should be continued or whether he was now ready to return to work. In response, the Claimant scheduled an appointment with his doctor for July 10, 2018. Nothing in the July 2nd communication put the Claimant on notice that he had ten (10) days to submit the required documentation or forfeit his seniority. The instruction to provide information "promptly" was insufficient notice of this requirement. Notice is fundamental to the due process protections afforded employees when terminating employment. The July 2nd communication was flawed in this regard. Thus, the Carrier was not within its right to terminate the Claimant's employment pursuant to Article 12.9 of the Agreement. Accordingly, the Claimant is entitled to seniority reinstatement subject to successful completion of a return to work physical.

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<sup>1</sup> Carrier Submission at 9.

**AWARD**

Claim sustained, in part.

**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 8th day of October 2021.**