

PUBLIC LAW BOARD NO. 7633

Case No.: 15/Award No.: 15

System File No.: UP: 1568992 MPR/BMWED UP509JF12

Claimant: Thomas L. Charlton

UNION PACIFIC RAILWAY COMPANY)

-and-)

BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION)

Organization's Statement of Claim:

1. The Carrier unjustly removed Mr. Thomas L. Charlton's seniority from the roster and denied his right to exercise his seniority in accordance with Rules 13 and 14 of the applicable Agreement.
2. As a consequence of the violation referred to in Part 1 above, the Claimant shall have his seniority restored unimpaired beginning in 2002, through and including on a continuous basis and to be paid his Foreman's rate of pay at his respective straight time rate of pay beginning February 7, 2012.

Facts:

The Claimant, assigned as a Track Foreman in 2000, obtained a MLOA in May 2000. The MLOA expired on September 13, 2000. The Claimant allegedly did not provide additional medical documentation after the expiration of his MLOA, which, therefore, according to the Carrier, ended on September 13, 2000. He did not exercise his seniority within 20 days as was his right under Rule 13 Leave of Absence or Absence on Account of Sickness. This resulted in a furlough. By the time the Claimant attempted to return to service in 2012, having been furloughed for over three years, his seniority had been removed from the roster by the Carrier allegedly in accordance with Rule 2 Seniority Rights.

Carrier Position:

The denial of the claim was timely, having been placed in the mail on the 56th day after receipt of the claim on May 29, 2012. The Organization's receipt of the denial on June 12, 2012 was beyond the Carrier's control. The Claimant was not on a MLOA between September 13, 2000 and 2012 because he had not submitted updated medical

documentation that would have supported an extended MLOA beyond September 13, 2000, despite being told to do so in 2005, 2008 and 2009. The summary provided by the Carrier's HMSD indicated that the Claimant had worked as a police officer between 2000-2008 and that he had gone skiing in 2004, with these activities inconsistent with a contention that he was physically unable to perform service. Failure to exercise seniority once his MLOA expired on September 13, 2000 meant that the Claimant self-furloughed. After three years of self-furlough, by rule the claimant's seniority rights were removed. Prior awards support the enforcement of self-executing Rules, which is what happened in this case when the Claimant self-furloughed for over ten (10) years.

Organization Position:

The claim must be allowed in accordance with Rule 23 because the Carrier failed to deny the claim within 60 days of receipt. The claim was dated April 3, 2012 and the denial was received on June 12, 2012, with June 2, 2012 marking the end of the 60-day deadline. There is ample precedent, including on-property cases, for sustaining the claim because of the time limits violation. Furthermore, the Carrier's termination of the Claimant's seniority violated the CBA because the Claimant had complied with Rules 13 and 14 in his notification to exercise his seniority. Claimant had not self-furloughed, but was on a MLOA from 2002 through February 7, 2012 when he was released to active service without restrictions. Medical documentation supports the Claimant's contentions and shows that the Carrier had knowledge of his medical condition. Claimant's continued contact with the Carrier's Health and Medical Department means that he had not self-furloughed and had retained his seniority.

Findings:

The first concern of the Board is whether the Carrier met the requirement embodied in Rule 23(a) that it "will, within sixty (60) days from the date it is filed notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. . ." Prior awards have not led to consensus on the meaning of the word "notify." PLB 6459, Award No. 19, states that "The Rule does not make the Carrier an insurer of receipt of the notice nor can it be read to mean that the decision is not 'rendered' until it is received." A differing interpretation was applied in NRAB Third Division Award No. 28734, in which the denial of a claim was postmarked on the 60th day after receipt and received thereafter. The act of posting the letter was not equated with notification to the Organization.

There is no dispute that in the case before this Board, the denial of the Organization's claim was mailed on the 56th day after Carrier receipt of the claim, but was received after the 60th day. The Board believes that the better approach to Rule 23(a) is to define "notify" to require posting of the denial letter within 60 days of receipt of the claim. The Board also notes that in situations where the posting date is in dispute, the Carrier has the burden of showing compliance with Rule 23(a).

The Claimant began his MLOA in May 2000 with the MLOA having an expiration date of September 13, 2000. There is nothing in either submission showing that when the MLOA expired, the Claimant provided documentation supporting a request for an extension of the MLOA in accordance with Rule 23E. Nor did the Claimant attempt to exercise his seniority rights within 20 calendar days of a return to service, as there was no return to service. Indeed, the Claimant neither returned to service nor submitted documentation to support an additional MLOA, although he was urged to do so in 2005, 2008 and 2009. In fact, the Board observes from documents in the record that the Claimant worked as a police officer during some of the period he was out of service and that he took a skiing vacation—activities inconsistent with his contention that he was unable to return to service. When the Claimant did not return to service within three years after the expiration of the MLOA and did not seek an extension, he self-furloughed in accordance with Rule 23. Any contact that the Claimant had with the Carrier's Health and Medical Department did not, because of an absence of a specific request to extend his MLOA, negate the fact that he had self-furloughed. By the time the Claimant moved to exercise his seniority rights in 2012, he had self-furloughed for well over three years and his seniority rights had long since expired. The Carrier was well within its contractual rights to deny the claim.

Award:

Claim denied.

Order:

The Board, after consideration of the dispute identified above, orders that no award favorable to the Claimant be entered.



Andrew Mulford, Organization Member



Katherine N. Novak, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
January 15, 2015