

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35019
Docket No. MW-32925
00-3-96-3-299

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it improperly disqualified Mr. T.D. Vaughter from the position of Bridge and Building (B&B) carpenter on June 28, 1994 and failed to schedule and hold an unjust treatment hearing which was timely and properly requested in compliance with Rules 9(c) and 20(b) (System File R914/8-00230-001).
- (2) As a consequence of the aforesaid violation, Mr. T.D. Vaughter shall be ‘ . . . reinstated to his assigned position of B&B Carpenter, and be reimbursed for any and all lost wages beginning June 28, 1994 and continuing until such time as this violation is corrected, as well as have all overtime, vacation, fringe benefits, and other rights, including seniority, restored which were lost to him as a result of the above violation.’”

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.

T. D. Vaughter (Claimant) established seniority in the Carrier’s B&B Sub-department. Following appropriate post and bid procedures, the Claimant was

awarded a promotion from his former Truck Driver position to a B&B Carpenter position on Crew 614, pursuant to Bulletin No. 121, dated April 25, 1994. Some 62 days later, on June 28, 1994, the Claimant's Foreman handed him a handwritten note advising that he was disqualified from his Carpenter position and that he was to return to his B&B Truck Driver position.

On July 14, 1994, the Claimant sent Manager Maintenance Engineering Edwin E. Howard a handwritten note requesting an "Unfair Treatment" Hearing under Rule 20 of the Agreement. The Carrier was struck by the UTU commencing July 15, 1994 which apparently accounts for the fact that Mr. Howard may not have received that request. In any event, it is not disputed that when the Claimant made a telephone inquiry on September 9, 1994, Mr. Howard suggested that the Claimant send him another copy of that Unjust Treatment request. The Claimant did so on September 12, 1994 and Mr. Howard responded by letter of September 15, 1994, denying the request on grounds that the July 16, 1994 request was more than ten days after the June 28, 1994 disqualification. By letter of November 8, 1994, the Organization filed the instant claim, pointing out to Mr. Howard that the language of Rule 20, *infra*, gives an employee 20 days to file a request for an Unjust Treatment Hearing, rather than the ten days which Mr. Howard had erroneously quoted in rejecting the Claimant's request for an Unjust Treatment Hearing. Specifically, the General Chairman noted that due to a September 1991 amendment, Rule 20 states that an employee who considers himself unjustly treated must submit a request for a Hearing within 20 days from the date of the incident rather than the ten day time limit upon which the Carrier had premised the denial.

According to the USPS certified mail return receipt the November 8, 1994 letter was received in Mr. Howard's office on November 9, 1994. So far as the record shows, neither Mr. Howard nor any other Carrier representative ever responded to the claim. By letter of June 23, 1995, the Organization advised the Carrier's highest designated officer that no response had ever been received to the November 8, 1994 claim:

"We maintain that this failure to respond constitutes a violation of Rules 21-1(a) and 21-1(b) of the Schedule Agreement dated October 1, 1987, which requires the Carrier to reply within sixty days from the date our claim was filed. Our claim in this instance should now be allowed as presented."

While acknowledging that the Organization presented a copy of a Certified Mail Receipt for the November 8, 1994 presentation of its claim, the Carrier noted that there was no record evidence to support the Claimant's initial submission of a July 14, 1994 request for an Unjust Treatment Hearing. Therefore, according to the Carrier, since the Claimant was disqualified on June 28, 1994 and the claim was not presented until November 8, 1994, the Organization had "far exceeded" the requisite 60 day limit as provided for in Rule 21 of the Agreement. Additionally, the Carrier asserted that

Rules 9, 20 and 21 of the Agreement state, in pertinent part:

“RULE 9 - QUALIFYING FOR PROMOTION

- (c) An employee who considers himself unfairly disqualified may request a hearing pursuant to the provisions of Rule 20.

RULE 20 - DISCIPLINE AND GRIEVANCES

- (a) An employee who has been in the service of the Soo Line for sixty (60) days or more, and whose application has been approved will not be disciplined or dismissed without a fair and impartial hearing and shall be advised in writing of the specific charges. . . . An employee who considers himself unjustly treated shall be given a fair and impartial hearing provided that the request for a hearing is made in writing to the Regional/Divisional Engineer within twenty (20) days from the date of incident.
- (b) The hearing will be held within twenty (20) days of the date of the occurrence or within twenty (20) days from the date the information is obtained by the appropriate officer of the company (excluding company security forces) and the decision shall be rendered within fifteen (15) days from the date the hearing is completed.

RULE 21 - TIME LIMIT-CLAIMS OR GRIEVANCE

1. All claims or grievances shall be handled as follows:
- (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 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his 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 Carrier as to other similar claims or grievances.”

The claim is “allowed as presented” in accordance with the plain language of Rule 21 (a), supra, due to the blatant violation of the requirement for a written

disallowance of the timely filed claim of November 8, 1994 protesting Mr. Howard's September 15, 1995 erroneous denial of the Claimant's request for an Unjust Treatment Hearing pursuant to Rule 20. Any belated challenge to the authenticity of the original July 14, 1994 request was effectively waived by Mr. Howard's handling of this matter. The record supports the Organization's position that Mr. Howard instructed the Claimant to refile his July 14, 1994 request on September 9, 1994, received the refiled request on September 13, 1994, raised no challenge to its authenticity or to the fact that it had originally been filed on July 14, 1994 and then treated it as if it had been filed on July 14, 1994 by denying it on grounds that it was filed "16 days after your disqualification." It is manifest that Mr. Howard erred in his reading of the governing Agreement time provisions, because the literal language of Rule 20 gave the Claimant 20 days after the disqualification to make his Rule 20 request. Finally, it is shown beyond refutation that Mr. Howard never responded at all to the November 8, 1994 claim letter which pointed out his previous error. Based on all of the foregoing, Rule 21 (a) requires that this claim be sustained.

AWARD

Claim sustained.

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 25th day of October, 2000.