

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33954
Docket No. MS-34763
00-3-98-3-452**

The Third Division consisted of the regular members and in addition Referee Robert Richter when award was rendered.

**(John S. Hammond
PARTIES TO DISPUTE: (
(Kansas City Southern Railway Company**

STATEMENT OF CLAIM:

“Appeal of decision and unjust treatment of John S. Hammond, Clerk, Baton Rouge, Louisiana, account the Carrier, Kansas City Southern Railway failed to grant his March 28, 1996 Unjust Treatment request and investigation under Rules 24 and 26 based on the assertion that he was not an employee under the Railway Labor Act and the KCS/TCU Labor Agreement, which is a violation of the Clerks’ Agreement.

REMEDY SOUGHT:

Carrier shall now give John S. Hammond, his unjust treatment conference under the terms of the Clerks’ Agreement and that John S. Hammond is entitled to all relief as law, equity and the nature of this matter permit. Awarding John S. Hammond all monetary damages to which he is entitles (sic) including but not limited to compensatory and actual damages, general and special damages, loss of salary, loss of medical, pension plan and other benefits, and awarding him reasonable attorney’s fees.”

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 was a clerical employee working at Baton Rouge, Louisiana. The Claimant, who had been off sick since February 9, 1996, received a request on February 10, 1996, from the Carrier's Trainmaster to provide an excuse for being off work. On February 16, 1996, Claimant sent such information to the Trainmaster. On March 14, 1996, the Trainmaster wrote the Claimant as follows:

"Please be advised KCS has no knowledge of any condition which would prevent you from protecting your employment and that if you do not protect your employment on or before March 25, 1996, KCS will consider you as having resigned your employment effective March 26, 1996, pursuant to the current collective bargaining agreement."

On March 15, 1996, the Claimant wrote to the Carrier's Human Resource Department, inclosing the same information provided in the February 16, 1996 letter.

In a letter to the Trainmaster on March 28, 1996, the Claimant averred that the Carrier had violated Rule 24, Discipline, and Rule 26, Complaints. On April 4, 1996, the Carrier's Trainmaster wrote the Claimant advising him he was no longer an employee, and therefore, his letter of March 28, 1996 was meaningless.

On April 9, 1996, the Organization wrote the Carrier's Superintendent protesting the Trainmaster's letter.

On May 1, 1996 the Superintendent wrote the Organization as follows:

"Inasmuch as it appears that Mr. Hammond was under the care of Dr. E. David Sledge in February 1996, (KCS denies that such medical statement was furnished to Mr. D. Roop in accordance with Mr. Roop's letter of March 14, 1996) KCS' letter of March 14, 1996, to Mr. Hammond is considered as withdrawn."

On May 5, 1996, the Organization wrote the Superintendent accepting the portion of his letter cited above, but rejecting the decision regarding the Unjust Treatment Hearing request of Rule 26, which reads:

“RULE 26. Complaints of employees alleging unjust treatment other than as referred to in Rules 24 and 25, shall be made in writing to their immediate superior officer, and unless satisfactorily disposed of may be appealed, provided that such appeals shall be made in writing in the regular order of succession up to and including the highest officer designated by the Carrier to whom such appeals may be made; and provided further that the original written complaint is made within sixty (60) days if the cause of complaint.”

The Organization appealed the Superintendent’s decision to the Carrier’s Vice President of Employee Relations by letter dated May 28, 1996.

The Trainmaster on June 6, 1996, wrote the Claimant asking for medical information or be terminated on June 18, 1996. The following information was furnished:

“Mr. Hammond is a patient of mine. He is a 37 year old gentleman who was found to have sleep apnea and a mildly elevated blood pressure secondary to his obesity. He has been evaluated by Dr. Bruner and his diagnosis was confirmed. A C-PAP machine was ordered which is the treatment for sleep apnea along with weight reduction. Initially he needed to be off of work because of his inability to stay awake which could cause safety concerns for Mr. Hammond as well as others. However, with the C-PAP machine he should be able to resume full activities. If he should have further problems he should see myself or Dr. Bruner. Please call me if I can be any further assistance.”

The Vice President of Employee Relations responded to the Organization on June 18, 1996 as follows:

“Inasmuch as Claimant’s employment and seniority was reinstated with Superintendent A. R. Luman’s letter dated May 1, 1996, to Division

Chairman J. G. Canada, with copy to the Claimant, the instant claim is moot.

Further, Carrier's (sic) denies all allegations addressed in your appeal and I find no agreement rule support for this claim.

Claim is denied."

Conference was held on September 23, 1996, concerning this matter. The Carrier confirmed the conference stating:

"At the conclusion of our discussion Carrier's previous position and denial was reaffirmed.

Also, the claimant resigned effective June 18, 1996, in accordance with Terminal Trainmaster's letter dated June 6, 1996."

Organization responded as follows:

"First and foremost, the Carrier has denied Mr. John Hammond rights for an Unjust Treatment request under Rule 26 of the Clerks' Agreement. All actions taken by the Carrier subsequent to this request must be viewed upon as retaliatory in nature particularly considering the circumstances in which the request was made."

Mr. Hammond has not resigned and the Carrier's use of Rule 27(a) or any other rule to entrap the employee, thereby attempting to steal his seniority from him is an example of the Carrier's vindictiveness in this case. Attached for your review is Award 4 of Public Law Board 3399 and Third Division Award 21178 concerning failure to grant an Unjust Treatment under the Rules of the Agreement.

Notwithstanding, Mr. Hammond has furnished evidence of his sickness under the provisions of Rule 47 and his physician has recommended a medical leave until he is under control and no risk to himself or others.

Your decision is not acceptable and my previous position is hereby affirmed."

On February 10, 1997, the Organization wrote the Vice President Employee Relations requesting this case be placed before Public Law Board No. 5836 for adjudication.

On June 25, 1998, the Claimant filed a "Notice of Intent" before this Board.

The Carrier and the Organization met on June 29, 1998, to further discuss this case without resolution. The Carrier in a post conference letter wrote:

"The Carrier's review of the file did not indicate the Organization had requested the case be listed to a Public Law Board, protecting the nine month time limit. The Organization stated the case is protected under the time limits.

In conference the Organization presented a letter dated June 11, 1996, from Dr. Sledge. The Carrier responded this information should have been furnished to Superintendent Luman following his letter dated May 1, 1996, and furnishing the letter at this at this stage is immaterial to the case. The Carrier's decision had to be made at the time the information was requested.

Claimant was notified he was considered as having resigned from service because of forfeiting his seniority under Rule 27(a)."

On July 8, 1998, the case was listed before a Public Law Board. In Award 2 of Public Law Board No. 6160 the Referee held:

"It being evident that Mr. Hammond has elected to personally present to the NRAB a claim not unlike that docketed to this Board, we have no alternative but to dismiss the claim before us for lack of jurisdiction since the same claim can not be pursued to two different tribunals for disposition. Moreover, although a Public Law Board is a tribunal of coordinate jurisdiction with the Divisions of NRAB, we are not aware of any provision in the Railway Labor Act, as amended, that permits an individual to

personally progress their own grievance to a Public Law Board instead of to the NRAB.”

The Carrier takes the position that the Board lacks jurisdiction. It argues that the case was not handled in the usual manner in that the Claimant did not conference the claim with the highest designated Officer of the Carrier.

As the Referee in Public Law Board No. 6160 stated, this case is not unlike the one before that Board. It is clear that the Organization has handled the case in the usual manner. The Carrier argued before Public Law Board No. 6160 that its case should be dismissed because the instant case was before the Board. The Carrier cannot have its cake and eat it too. This case was properly handled on the property and timely filed before the Board.

The Carrier further argues that the Organization did not file a claim for time lost. Therefore, any claim for time lost is improperly before the Board. The Carrier’s position is well taken. Aside from that the record indicates that the Claimant was under medical care and therefore, could not have worked thus he would not be entitled to any compensation. In addition Claimant has not presented any medical evidence that he can return to work.

As to the Carrier’s position that the Claimant is no longer an employee for failing to provide the Carrier with medical evidence for his absence, the argument fails. The record shows that not only was the Trainmaster furnished information, so was the Employee Relations Department. The record is also void of any follow up to the Trainmaster’s letter of June 6, 1996. He did not write the Claimant stating the failure to produce medical evidence resulted in the forfeiture of his seniority. The record is clear the Claimant was under the treatment of Dr. Sledge. The Claimant is still an employee of the Carrier.

Also, based on the information furnished the Board, the Claimant was entitled to an investigation as to being unjustly treated.

Accordingly, the Board orders the Claimant to be reinstated without pay for time lost, with seniority in tact and all other rights unimpaired. The Carrier is further advised to investigate the Claimant’s unjust treatment charge. Before being reinstated the Claimant must be approved by the Carrier’s Chief Medical Officer.

As to legal expenses, this Board has no jurisdiction to award such monies.

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 22nd day of February, 2000.