

In the Matter of the Arbitration Between:

BNSF RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION (COAST LINES)

NMB Case No. 114

Claim of A. M. Leon

Forfeiture of Seniority
Failure to Respond
To Recall

STATEMENT OF CLAIM: Request on behalf of Trainman A. M. Leon requesting reinstatement of Claimant on a leniency basis.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on August 19, 2010 in Washington, D.C. Claimant was present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement (the "Agreement") which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts including Claimant. The Board makes the following additional findings.

Claimant was employed as a Switchman. He had commenced employment in that capacity on April 25, 2005. Claimant had several years of prior service in the track department.

In early 2009, Claimant was furloughed as a result of reductions in business. He was notified on July 13, 2009 of his recall. The letter, which Claimant received on July 18, 2009, advised him that he was obligated to respond to the recall and that, if he failed to report within 15 days, he would forfeit his seniority. It is not disputed that Claimant received the letter, but he failed to report in response to the notice within 15 days from the date of his receipt.

Claimant requested a leave of absence to tend to family matters on July 26, 2009. The Carrier in its discretion denied the claim, as was its right. On July 28, 2009, Claimant was advised that he would be required to obtain a Transportation Worker Identification Credential ("TWIC") card to work in the Port of Los Angeles. Claimant was delayed in obtaining an advance appointment for hi TWIC until August 13, 2009. In the meantime, the Carrier sent Claimant a letter advising him that, as a result of his failure to respond to its recall notice, he had forfeited his seniority.

The Organization's submission details Claimant's efforts to obtain a leave of absence, his efforts to renew his TWIC card, which came in on September 1, 2009, and his efforts thereafter to contact his supervisors concerning his job. Claimant did not reach his supervisor until September 9, 2009, after receipt of notice of the forfeiture of his seniority.

The provision for forfeiture of seniority when an employee fails to respond to a notice of recall is self-executing. There is no requirement for an investigatory hearing, and none was held. The Organization submitted a claim seeking Claimant's return to service on a leniency basis. The Carrier denied the claim. The Organization appealed the denial up to the Carrier's highest designated official, but without resolution. The Organization then invoked arbitration, and the dispute was referred to this Board.

POSITIONS OF THE PARTIES: **The Carrier** argues that the evidence is that Claimant failed to respond to the notice of recall in a timely manner. It contends that, consistent with the provisions of the Agreement, he forfeited his seniority. BNSF denies any contractual provision requiring it to conduct a formal investigation. It maintains that the request for reinstatement lacks contractual support and disputes that Claimant did all that he could to preserve his job. It urges that the claim be denied.

The Organization argues that Claimant was dealing with the death of his father-in-law and issues with his son. It asserts that those difficulties prompted him to seek a leave of absence, which the Carrier summarily denied. It maintains that Claimant diligently attempted to take the necessary steps to mark up, but was delayed by the necessity to obtain a TWIC card. UTU contends that Claimant was simply "hung up" in the system. It argues that dismissal was too harsh a punishment for Claimant's conduct in light of his prior service and diligent efforts to obtain reinstatement, some of which were beyond his control. The Organization urges that the claim be sustained and Claimant returned to service on a leniency basis.

DISCUSSION AND ANALYSIS: The Agreement contains the procedures for recalling employees from furlough and provides for forfeiture of seniority when an employee fails to respond to a notice of recall within the required time period. The action is self-executing. It is not a disciplinary dismissal. The Agreement does not require an investigative hearing. The burden of proof in claims protesting such forfeitures of seniority rests with the Organization.

The requirement that employees report in response to recall notices serves important objectives: the Carrier has a business to run and, when it holds a job for an employee pending recall from furlough, it has a right to expect the employee to return to work. By placing that requirement, and the consequences of failure to meet the obligation, in the Agreement, the Parties have jointly recognized the validity of the Carrier's concern and its right to revoke an employee's seniority if the employee fails to report.

It is clear that Claimant did not timely report for service in response to the Carrier's notice. He did attempt to obtain a leave of absence, but the grant of such leaves in the circumstances in which Claimant found himself is discretionary; and the Carrier denied his request. In any event, a request for a leave of absence is not the equivalent of reporting for work and, when it was refused, did not toll the 15 day requirement to report.

The claim at issue in this proceeding is filed as a request to return Claimant to work on a leniency basis. A request for leniency is an appropriate vehicle to resolve a claim when the evidence establishes a violation of the contract by the employee and establishes the propriety of the employer's action with respect to that violation. Leniency is the legal equivalent of the employee throwing himself "on the mercy of the court."

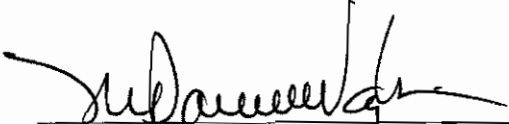
As a general matter, the exercise of leniency is a matter within the discretion of the Carrier and not for resolution in Section 3 proceedings. However, the governing Agreement specifically provides for the submission of leniency claims to this Board. It is an established principle of contract interpretation that each provision is assumed to have meaning and no provision is to be interpreted to make it a nullity. Thus, the inclusion of leniency claims within the scope of the Board's jurisdiction assumes that some standard in the resolution of such claims other than total employer discretion is intended.

In the instant situation, the evidence establishes that Claimant failed to respond to the recall notice within the required time period and that the Employer was had the right under the terms of the Agreement to have his seniority forfeit. Nevertheless, and without making a precise determination as to the scope of the Board's review of management determinations in leniency situations, it also appears that Claimant had valid personal circumstances which required his attention and, at the least, preoccupied and delayed his response to the Carrier's recall notice, that he was further delayed by the necessity to get an appointment to obtain a TWIC, without which he could not work, and that he commenced

efforts to contact his supervisor as soon as he obtained the Card. These are reasonable circumstances in mitigation of his failure to timely report. The Award reflects the Board's disposition of the Claim.

AWARD: The Claim for leniency is sustained as set forth herein. Claimant shall be entitled to be recalled when next employees in his classification are recalled, in accordance with his prior seniority. Claimant shall provide the Carrier with his current address to which such notices are to be sent. Claimant shall timely respond to any such recall notice. At such time as Claimant shall timely report and be accepted for service by the Carrier, he will establish a new seniority date. If Claimant fails to report timely in response to the Carrier's notice, his forfeiture of seniority shall stand. Claimant will not be paid wages or benefits for the period of his absence.

Dated this 4th day of November, 2010


M. David Vaughn,
Neutral Member


Gene L. Shire,
Carrier Member


D. L. Young,
Employee Member