Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32224
Docket No. MS-31307
97-3-93-3-286

The Third Division consisted of the regular members and in addition Referee W. Gary Vause when award was rendered.

(Steven P. Landherr
PARTIES TO DISPUTE: (
(Chicago Central and Pacific Railroad Company

STATEMENT OF CLAIM:

"Steven P. Landherr was wrongfully discharged on or about February 19, 1992, for allegedly violating Rule 24(b) of the Collective Bargaining Agreement between Chicago Central & Pacific Railroad Company and the Brotherhood of Maintenance of Way Employees. Specifically, the Company alleges that it was justified in discharging Mr. Landherr because he did not give the railroad a slip of paper with his name and address on it. The Company discharge of Mr. Landherr was wrong for several reasons including:

1. The Company arbitrarily and capriciously applied Rule 24(b) when in fact claimant and other employees had in the past not filed their names and addresses in writing with the company and had maintained their seniority. There was selective enforcement against Mr. Landherr.

2. Claimant presented himself to the appropriate person within five (5) days and asked for the required papers.

3. The person to whom he presented himself knew his name and his address had not changed.

4. No furlough slip was given to him to sign by the representative of the Railroad.

5. The company did not enforce the rule but instead stated that in light of his work performance there would not be 'leniency' in this case. Claimant was an eight (8) year employee who was two (2) years from vested retirement benefits.

6. There is no evidence that any other employee in the Iowa region has been dismissed for these grounds even though other employees have not provided their name or address in writing within five (5) days.

Relief requested includes: Reinstatement of employment, back pay for the period since termination including lost benefits, and reinstatement of seniority from date of termination."

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.

On January 31, 1992 Claimant was displaced from his regular assignment as a Trackman on Gang No. 132 headquartered at Storm Lake, Iowa. This displacement was effective February 3, 1992. Rule 24(a) of the applicable Agreement between the Carrier and the Organization required the Claimant to exercise his seniority within ten working days from the effective date of his displacement. The Claimant did not exercise his seniority within this ten day period. Therefore, pursuant to the applicable Rules he was considered to have assumed furlough status.

Rule 24(b) requires that furloughed employees who desire to protect their seniority for future work opportunities must file their names and addresses in writing

with the appropriate Carrier officer within five calendar days from their date of furlough. The Carrier contends that the Claimant did not comply with the requirements of Rule 24(b), nor did he in any way advise Carrier officials of his desire to protect his seniority.

The Claimant was notified by certified letter dated February 28, 1992 that his name had been removed from the Maintenance of Way seniority rosters due to his failure to file his name and address in writing as required by Rule 24(b). This effectively terminated his employment with the Carrier.

The Claimant filed a claim dated April 7, 1992 protesting his termination. By letter dated April 10, 1992 the claim was denied by the appropriate Carrier officer.

Mr. Donald B. Redfern, an Attorney representing the Claimant, sent a letter dated June 1, 1992 to Mr. Lyle D. Reed, President of the Carrier, stating that on behalf of the Claimant, he (Attorney Redfern) was appealing the termination of Claimant's employment. By letter dated July 24, 1992 Mr. Reed, through Carrier's counsel, denied Mr. Redfern's appeal and reaffirmed the propriety of the Claimant's termination.

By letter dated April 20, 1993 the Claimant's Attorney advised the Executive Secretary of the NRAB of intention to file a Submission on behalf of the Claimant appealing his termination.

Both the employee and the Carrier made extensive arguments with respect to the merits of this dispute. However, the Board will first address the jurisdictional objections raised by the Carrier. The Carrier takes exception to this matter being presented to this Board for adjudication on the grounds that the dispute has not been properly handled pursuant to the provisions of the Railway Labor Act, as amended ("RLA"), nor in accordance with the existing Agreement between the Carrier and the Organization.

Specifically, the Carrier argues that this claim has not been filed and progressed by "the employee or his duly accredited representative" as is required by governing Rule 36 (Grievance Procedure). Relevant portions of Rule 36 read as follows:

"RULE 36

GRIEVANCE PROCEDURE

(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the carrier authorized to receive same, within forty-five (45) calendar days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the company shall, within sixty (60) calendar days from the date same is filed, notify whoever filed the claim or grievance (the employee or his duly accredited representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the company as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within sixty (60) calendar days from receipt of notice of disallowance, and the representative of the company shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employee as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the sixty (60) day period for either a decision or appeal, up to and including the highest officer of the company designated for that purpose."

The Carrier contends that neither the Claimant nor his representative notified in writing the Carrier officer to whom the initial claim was presented that his decision was being rejected as required by Rule 36(b).

The Carrier further contends that the claim was not conferenced on the property as is required by the RLA, and therefore must be dismissed.

The jurisdiction of this Board is defined in Section 3, First (i) of the Railway Labor Act, which reads as follows:

> "The disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

In Brotherhood of Locomotive Engineers v. Louisville and Nashville Railroad Company, 373 U.S. 33, 37 (1963), the United States Supreme Court stated that under this provision of the Act, recourse to the Board is conditioned upon compliance with and performance of the duty to negotiate on the property concerning the dispute.

The Board held in Third Division Award 11434 that such duty to negotiate includes the obligation to seek to meet and confer on the property concerning the claim, and if the employee fails to satisfy this statutory prerequisite for recourse, the Board is without jurisdiction and the matter must be dismissed.

The same result has been reached in other decisions of this Board where the petitioner failed to ensure that a conference was held on the property. In Third Division Award 11896, the Board dismissed the claim for want of jurisdiction, stating:

> "The question raised by the Carrier has been discussed in prior awards of this Board. The Federal Courts have held that the Railroad Adjustment Board has no authority to adjudicate a dispute unless the statutory requirements of the Railway Labor Act are complied with which unconditionally impose upon all Carrier and Employe representatives legal duty to hold a conference in connection with each dispute that they are unable to settle by other means. A conference must be a part of the usual manner of the handling of the dispute on the property; it is a jurisdictional requirement and cannot be waived by the parties. See Awards 11434 and 11484." [Emphasis added.]

The Claimant's Attorney argues, in effect, that the Board should reject the Carrier's jurisdictional objection on the grounds that the Carrier made no response to the Claimant's request to meet to discuss the issue. A letter from the Claimant's Attorney to the Carrier's President dated June 1, 1992 contains the following statement: "I believe it would be of assistance to discuss the provisions of Rule 24 as applied to Mr. Landherr and other employees before discussing further the facts of this case." No steps were taken by the Claimant or his Attorney to schedule a conference. The above statement does not constitute a request for a conference, nor does the record contain any other evidence of the alleged request for a conference.

The jurisdictional requirement of holding a conference on the property was not met, and the claim therefore must be dismissed for want of jurisdiction.

AWARD

Claim dismissed.

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 17th day of September 1997.